

Scottish Parliament Region: Highlands and Islands

Case 200700322: The Scottish Commission for the Regulation of Care

Summary of Investigation

Category

Scottish Government and Devolved Administration: Policy/administration

Overview

The complainants, Mr and Mrs C, raised concerns about the conduct of an investigation carried out by the Scottish Commission for the Regulation of Care (the Care Commission) into allegations made anonymously against a member of staff employed in a nursing home owned by Mr and Mrs C.

Specific complaints and conclusions

The complaints which have been investigated are that:

- (a) the Care Commission's initial investigation was disproportionate to the complaint and should have been dealt with at Level 1 of the Care Commission's investigative process (*not upheld*);
- (b) the professional judgement of the Care Commission officer was compromised by previous complaints made by Mr and Mrs C into their investigations (*not upheld*); and
- (c) given that the Care Commission's process was reviewed after their complaint, it was unreasonable that the Care Commission officers were exonerated (*not upheld*).

Redress and recommendations

The Ombudsman has no recommendations to make.

Main Investigation Report

Introduction

1. On 1 May 2007 the Ombudsman received a complaint from Mr and Mrs C about an investigation by the Scottish Commission for the Regulation of Care (the Care Commission) into a nursing home then owned by them. The Care Commission's investigation was prompted by a complaint from an individual, who wished to retain their anonymity, that the Deputy Manager of the nursing home was overheard to comment that she worked more than 50 hours a week; that the Deputy Manager was acting as the nominated manager for the day care service; and that the Deputy Manager had been observed being unpleasant and short with staff, in front of relatives of the nursing home residents. Mr and Mrs C contended that, in initiating a formal investigation, the Care Commission were at fault, as they believed the complaints did not warrant being escalated to the second stage of the Care Commission's process and the complaint could have dealt with on a less formal basis. Mr and Mrs C further contended that the judgement of one of the Care Commission officers responsible for investigating (Officer 1) was compromised as a result of previous complaints made by Mr and Mrs C into their inspections. The final aspect of Mr and Mrs C's complaint was that the Care Commission's review of their internal process after investigating their complaint was not in accordance with the finding of the Care Commission's investigation that Officer 1 had acted properly.

2. The complaints from Mr and Mrs C which I have investigated are that:
- (a) the Care Commission's initial investigation was disproportionate to the complaint and should have been dealt with at Level 1 of the Care Commission's investigative process;
 - (b) the professional judgement of Officer 1 was compromised by previous complaints made by Mr and Mrs C into their investigations; and
 - (c) given that the Care Commission's process was reviewed after their complaint, it was unreasonable that the Care Commission officers were exonerated.

Investigation

3. The investigation involved obtaining and considering the relevant documentation, including correspondence between Mr and Mrs C, their solicitor and the Care Commission. I also obtained from the Care Commission, having written on 29 May 2007, a copy of their Operational Guidance on considering complaints against services regulated by them; a copy of the Complaint Report;

and associated correspondence relating to the complaint against the Deputy Manager of Mr and Mrs C's nursing home. The Care Commission also provided me with a copy of their pre-investigation tool, a document designed to allow Care Commission officers to plan and document their investigation, and correspondence between Mr and Mrs C and the Care Commission in relation to previous inspections carried out by Officer 1. The pre-investigation tool was introduced into the Care Commission's Operational Guidance on 2 July 2007, after the date of the investigation which led to Mr and Mrs C's complaint.

4. I have not included in this report every detail investigated but I am satisfied that no matter of significance has been overlooked. Mr and Mrs C and the Care Commission were given an opportunity to comment on a draft of this report.

(a) The Care Commission's initial investigation was disproportionate to the complaint and should have been dealt with at Level 1 of the Care Commission's investigative process

5. On 4 November 2005 two Care Commission officers visited Mr and Mrs C's nursing home, following receipt of a complaint from a relative of a service user. The Care Commission's Complaint Report describes the complaint as follows:

'The complainant is a regular visitor to the care home who is concerned about the fact that [the Deputy Manager] has been appointed as the manager of the day care service. The complainant has observed that she works long hours and has heard her say that she works in excess of fifty hours a week: He/she and other visitors feel that she is often quite short tempered and is not always pleasant. They have observed that she is often rude to staff: The complainant is concerned that the further responsibilities will impact on her behaviour in the care home and that this will affect service users and that he/she had not used the home's complaints procedure as she finds the home owner to be unapproachable.'

6. Mr and Mrs C felt that Officer 1's investigation of this complaint was disproportionate to the seriousness of the matter. They regarded the Care Commission's final response to their complaint, that the decision to investigate was a reasonable professional judgement based on Officer 1's assessment of the situation, was inappropriate. Mr and Mrs C contended that the complaint was of a relatively trivial nature and should have been dealt with in a less formal manner. They believed that it was not sufficient for the Care Commission to maintain that it was a matter of professional judgement, without defining the

criteria used to determine whether a formal investigation was an appropriate action to pursue or not.

7. The Care Commission's document, 'Complaints Procedure', is readily available from their website and provides members of the public with an overview of the Care Commission's complaints process. It documents the different stages of their process and states the following in relation to Level 1:

'This is the point where all reasonable efforts are made to fully understand the complainant's concerns, to clarify the outcome they seek and to attempt to resolve the complaint in an informal manner without the necessity for a visit to the care service or formal interviews. This will be appropriate where the Care Commission may have a liaison role in resolving minor matters of service delivery between the complainant and the service provider. Level 1 will also include any matters falling outwith the Care Commission's remit, where the complainant has been advised to refer the matter to another body or authority. The level 1 process will be completed within no later than 3 working days of the recorded receipt of the complaint. Any complaint not resolved at this stage will progress to level 2.'

8. The Care Commission's internal document, 'Complaints Procedure Operational Guidance', states that in determining whether to move a complaint received to level 2 of their process the following considerations must be taken into account:

'Is the matter concerned an appropriate matter for the Care Commission to investigate?
Is it within the relevant timescale to merit investigation?
Has the complainant previously raised the matter with the care provider?
Would the complainant prefer in the first instance to take the matter to the provider to achieve local resolution ...
... If the complaint is appropriate to the Care Commission, falls within our timescale and the complainant is not going to the provider with the matter – then the complaint moves onto the formal investigation stage ...'

9. The Care Commission's investigation into the complaint about the nursing home itself partially upheld the complaint, noting the following in a letter to Mr and Mrs C on 21 November 2005:

(i) Records examined indicated that on occasions extra shifts had been worked by [the Deputy Manager]. The number of hours worked by an

employee is an employee/employer matter and outwith ... [the Care Commission]'s remit.

- (ii) This aspect of the complaint did raise for us concerns about the fitness of [the Deputy Manager] had she been regularly working 'excessive hours'. Our investigation provided no indication that the number of hours being worked by [the Deputy Manager] was having any effect on her fitness as a manager.
- (iii) Officers were advised by the majority of staff spoken with that [the Deputy Manager] had spoken to them in front of residents/relatives or else they had witnessed it happening. Concerns were expressed about the manner in which it was done. This element of the complaint is therefore upheld.
- (iv) Overall the complaint is partially upheld.'

10. In the same letter, the Care Commission indicated that they expected Mr and Mrs C as the managers of the nursing home to take 'appropriate action to ensure that the manner in which the deputy manager raises issues with staff, does not have any impact on service users. Service users have the right to live in an environment in which they feel safe and secure'. This action was stipulated alongside the citing of National Care Standard 9.7 for Care Homes for older people. National Care Standard 9.7 states under the heading of 'Feeling safe and secure' that 'You are confident that you are living in an environment that is free from bullying, harassment, discrimination and any other form of abuse'.

11. Writing to me on 3 July 2007 the Care Commission, in response to my letter of enquiry, stated that the reference of National Care Standard 9.7 'indicates that the matter under consideration was clearly within the locus of the Care Commission for investigation and that when deciding if an investigation was appropriate, the correct decision was taken by the Care Resolution Officer'. They also commented that in considering if a complaint should be investigated, ie, moved to level 2, the person responsible for taking the decision would use their knowledge of the Regulation of Care (Scotland) Act 2001, its supporting regulations and the National Care Guidelines.

(a) *Conclusion*

12. The Care Commission have provided a copy of their internal guidance for moving a complaint from Level 1 to Level 2. The criteria used are detailed in paragraphs seven and eight of this report. In light of this, and for the following reasons, I believe that the decision to move the complaint to the second level

and formally carry out an investigation was correctly applied in this case: the matter being complained about was appropriate for the Care Commission to investigate; there was no apparent issue with the complaint being time barred; and the complainant had indicated to the Care Commission that they had not previously raised their complaint with the care provider and given a reason why this was the case.

13. I am satisfied, therefore, that the decision to move the complaint to level 2 and investigate was appropriate and in line with the Care Commission's internal guidance to staff. Mr and Mrs C maintain that it was not sufficient for the Care Commission to state that the decision was a matter of judgement without defining the criteria used. In conducting my investigation, I have received copies of documents outlining the criteria used in coming to this decision (see paragraphs 7 and 8). It is on the basis of that information that I have reached my decision that this aspect of Mr and Mrs C's complaint is not upheld. While the Ombudsman is making no specific recommendations, it would have been helpful if the Care Commission had passed this information on to Mr and Mrs C in their correspondence earlier and prior to them bringing their complaint to the Ombudsman's office.

(b) The professional judgement of the Officer 1 was compromised by previous complaints made by Mr and Mrs C into their investigations

14. Mr and Mrs C believe that the judgement of Officer 1 was compromised as a result of them previously having complained about aspects of Officer 1's inspections of their nursing home. In the course of conducting my investigation, Mr and Mrs C stated that the Care Commission inspections that occasioned complaints from them were carried out on 22 October 2003 and 9 June 2005.

15. In response to my asking the Care Commission about this aspect of Mr and Mrs C's complaint they advised on 3 July 2007 that 'The Care Commission has no record of a complaint having been received concerning either inspection'. The Care Commission explained that their process is that, when they issue a draft inspection report, they include an error response form to enable the provider to comment on and advise on any factual errors in the draft. In response to the draft reports produced by the Care Commission, Mr and Mrs C submitted detailed responses, after which the final report was amended taking into account their response to varying degrees.

16. The Care Commission continued that Mr and Mrs C 'may have considered that they were expressing their views strongly in their responses to the draft reports. However, it was not considered to be a complaint. Had we not followed our error response procedure and had [Mr and Mrs C] remained dissatisfied following the publication of the reports, they would have been entitled to raise the matter as a complaint. I can confirm that this did not happen'.

17. In the course of my investigation, I obtained and considered the Care Commission's records relating to Mr and Mrs C's representations following the 22 October 2003 and 9 June 2005 inspections and also Mr and Mrs C's notes and copies of their correspondence relating to these events. These substantially supported the Care Commission's view that Mr and Mrs C's representations were made under the Care Commission's error response procedure and not as a complaint. In the course of my investigation, Mr and Mrs C provided me with their file note relating to the two inspections in question. Although, in relation to the 22 October 2003 inspection, they mentioned requesting a meeting with the Care Commission to lodge a complaint, their file note stated that following the requested meeting the inspection report was amended and re-issued. I believe that this implies that the process followed was that of the Care Commission's standard procedure and not one that would be instigated following receipt of a formal complaint.

18. In making this aspect of their complaint, Mr and Mrs C made particular reference to a statement made in a letter received by them dated 4 August 2006 which was the Care Commission's initial response to their complaint. In a section addressing their complaint that the nature of the anonymous complaint against the Deputy Manager of their nursing home was not made known at the start of the investigation, it stated, '[Officer 1] made this decision in light of [their] assessment of the nature of the complaint, the relationship between the service's Owner/Managers and the Care Commission and a desire to ensure that responses were not prepared or subject to undue influence'. In making their complaint, Mr and Mrs C indicated that they wished to see these remarks withdrawn, as they regarded that they impugned their professional integrity. In response to my letter of enquiry, the Care Commission responded that these remarks were included in accordance with the Care Commission's principle of openness.

(b) Conclusion

19. Mr and Mrs C believe that the professional judgement of Officer 1 was compromised by complaints they had made into Officer 1's previous investigations. In particular, Mr and Mrs C referred to Care Commission inspections held on 22 October 2003 and 9 June 2005. My investigation considered copies of the Care Commission's records relating to Mr and Mrs C's representations relating to these inspections and Mr and Mrs C's relevant file note. I also considered the Care Commission's internal procedures and, in particular, their error response process which is essentially an opportunity for the care provider to challenge or dispute the accuracy of the inspection report in draft stage and prior to its publication. I am satisfied from both the Care Commission and Mr and Mrs C's records that their contact and representations in relation to the Care Commission inspections in question are in line with the Care Commission's standard procedure and were not regarded by the Care Commission as a complaint nor, from the evidence I have seen, should they have been regarded as a complaint. I am, therefore, of the view that Mr and Mrs C challenging the inspection reports in line with the Care Commission's procedures would not have given cause to support their contention that Officer 1's professional judgement would have been compromised by Mr and Mrs C's previous actions, in complaining about Care Commission inspection reports on 22 October 2003 and 9 June 2005. Accordingly, I do not uphold the complaint. While Mr and Mrs C were concerned that the remarks made in the Care Commission's letter of 4 August 2006 impugned their professional integrity, I have not seen evidence to back this up.

(c) Given that the Care Commission's process was reviewed after their complaint, it was unreasonable that the Care Commission officers were exonerated

20. Mr and Mrs C's final complaint is that the Care Commission have reviewed their internal process as a result of investigating their complaint. Mr and Mrs C believe, therefore, that this is incompatible with the Care Commission's assertion that Officer 1 and the other Care Commission officer (Officer 2) responsible for conducting the investigation into the nursing home's Deputy Manager had not acted inappropriately. In reviewing the paperwork submitted by Mr and Mrs C in support of their complaint, this argument is put most succinctly by the solicitors acting on their behalf when corresponding with the Care Commission on 28 September 2006:

'Is it the case that a complaint against a member of the Care Commission staff will not be upheld if that member of staff has been found to have

operated within the Organisation's policy or procedure? If so, in the light of the fact that the conclusion in the letter giving the decision regarding our clients' complaint indicated that the Care Commission recognised that their policies required to be reviewed, that view is not sustainable. If the way in which the original complaint was handled causes the procedures to have altered then it must surely follow that the original actions of the Care Commission Officers are not beyond criticism.'

21. The 'conclusion in the letter' referred to in the solicitor's letter in paragraph 20 was that contained in the Care Commission's initial response to Mr and Mrs C's complaint dated 4 August 2006. It stated, 'This investigation has resulted in recommendations for the organisation to follow and further develop its policies and procedures with regard to complaint investigations'.

22. As part of my investigation into Mr and Mrs C's complaint, I asked the Care Commission to detail what documentation, processes or guidance had changed following consideration of Mr and Mrs C's complaint. In response, the Care Commission indicated that they were in the process of updating their document 'Complaints Procedure – Operational Guidance' to include a pre-investigation planning section requiring more detail than that contained in the operational guidance at the time of Officer 1 and Officer 2's investigation. Specifically, these would relate to the provision of information to services at the beginning of a complaint investigation; the handling of situations where there is concern about the potential for interference in an investigation; and contacting care staff at their home addresses.

23. The changes being made to their internal guidance by the Care Commission related to documenting the reasons why Care Commission investigating officers take certain decisions. In their response to my letter of enquiry, the Care Commission gave the following two examples:

'The Care Commission considers that it is good practice for the information concerning the reason for our visit to be given on arrival. There may however be occasions when, for specific reasons, the assessment of the CRO [Complaint Resolution Officer] and CIO [Complaints Investigation Officer] is that this should not be done. The reasons for such decisions now require to be recorded.'

and

'Allegations concerning staffing issues in care homes are viewed as serious complaints and it is not unusual for a complaint which may

potentially relate to staffing to be investigated through an unannounced visit. The Pre-investigation tool requires that the reasons for the decision be recorded. This reinforces the requirement for the specific method of investigation to be discussed between our officers and thereafter recorded.'

24. As part of my investigation, I wrote to the Care Commission and asked if the changes made to their internal guidance were made as a result of Mr and Mrs C's complaint alone or if Mr and Mrs C's complaint was one of a number that resulted in the Care Commission reviewing their processes. In response, the Care Commission indicated that the decision to update guidance was made to reflect knowledge gained through their general complaints activity, not solely Mr and Mrs C's complaint, but that their complaint did result in specific consideration being taken in relation to documenting the reasons for a particular method of investigation being chosen.

(c) Conclusion

25. Mr and Mrs C complained that it was unreasonable for the Care Commission to conclude that their officers acted appropriately in conducting their investigation, while also changing their internal procedures as a result of reviewing Mr and Mrs C's complaint. In response to my enquiry, the Care Commission detailed the aspects of their internal guidance that had been reviewed and changed as a result of Mr and Mrs C's complaint. The changes made related to documenting the reason a particular decision was taken rather than changing the ability of a Care Commission officer to take such a decision. It follows, therefore, that the Care Commission, having reviewed Mr and Mrs C's complaint, reached the view that Officer 1 and Officer 2 did act appropriately but that the guidance did not prompt the investigating officers to record the reasons why certain decisions were taken in the paperwork associated with their investigation. Additionally, the Care Commission have indicated that, although Mr and Mrs C's complaint was a significant contributor in them taking the decision to review and change their internal guidance, it was not the sole reason and there were other prompts, including general complaints activity and previous investigations by the Ombudsman's office. Mr and Mrs C's complaint was specifically considered and led to the decision to internally document the reason why a particular investigation method is being pursued. This does not, however, mean that the Care Commission officers' actions were inappropriate, rather that the guidelines being followed at the time should have prompted them

to document why they were taking those actions. I, therefore, do not uphold the complaint.

Explanation of abbreviations used

Mr and Mrs C	The complainants
The Care Commission	The Scottish Commission for the Regulation of Care
The Deputy Manager	The Deputy Manager or Mr and Mrs C's nursing home
Officer 1	Care Commission officer involved in previous inspections of Mr and Mrs C's nursing home
Officer 2	Care Commission officer not involved in previous inspections of Mr and Mrs C's nursing home