

Dysfunction

Regulatory failures harming providers

GPO service

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Optimo

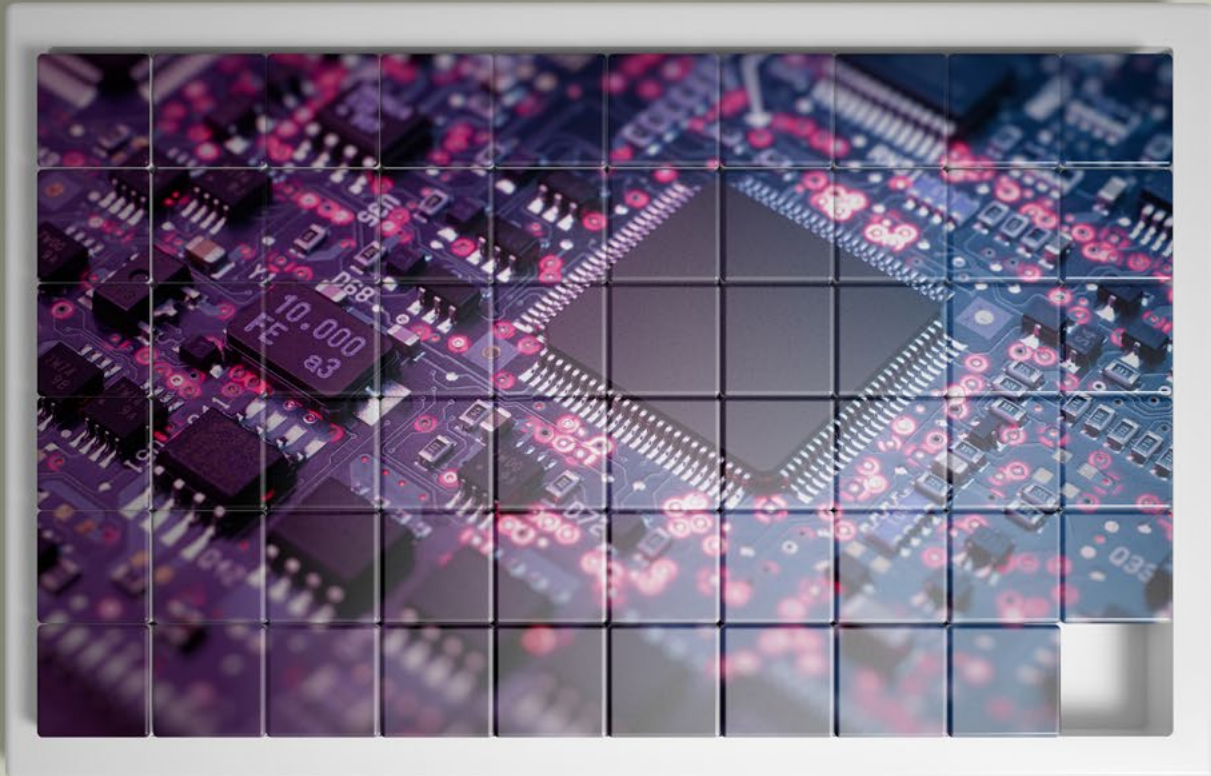
Care group grows portfolio with acquisition

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With the Care Quality Commission (CQC)'s single assessment framework in force, **Duncan Astill**, partner at law firm Mills & Reeve, assesses the uptick in CQC prosecutions and its approach to enforcement under the new system



On the rise

Prosecutions of health and care providers in England are at their highest level ever since the introduction of the CQC 15 years ago. The CQC replaced three former regulatory bodies in 2009 and took over the registration, inspection and monitoring of health and adult social care providers under the Health and Social Care Act 2008. From 2010 this included NHS providers and with GPs becoming subject to the same requirements in 2013.

Flexing its muscle

We are seeing a rise in CQC prosecutions in the care sector. The stakes for providers are high, providers care for some of the most vulnerable members of our society and non-compliance costs extend beyond the purely financial to serious reputational damage.

While the CQC had criminal prosecution powers from the outset, it was only in 2015, following criticism of a perceived regulatory gap highlighted by the Mid-Staffordshire public inquiry,¹ that the CQC entered into a memorandum of understanding with the Health and Safety Executive to agree which body would have primary responsibility for investigating and prosecuting healthcare harm events that there was an increased appetite to use those powers.

Analysis of the CQC's data set of prosecutions brought to date clearly shows a rise in the use of its enforcement powers, particularly since the Covid-19 pandemic. The regulator has the power to prosecute health and social care providers if they fail to provide safe, high-quality care. It has the power to prosecute both the registered provider and, in certain circumstances, senior individuals.

The CQC has a range of civil and criminal enforcement powers and sometimes it will be appropriate for it to use both civil and criminal enforcement powers at the same time. It uses its enforcement policy and its enforcement decision tree to make decisions about what enforcement power to use based on the nature of the breach.

Legal basis for prosecutions

There are several prosecutable offences in the Health and Social Care Act 2008 (HSCA) and related regulations (Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 (2014 Regulations) and Care Quality Commission (Registration) Regulations 2009).

Based on CQC data, prosecutions cover the following breaches, but are not limited to:

- **Regulation 12 of the 2014 Regulations**
Failing to provide safe care and treatment resulting in avoidable harm or a significant risk of avoidable harm.
- **Regulation 13 of the 2014 Regulations**
Failing to safeguard people who use services from suffering any form of abuse or improper treatment while receiving care and treatment.
- **Regulation 20 of the 2014 Regulations**
Duty of candour.
- **Regulation 20A of the 2014 Regulations**
Failure to show CQC rating on website.

- **Section 10 HSCA**
Carrying on a regulated activity without registration.
- **Section 64 HSCA**
Failure to provide information.

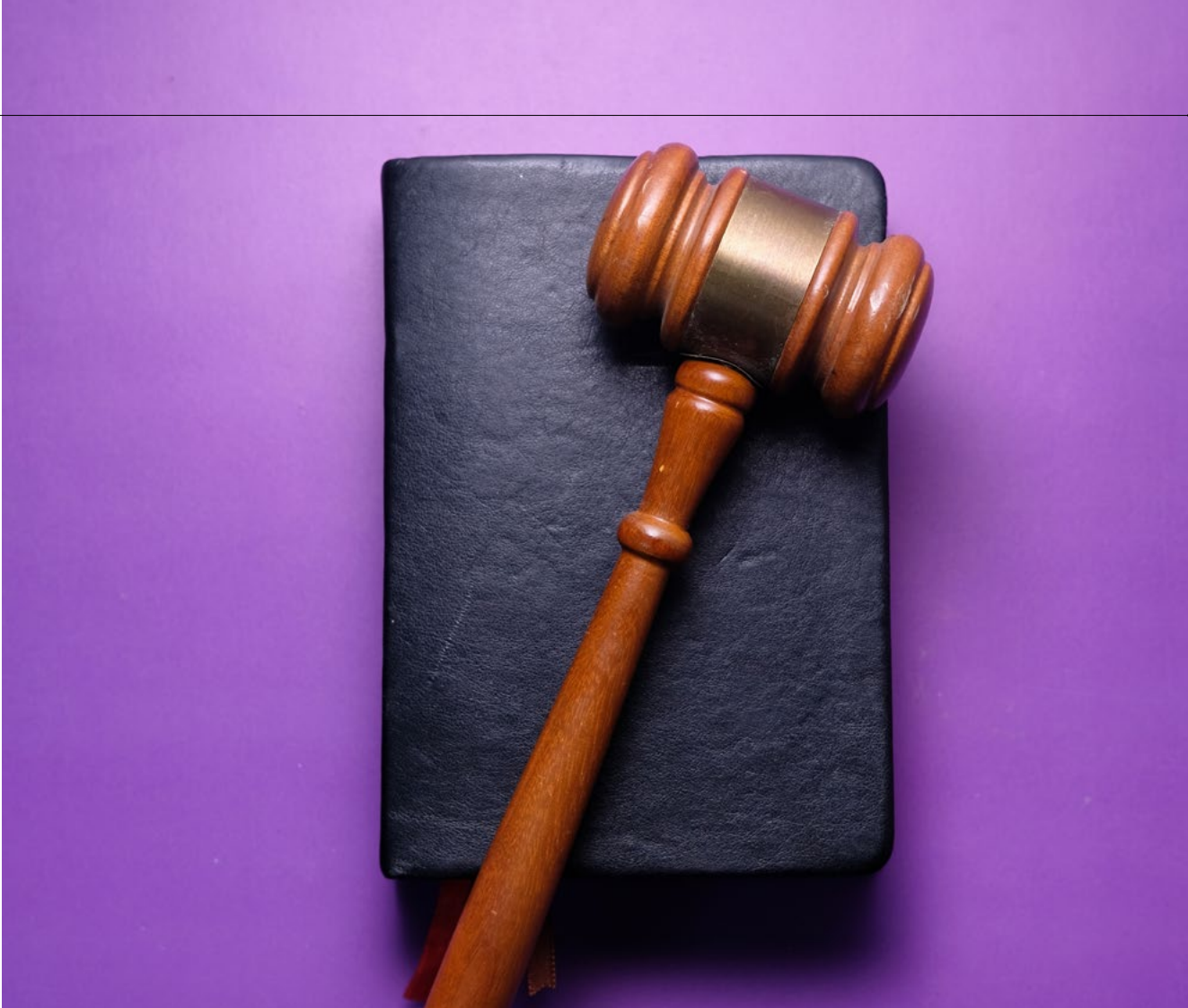
The CQC's criminal enforcement powers cover cautions, fixed penalty notices and prosecutions. Where breaches of the regulations do not constitute a criminal offence, the commission can enforce the standards by using its civil powers to impose, vary or remove conditions; and suspend a registration and or cancel a registration. Failure to comply with the CQC's civil powers is a criminal offence and may also result in a prosecution.

On closer inspection

Considering the scope of CQC's enforcement powers, it is notable that since 2009 over 100 health and care providers have been prosecuted for 139 offences mostly for breaches of Regulation 12 of the 2014 Regulations, with many from the independent sector. Regulation 12 (one of the fundamental standards) is very broad and has resulted in a wide range of prosecutions for many failings in care homes, such as falls, assaults on residents, burns, choking incidents and pressure sores.

Over the past five years, the number of successful prosecutions brought by the CQC has increased year on year with 16 prosecutions in 2019 rising to 24 in 2023 and a total of 12 prosecutions recorded to 4 June 2024, suggesting that the upward trend is continuing.

Coupled with CQC's increased enforcement of regulatory breaches, the courts are imposing larger financial



penalties. The average fine in 2019 was £35,934 rising to £144,570 in 2023 but for context individual fines ranged from £2,511 to £2,571,502 across this period.

For some offences the magistrates' courts have the power to order unlimited fines, whereas other offences are capped at certain amounts. Fines are also based on several factors and a credit for an early guilty plea can lead to a reduction in the total fine.

Enforcing accountability

CQC's prosecution data reflects an increasing appetite to prosecute where it considers that there has been a breach of the regulations. It reflects a growing focus on accountability in the care sector and the level of fines demonstrate the severe financial consequences of failing to keep residents safe.

Understanding your legal duties and being able to show and evidence how you are meeting the fundamental standards including demonstrating continuous improvement in practices and

procedures will help to reduce your risk of exposure to prosecution. The risk of enforcement action is not theoretical as CQC prosecution data reveals.

FAILURE TO COMPLY WITH THE CQC'S CIVIL POWERS IS A CRIMINAL OFFENCE AND MAY RESULT IN A PROSECUTION

Registered care providers should review their compliance procedures to ensure their quality and safety management systems are robust and meet regulatory standards. This includes adopting a risk-based approach for residents,

service users, and staff.

Are we likely to see an increase in CQC prosecution and enforcement action under the new single assessment framework? That remains to be seen.

If the CQC achieves its ambition to be a 'dynamic regulator', then in its own words: 'We'll use our powers and act quickly where improvement takes too long, or where the changes won't be sustainable. We'll take action where services are unable to identify systemic issues in their own organisational culture or fail to learn lessons from widely publicised failures happening across health and care.'

If you are facing a CQC prosecution or criminal investigation do seek early legal support as it can limit the impact of a prosecution on your care home business. And don't forget to notify your insurer.

NOTE

1 <https://assets.publishing.service.gov.uk/media/5a7ba0faed915d13110607c8/0947.pdf>