

Care Brief

Autumn 2011



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Welcome

Welcome to the Autumn 2011 edition of the Care Brief.

Following the BBC Panorama programme about Winterbourne View Hospital - a private hospital - at the end of May, the Care Quality Commission (CQC) have had a busy summer with the publication of some 20 reports. As a result, care homes have continued to be in the press over the holiday season.

Winterbourne was one of a number of homes operated by a member of the Castleback Care Group. The CQC has inspected all the services run by this group.

Some of the matters criticised included:

- Investigations into the conduct of staff were not robust

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- Lack of training for staff, or poor supervision
- Inadequate planning of residents' care
- Failure to notify the relevant authorities of safeguarding incidents

On 10 October 2011, the government issued a formal discussion paper following the dramatic collapse of the UK's biggest care home operator, Southern Cross. We consider the tough proposals put forward in the paper to tackle oversight of the social care market.

A few days later, on 14 October, the result of judicial review proceedings, brought against the Charity Commission, will come as a relief to many charitable care operators struggling with the concept of demonstrating public benefit required by the Charity Commission's guidance. The Independent Schools Council (ISC) claimed that the CC's guidance contained important errors of law, particularly regarding the definition of "public benefit". Independent schools - as well as care homes - were required to show that they are offering a public benefit as a condition of charitable status. However,

there was confusion about what public benefit means and the ISC wanted clarification.

The Tribunal has backed the ISC. Among other matters, the Tribunal has rejected the idea that a charity's failure to meet the Commission's views on public benefit should lead to the removal of charitable status. As a practical matter, this ruling should enable care operators to cut down on some of the disclosures that were required in the accounts, annual return and on websites as a consequence – once the Commission reissues its guidance. We will be discussing the implications of the ruling for care operators in a forthcoming issue of DBRIEF.

On another brighter note, we discuss the HMRC consultation on a possible exemption to VAT for shared services. If the proposal contemplated in the consultation is implemented, this could lead to a reduction in VAT for those involved in the provision of supporting people services.

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Agency Worker Regulations

The Agency Worker Regulations came into effect on 1 October 2011. However, the key right of equal treatment as regards basic terms and conditions will not "bite" until Christmas 2011. This means that for HR departments of care operators, there is time to review their use of agency workers and how the impact of the Regulations can be managed. Regrettably, this is likely to involve additional internal paper work, new agreements and extra costs – and potentially a £5,000 fine. However, if the Regulations are triggered by a care operator then using agency staff could become much more expensive. This will affect budgets for 2012.

We set out some key questions for those grappling with the regulations.

What are the Agency Worker Regulations?

The Agency Worker Regulations 2010 (the Regulations) will give an agency worker the benefit of the same "basic working and employment

conditions" as if they had been engaged by the hirer directly to that role. These include:

- Pay (including holiday pay, overtime, individual performance-related bonuses, vouchers/stamps, workplace pension contribution (from 2012))
- Duration of working time
- Length of night work
- Rest periods and rest breaks
- Holiday entitlement

They also enable agency workers to use collective facilities which are made available to other staff and to know what vacancies the hirer has on offer. They also introduce enhanced protection for pregnant agency workers. This, as indicated above, will mean additional costs for care operators.

Who do they apply to?

The Regulations apply to:

- 'Agency workers' – individuals supplied by a temporary work agency to work temporarily for and under the supervision and direction of a hirer but who have a contract with the temporary work agency rather than with the hirer. An agency worker is often used where a hirer needs staff at short notice and its existing workforce cannot cover.
- 'Temporary work agency' – the companies who supply the agency workers whether directly or indirectly to the hirer
- 'Hirer' – you. The agency worker is supplied to you to work on a temporary basis under your direction and supervision
- Those who are outside the scope of the Regulations are:
- Self-employed individuals
- In-house temporary staffing banks

When does the agency worker get the right to those “basic working and employment conditions” referred to above?

The agency worker has to have worked with you for 12 weeks in the same role to benefit from the “basic working and employment conditions”.

However counting those 12 weeks is not always straightforward.

The easiest way that an agency worker can accrue the 12 weeks is if they work for you in the same role for 12 consecutive weeks, even if only for 1 shift per week. When looking at anything more complicated than this, it is useful to think of a clock which counts the weeks of service and can be paused and resumed or reset to zero. Absences and breaks for different reasons and different lengths of time can pause or reset the clock or in some circumstances leave it ticking even if the agency worker isn't working for you at the time.

“it is useful to think of a clock which counts the weeks of service and can be paused and resumed or reset to zero.”

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- Individuals working under a managed service contract (such as those managing and delivering a service, for example, welfare/care, catering or cleaning)

What will an agency worker's rights be on 'Day 1' of the assignment?

From the first day of the assignment, you, as the hirer, are responsible for providing equal treatment to the agency worker in terms of for example:

- Access to facilities and amenities (e.g. canteens, childcare, local transport pick-up service); and
- Notification of 'relevant' vacancies within your organisation.

Here's an example of when the clock would pause and resume:

Agency Worker A (A) is on a 4 week assignment with you. The assignment comes to an end but 5 weeks later you get A back again to do the same role. A starts the second assignment with 4 weeks service already accrued towards the 12.

Here's an example of when the clock would reset to zero:

Agency Worker B (B) does a one-off shift for you and 3 weeks later does another one-off shift. However, then you don't need B back again for another 8 weeks after that. At the start of B's third assignment, the clock is reset to zero and B cannot count 2 weeks towards his 12 weeks.

What if we have an agency worker in one role and then we want to move them into another role without any break in-between?

If the new role is substantively different (and the agency has told the agency worker in writing what the new role entails) then the clock will be reset to zero when the new role starts. However, it appears that substantive difference is not going to be easy to show, to stop hirers from using that as an excuse to stop rights from accruing – a tribunal would look at the main duties and responsibilities of the post and could also look at wider aspects such as location, and line management.

Can I terminate an agency worker's assignment after 11 weeks?

Yes you can. The agency worker would still be entitled to those 'Day 1' rights from the outset of their assignment. However, it is not unlawful to stop the assignment before 12 weeks even if the only reason for doing so is because you don't want the agency worker to accrue 12 weeks. If you are

Who will monitor how many weeks of service an agency worker has accrued?

If you have a good relationship with the agency, you should be able to get them to agree to monitor your use of agency workers and to notify you when they are coming up to their 12 week period. Otherwise you will have to get to grips with the rules on counting weeks of service yourself.

Some practical steps

Over the next few weeks, if HR departments have not already done so, they will need to:

- Look at the organisations existing use of agency workers and calculate the cost of the impact of the Regulations?
- Make sure managers know how and when to use agency workers and put systems in place to count weeks of service
- Consider not only options to minimise risk and cost when engaging agency workers but also consider solutions to reduce the need to

“make sure you know how to count the weeks so that you are not caught out by periods of absence.”

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going to adopt this as your practice, make sure you know how to count the weeks so that you are not caught out by periods of absence. The only time that this practice could be unlawful is if you keep calling the same agency worker back to the same role again and again but leaving just enough time between the assignments to reset their service clock to zero. This looks like you are trying to avoid the application of the Regulations and can be penalised by a £5,000 fine.

However, you should also think about whether it is more important to you to engage someone you can trust, even if that means they end up accruing more than 12 weeks service. In itself the need for someone in such a repeated/long-term way may indicate a medium-term staffing need that could be dealt with, more appropriately in another way, than through the use of agency workers.

use agency workers by making your existing workforce more flexible, for example nil hour contracts or better training

- Consider what collective facilities and amenities are available to be made accessible to agency workers and how they can be informed about vacancies.

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An overview of the government discussion paper on oversight of the social care market

Following the collapse of Southern Cross the government is considering a series of rigorous regulations for residential care homes in a formal government discussion paper. The objectives of the reform are to provide enhanced protection to people who may find themselves without the care they require due to the sudden failure of a provider. The Department of Health is looking to learn from other sectors such as the health and rail sector which have robust financial monitoring frameworks.

The paper explains that the case of Southern Cross not only highlighted the risks if a provider operating at a significant scale falls into financial difficulty but also illustrated how the financial structure of a company can affect the delivery of vital care services.

The discussion paper proposes the following key measures to be placed under consultation:

and manage the situation in an attempt to avoid failure. Local Authorities (and the NHS) would be involved in assessing the financial and operational strength of a care provider more vigorously and sharing best commissioning practices across local authorities and the NHS. The paper recommends changes to the registration regime. For example a provider could be obliged to undergo a rigorous financial check as a requirement of registration and then using regular monitoring and reassessment. This could take the form of regular review or it could be triggered by a significant change in their financial position such as securitisation.

Post failure regimes

The aim is to better manage provider failure immediately prior and after it has occurred to ensure service continuity and protect the interests of those receiving care. The paper anticipates that this could be achieved through clear, transparent contingency plans being published by the Local Authority on how it intends to respond to provider

“The Department of Health is looking to learn from other sectors such as the health and rail sector which have robust financial monitoring frameworks.”

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Better market intelligence and improved information sharing

The aim is to have a more rigorous analysis of the social care market and joined-up intelligence as a means of preventing and managing failure. The paper contemplates that this could be achieved through developing better market intelligence, improving information sharing across central and local government, using interventions as an early warning system and highlighting where potential problems may arise. The paper also suggests that a national body (which may or may not be the Care Quality Commission) could have responsibility for undertaking a formal analysis of the market and providers could voluntarily publish enhanced information rather than just providing audited accounts.

Measures to try and avoid provider failure

The key is to identify providers who may be at risk of financial distress, intervene at an early stage

failure, a strengthening of the powers and duties and a formalisation of roles and responsibilities at local, regional and national level. The paper also proposes changes to insolvency and closure arrangements to ensure service continuity and prevent care homes closing suddenly, for example by posting capital upfront in a segregated account or through a risk pooling scheme.

All of the above measures will have potential cost implications for care providers, so this paper is worth reading. The deadline for responses to the consultation is 2nd December 2011.

The discussion paper can be found at the following link: http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_130438

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Saving VAT by sharing? – VAT and the cost sharing exemption

Background

HM Revenue & Customs (HMRC) have been consulting on proposals to implement an exemption from VAT on “shared services” arranged by and for bodies engaged in VAT exempt or non-business supplies. Consultation ended on 30 September.

Care organisations have often worked with other entities (including other members of the same corporate group) in order to save costs. Under current UK legislation, many of these arrangements result in VAT being charged. While commercial entities may be able to reclaim all the VAT, charitable bodies may not be able to do so.

If the cost sharing model contemplated by the consultation paper is introduced, charitable entities may be able to form groups which once formed, could be relieved of the requirement to charge VAT on their supplies. Accordingly, the exemption will enable certain businesses to share services, without paying VAT, where currently this would result in an irrevocable or only partly recoverable

An independent group

Bodies which wish to share costs must do so through a CSG. This must have a separate identity that distinguishes it from the individual members. Whilst it could be a body corporate in its own right (such as a company limited by guarantee or industrial and provident society) it could also be an arrangement set up by a contract.

An unincorporated association (for example set up by a contract) is attractive as it avoids the expense and extra administration involved in forming a corporate CSG. However, some may find it administratively cumbersome to operate (for example signing documents). It also brings risks of its own. To facilitate administration a lead body would need to be appointed to enter into CSG contracts. The lead body will, invariably, require a right of reimbursement from the other members for any liabilities it incurs, over and above its pro rata share.

The participating bodies should be members of the CSG but none of them individually should

“The participating bodies should be members of the CSG but none of them individually should control it.”

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VAT charge. This will enable groups to achieve cost savings – and economies of scale.

However, those sharing the services, would need to establish a cost sharing group (CSG) which supplies the services to its members at cost. There is nothing to prevent bodies from a wide geographical area and/or a variety of sectors coming together to form a CSG. A larger CSG would achieve greater economies of scale though it might be more difficult to manage and political or cultural differences could be an issue. One area which will need particular care is how a CSG is staffed. There are a number of options; they range from transferring staff to a new corporate vehicle to secondment or joint contracts of employment. Many organisations may be wary of committing to a full TUPE transfer.

Conditions

The exemption will only be available where certain conditions are met. These are, in summary:

control it. HMRC suggests that “control” is by reference to either voting or entitlement to income or assets. We believe that only voting control should be relevant.

The members must provide exempt and/or non-business supplies

The provision of a supporting people service would qualify.

The services supplied by the CSG must be directly necessary for exercise of the members’ exempt or non-business activities

HMRC proposes that where a substantial majority of a member’s activities are exempt and/or non-business, then all the CSG’s services can be treated as directly necessary. If, on the other hand, only part of the members’ activity is in this category then a partial exemption method would be followed to determine what proportion of the CSG’s service is attributable to its exempt or non-business activity.

HMRC put forward an alternative method whereby certain services provided by a CSG would be ranked as “necessary”. The danger here is that some significant activities, which are often shared, such as HR and IT, might be deemed not to be “necessary” and so fall outside the exemption.

The services must be supplied at cost (exact reimbursement)

The CSG may not make a profit from providing services to its members. That said, the consultation paper allows considerable flexibility for the CSG to deal with “timing differences”. For example, a CSG may build up a fund to meet anticipated expenditure and there is flexibility as to how costs are apportioned.

The cost share exemption must not distort competition

It is hard to see when this should be an issue in practice. The exemption is available alike to all businesses which comply with the other requirements. Distortion generally occurs where

a body achieves a dominant position. It seems unlikely that this would happen specifically as a result of the VAT exemption.

Looking forward, for those without the luxury of a “crystal ball”, it is difficult to forecast how HMRC will implement this exemption. In the meantime, those drafting services agreements should ensure that they are drafted in a flexible way to facilitate a change of service provider (for example, if a new company is being established to provide the services). It may be time for a pre-emptive strike at the “standard” services template – before the results of the consultation are published.

For further information, or if you would like to see Devonshires’ response to the Consultation, please contact:

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Are you prepared – becoming involved in a coroner’s investigation

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As Mark Twain said “there are only two certainties in life, death and taxes”. There is also another certainty; that the number of deaths that are reported to coroners will continue to rise.

In 2010, 230,600 deaths were reported to coroners - a rise of 700 from the previous year. In the last few years the proportion of registered deaths reported to coroners has slowly been on the increase. Following criticism of the Shipman case, there has been considerable focus about ensuring proper processes are in place. There has also been a noticeable drive to deliver more effective, transparent and responsive justice and coroner services for victims, witnesses, bereaved families and the wider public. With that aim, the eagerly awaited Coroners and Justice Act 2009, expected to be fully implemented by April 2012, should ensure that the number of deaths reported to the coroners will continue to rise. Recent high-profile inquests such as those into Derek Bird and the July 7 bombings have ensured that inquests

themselves remain high up the political agenda.

Another visible trend is the increase in cases that are reported, for investigation by the coroner, by family members of the deceased. In most cases the deaths have occurred through no-fault of the provider of the facility. That said, it is essential that investigations by the coroner into these deaths are handled carefully and sensitively.

It is important to emphasise that just because the matter has been reported to the coroner for investigation that does not mean that a full inquest is inevitable. Having in place proper processes and procedures means that if you are faced with a coroner’s investigation you are well equipped to assist the coroner with minimum disruption to your business. A provider, should, therefore ensure the following:-

- The particular needs of the occupant are catered for. For example, health concerns should be identified at the outset and, if

appropriate, a risk assessment and care plan should be agreed and implemented.

- Staff members are fully conversant with the internal processes of the organisation.
- The terms and conditions of any care plan are understood and complied with at all times by staff members and a copy of that plan is provided to the occupant's next of kin if deemed appropriate.
- In the event of death or accident, the staff member who found the injured or deceased individual should always consult with his/her line manager and a doctor as soon as is practically possible. A system should also be in place to notify the next of kin.
- Openness and sensitivity are key when communicating with members of the deceased's family. Often the way in which initial communications are dealt with family members will set the scene as to how matters may progress. For example, if the family member

It is also an opportunity to provide details of the provider's previous good record in dealing with those occupants. Whilst this may not be appropriate in every case, thought should be given as to how the provider can portray itself in a positive light and seek to put the unfortunate death in context. If for example, the provider has 1,000 occupants and this is the only death in the last 12 months this may assist the coroner in reaching a conclusion that the general standard of care offered was good and while the death was unfortunate, it was not as a result of a failure on the part of the provider.

- If the provider and staff members are subsequently called to attend a coroner's inquest it is essential that they are well represented and properly prepared when they are called to give evidence. Your legal representatives will be able to advise you on this issue at an early stage. It is important that the lawyers working on the coroner's investigation and those looking at employment issues work hand-in-hand

“ Depending on the particular circumstances surrounding the death, the parties can also be thrust into the public spotlight.”

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thinks that the provider is being secretive or insensitive they are, in our experience, more likely to want an investigation of the death. This is all the more likely if they feel there could have been a mistake by the provider who is now seeking to cover it up.

- Cooperate fully with the police and any other bodies charged with investigating the death. It is important that you also understand the legal obligations and to take advice. Obtain representation at an early stage.
- If the coroner does decide to hold an inquest, it is good practice to prepare a report and, where appropriate, witness statements to be sent to the coroner. Ensure that you liaise with your legal representatives on these important documents and that you include evidence beyond the circumstances of the death itself. It may be useful for the coroner to know, for example, how many occupants are in the provider's care.

For the parties involved, an inquest can be a draining and emotional experience. Depending on the particular circumstances surrounding the death, the parties can also be thrust into the public spotlight.

In summary, ensure that you have good internal systems in place. Make sure that you adhere to those systems and obtain legal advice as soon as you receive any communication from the coroner's office investigating a death of someone in your care.

Whilst reports to coroner's offices continue to rise, proper preparation will ensure that you can meet any coroner's investigations openly and in the knowledge that as a provider you have taken all steps possible to ensure the safety of the individuals in your care.

For further information please contact:

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Creating agreements by email

Two recent cases highlight the risks of negotiating by email.

In *Nicholas Prestige Homes v Neal* [2010] EWCA Civ 1552, the Court decided that a contract had been entered into by email when an estate agency sent a property seller an email stating that the agency would have sole selling rights and the seller replied saying “that’s fine, look forward to viewings”. The seller then instructed another agent and the property was sold. The seller argued that there was no contract with the first agent. However, the Court held that a contract existed and that it had been breached by the seller by instructing a third party estate agent. That said, substantial legal expenses must have been incurred by the agent clarifying whether there was a contract.

The case illustrates that it is crucial to take care when dealing by e-mail. If, as a supplier of care services, you wish to ensure that a contract has been entered into and avoid risking expensive court action, consider sending a confirmation form with the email. Alternatively, require the other

This decision in the *Immingham storage case* illustrates the risk that a vague reference in a document or email to a formal agreement may not be enough to preclude the document or email from becoming legally binding when the main terms are all agreed. The word “formal” may even indicate that any further agreement is a mere formality, as the substance has already been agreed.

This case also shows the court’s willingness to enforce an agreement made informally, where the parties have fulfilled agreed preconditions and have not expressly make their negotiations “subject to contract”.

If, as a buyer of services (or for that matter, goods), you wish to avoid intentionally entering into a legally binding contract with a supplier by email, you should state that the email correspondence is “subject to contract.”

“The phrase “subject to contract” in commercial negotiations creates a strong presumption that the parties do not yet want to be bound.”

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party to expressly show that they accept the terms of the contract. If you want to conclude an agreement by email, do also make sure that you are using the correct email template. It would be unfortunate for the wrong group company to, inadvertently, enter into the agreement!

In another recent case - *Immingham Storage Company Ltd v Clear plc* [2011] EWCA Civ 89, the Court of Appeal considered whether an email exchange, which included the phrase “a formal contract will follow”, was “subject to contract” or whether a contract had already been formed.

The phrase “subject to contract” in commercial negotiations creates a strong presumption that the parties do not yet want to be bound. Parties who do not use this formula in correspondence (including by email) need to make it clear if their agreement on the main points is a non-binding pre-agreement, rather than a binding but conditional agreement.

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Legal action and mental capacity

– Some questions and answers

Care operators may find themselves having to take legal action against their tenants. In some situations this can involve legal action against a person whose mental health is such that they do not have capacity to make decisions for themselves. In these cases, what does a care operator need to know to be able to take legal action?

Below we tackle some of the frequently asked questions.

Q: When does someone lack mental capacity?

A: For the purposes of legal action a person does not have mental capacity if they are unable to make a decision for themselves. This means the person is unable to:

- understand the information relevant to the decision
- retain that information

court proceedings come to a halt until a litigation friend is appointed.

Q: Who can be a litigation friend?

A: Often it is a spouse, family member or social worker. Crucially, they must be able to act fairly and competently and they must not have any conflicting interests with the person they are acting for. A deputy appointed by the Court of Protection can also act as a litigation friend.

Q: What happens if no one is able to or prepared to act as a litigation friend?

A: The official solicitor can be appointed as the litigation friend.

Q: Will the appointment of a litigation friend impact on the result of the case?

A: The role of the litigation friend is to protect the interests of the person lacking in capacity. Once appointed any legal case brought by a person lacking in capacity or

“The litigation friend makes the decisions in the legal action for that person.”

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- use or weigh that information as part of the process of making the decision, or

- communicate his decision.

Q: Does a person’s lack of capacity prevent a landlord from taking legal action against that person or the person taking action against a landlord?

A: No but a “litigation friend” must be appointed on behalf of the person lacking in capacity. The litigation friend makes the decisions in the legal action for that person. Furthermore, a court will not allow any steps to be taken against a person who does not have mental capacity, except for issuing a claim and applying to appoint a litigation friend, until a litigation friend has been appointed. If it becomes apparent during court proceedings that a person lacks mental capacity, then those

against that person will continue in much the same way as it would with a person who has capacity. The important point to remember is when legal action is taken against a person who the landlord knows does not have mental capacity that steps are taken to appoint a litigation friend as soon as possible to avoid legal action stalling.

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Freedom of information – An additional burden?

The Housing Minister, Grant Shapps, announced in June of this year that the Ministry of Justice will be consulting with Registered Providers on whether to extend the scope of the Freedom of Information Act (FOIA) to include Registered Providers (RPs).

The consultation is expected to be published in the autumn and will consider whether RPs should open up to more public scrutiny in order to promote efficiency and ensure that public money is being spent as effectively as possible. This is in accordance with the Government's wider transparency agenda and the drive across the public sector to achieve greater value for money.

If RPs do become subject to FOIA, individuals and companies will have the right to ask whether they hold certain information and, if they do, the right to be given that information unless an exemption applies.

The consultation process will provide a valuable opportunity for RPs to robustly defend their positions and it is important that RPs participate and voice their concerns. However, if (as seems likely) following the consultation RPs do become subject to FOIA, it will be vital that they are fully prepared to respond to the challenges they will face in ensuring compliance with FOIA.

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Groups – Where does the responsibility lie?

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Where care providers are part of group structures, the waters can become very muddy indeed as to where the responsibilities for health and safety compliance lie.

Take for instance a parent entity that sits at the top of a group containing several care operator subsidiaries. The subsidiaries themselves may have numerous premises. Compliance with health and safety law, therefore, requires a clear understanding of where responsibility for those specific premises lies within that group structure and, more importantly, the extent to which an enforcing authority can prosecute the parent company for a health and safety breach that, on the face of it, is ultimately the responsibility of the subsidiary.

We recently acted for a large care operator with a group structure, in which the group head company sits at the top of several subsidiary care operators. The health and safety breach

occurred in premises owned and managed by the subsidiary, but rather than prosecuting the subsidiary as the employer, the enforcing authority pursued the care operator head directly.

Prosecuting authorities do this for numerous reasons, including the following:

- The parent company may be responsible for devising and implementing the health and safety policy, practices and procedures for the group as a whole. As such, the policy, practices and procedures may have been imposed from above and the flaws contained within the system at the responsibility of the parent.
- The parent company may be responsible for ensuring that sufficient resources are allocated to the subsidiaries so that the group health and safety practices and procedures can be implemented.
- The parent company may be financially

stronger than the subsidiary in which the breach takes place. The subsidiary may have insufficient funds to finance a large fine on conviction.

- The parent company may have a higher profile than the subsidiary - this was certainly the case in the matter referred to above. As all organisations are concerned with the impact of reputational damage, a prosecuting authority may use such concerns to pile on the pressure.
- Prosecuting authorities may find it more convenient to prosecute the parent company rather than trawl its way through the group structure to locate exactly where responsibility for the breach lies.

A prosecuting authority will always be interested in determining who actually “called the shots” in respect of premises where a health and safety breach took place. A care operator should always look at the facts on the ground to determine

authority may construe this as a failure of an employer in respect of the group, as a whole, and that subsidiary in particular.

Therefore, in order for a group parent to avoid the risk of being prosecuted for a failure at subsidiary level insofar as is reasonably practicable, it is crucial that the relevant senior manager at the parent takes an active role in the governance of what is actually going on at the care subsidiary level. Failure to do so may prove to be avoidably expensive.

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“A prosecuting authority will always be interested in determining who actually “called the shots” in respect of premises where a health and safety breach took place.”

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whether or not a prosecuting authority may seek to pursue the parent, the subsidiary or both. Although the subsidiary is the direct employer, the parent company may in certain circumstances be construed as the true employer, and that some or all of the employer’s responsibilities under health and safety law fall upon the parent company rather than the subsidiary. The stronger the influence the parent has over its subsidiary, the more likely this is to be the case.

The board of a parent company must also keep in mind its governance responsibilities. Where it has set the policy, practices and procedures for the group as a whole - indeed, where the health and safety department for the whole group including the subsidiaries is located within the parent company’s offices – and the subsidiary has implemented the regime incorrectly, the group head may be partially at fault for failing to ensure the policy was being followed. The prosecuting



The changing regulatory system of the care sector

Care and nursing home service provision for older people continues to progress through a period of significant evolutionary change following the introduction of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2010 and the Care Quality Commission (Registration) Regulations 2009.

This new regulatory system presents a shift in focus from checking systems and processes to measuring outcomes and people's experience of a service, underpinned by the requirement to demonstrate improvements in the quality of care provided. As part of its regulatory duty, the Care Quality Commission (the CQC) has produced guidance for service providers on compliance with the regulations and associated outcomes; the outcomes are what people can expect to experience from using the service.

These changes represent a major challenge. The care home sector has to assimilate and incorporate the new regulatory systems into practice so as to demonstrate evidence of

a positive health and safety culture, through policy, organising, planning and implementation, measuring and reviewing performance and auditing. Working through this process will enable the incorporation of both health and safety legislation and the new care regulatory requirements with the ability to demonstrate evidence to meet the essential standards and outcome measures for compliance.

As care providers, there are of course legal reporting and notification duties for health and safety under the 'Reporting of Injuries and Dangerous Occurrences Regulations 1995' as well as under the new Care Regulations. When combined with other reporting requirements for risk and performance data as part of good risk management control, the sector can face considerable duplication of reporting systems.

The case of Health and Safety Executive v Marble City Ltd has provided health and safety advisors with an early indication of how the higher courts view the Definitive Guideline on Corporate

“As part of its regulatory duty, the Care Quality Commission (the CQC) has produced guidance for service providers on compliance with the regulations and associated outcomes”

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compliance with the essential standards. This includes the requirement to integrate the new 'code of practice for health and adult social care on the prevention and control of infections and related guidance' building on Regulation 12 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2010. This new code sets out criteria against which registered care providers will be assessed by the CQC.

The Health and Safety Executive guidance on 'Successful health and safety management' (HSE:HSG 65) provides a useful management process for reviewing existing health and safety arrangements to ensure they meet the requirements of the new care regulatory system. This process is universally recognised for providing effective and quality driven good health and safety management practice. HSE:HSG 65 is based on principles of risk assessment and control, prioritisation, safe systems of working, training, continuous improvement and promoting

Manslaughter & Health and Safety Offences Causing Death (Definitive Guideline) in cases where health and safety convictions are secured.

An employee of Marble City Ltd, a stone company, died after he was crushed by a five tonne stack of marble slabs being unloaded in a manner the first tier court ruled to be in breach of the Health and Safety at Work etc Act 1974. Marble City was fined £100,000 and ordered to pay £46,564 in Health and Safety Executive (HSE) costs. Two directors of Marble City were also fined £10,000 each.

The Court of Appeal rejected Marble City's appeal on the basis that the Judge at first instance had given sufficient credit to the company's mitigation and that the fine initially imposed was not excessive. Having pleaded guilty, the Judge gave Marble City the full early plea discount. Therefore, the starting point from which the Judge decided the fine was £150,000.

The Marble City Court of Appeal judgment has received some criticism for failing to establish a clear starting point for sentences. However, the Definitive Guideline states that where a health and safety offence causes death, the appropriate fine will seldom be less than £100,000 and may be measured in hundreds of thousands of pounds or even millions. The Judge in the lower court would, therefore, appear to have been acting within the natural boundaries set by the Definitive Guideline.

Perhaps more cause for concern is the weight of the fine when considered against the financial resources of the company. The Definitive Guideline allows for a defendant company to provide the court with financial information so as to determine the effect of, amongst other things, a fine on innocent people employed by the defendant and whether or not the fine will have the effect of putting the defendant out of business.

In the event of a serious health and safety breach, Registered Providers (who are also care operators) are unlikely to be immune from such

burden of proof in health and safety law places pressure on the prosecuted to plead guilty even in a case where there is a strong defence. A matter involving a death is, clearly, not the strongest case to fight.

Therefore, a company or, indeed, a care operator is unlucky that a death has occurred “on it watch” may find itself, unfortunately, caught in a “steel trap” of having to plead guilty due to the reverse burden of proof only to be hit with a massive fine under the Definitive Guideline for having caused that death.

In order to off-set such risks, care operators must ensure they are maintaining sufficient standards of health and safety across their organisation so that, in the event of a death or serious injury, the court will keep any fine to a minimum. The threshold of reasonable practicability accommodates such considerations - as long as you have been meeting that threshold in the first place.

“the reverse burden of proof in health and safety law places pressure on the prosecuted to plead guilty even in a case where there is a strong defence.”

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thinking. Marble City is a small company. To have received such a large fine - a fine that leads to it going out of business - may appear to be a sufficient penalty for a breach that led to a death. For a larger care operator the scale of the fine would have to be vast to put it out of business, but some organisations may find that a significant fine will still have a material impact.

The Definitive Guideline states that in some circumstances putting the defendant out of business may not be such a bad thing, for instance if it is a “cowboy” outfit whose poor standards include a failure to take sufficient health and safety measures. In this regard, the Court is absolutely right.

However, the same fact pattern may lead to a death in some circumstances and injury in others, depending on the luck of both the victim and the employer. The death itself may be incidental to the gravity of the offence. Meanwhile, the reverse

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Extra Care Housing

With the increasing pressures on the housing with care market, extra care housing is a growing and increasingly popular alternative to residential care as it offers both independent living and the ease of accessing on hand services when desirable (or necessary).

Devonshires has acted on many of the pioneering extra care schemes and continue to play a prominent role in the sector acting on a number of the extra care schemes currently in procurement

We have summarised a few of these schemes below:

London Borough of Camden - Homes for Older People

Devonshires assisted the Local Authority in relation to their Homes for Older People scheme which achieved financial close at the end of June. This scheme will provide two new care homes in the London Borough of Camden. It is a Public Private Partnership in which the private sector consortium will design, build and operate the two

and it is envisaged that these facilities will provide up to 300 more units of accommodation together with a range of communal facilities.

Sevenoaks Care Home and Flats

We are currently acting on a project based in Sevenoaks involving the construction of a new care home and the redevelopment and conversion of two flatted developments for the over 60's.

Walsall Metropolitan Borough Council – Re provision of Care Services

We acted for the successful bidder in this project which rationalised existing residential care facilities throughout the Borough. A new state of the art dementia facility was provided and over 275 extra care apartments were created.

Kent County Council - Better Homes Active Lives

Devonshires assisted the successful bidder in the procurement of the Better Homes Active Lives Housing PFI. The 30 year contract was signed

“Devonshires has acted on many of the pioneering extra care schemes and continue to play a prominent role in the sector”

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new care homes which will include both nursing and extra care sheltered housing.

Kent County Council - Excellent Homes For All

Kent County Council and five District and Borough Council Partners are currently procuring the Excellent Homes for All PFI project. This project will deliver 200 new social housing apartments for vulnerable people on five schemes of extra care housing for older people and two schemes of supported accommodation for vulnerable people. Devonshires is acting for one of the private sector consortiums bidding to deliver this project.

Derbyshire County Council – Extra Care Facilities

We are working with one of the bidders seeking to provide Derbyshire County Council's extra care project which will involve the design, build, operation and maintenance of mixed tenure Extra Care schemes. Derbyshire County Council already has a number of operational extra care schemes

in 2007 and provided for a £72 million project to build and manage modern apartments for older and disabled people in Kent. All of the apartments are now operational and the project has delivered 340 new homes in total.

North Tyneside Council Extra Care PPP

Devonshires assisted the successful bidder in the procurement of North Tyneside Council's Extra Care scheme which provided flats for elderly people, community facilities and a day care facility.

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TUPE or not TUPE: The confusion returns

When the Transfer of Undertakings (Protection of Employment) Regulations 2006 were introduced on 1 April 2006, there was a sense of relief in the outsourcing world. These regulations revised the regulations introduced in 1981 and gave service providers far more certainty that the Transfer of Undertakings (Protection of Employment) (TUPE) regime applies where there is a change of provider in an outsourcing context. Under 1981 regulations, there was always a question mark over the extent of the application of TUPE in such a situation. The reason being that the earlier version of the regulations had been introduced before the concept of outsourcing had properly taken hold. With the introduction of revised regulations in 2006, the wrangling that had taken place over the interpretation of the earlier version of the regulations had disappeared.

As a consequence, changes of providers in an outsourcing context have operated much more smoothly, until recently...

Fragmentation is an approach by which commissioning bodies, including local authorities, decide to award the re-tendered contract to a large number of different providers in such a way that the service becomes so fragmented no one can identify where the employees should transfer.

Whilst this would appear to be a blatant attempt to get round TUPE, it is consistent with the current state of the law. The legal cases confirm that a service provision change can occur where activities are distributed among a number of contractors, providing it is possible to identify with which contractor they end up. However, where the activities are randomly distributed among the new contractors and are not easily identifiable as the activities carried out by the original contractor, it would appear that TUPE will not apply.

This has been seized upon by 'cash strapped' organisations that attempt to structure re-tendering, outsourcing or service provision transactions in an effort to avoid TUPE.

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The repercussions of the comprehensive spending review have, by necessity, resulted in local authorities looking at ways to try and reduce spending. One area has been Supporting People contracts. As a result, there has emerged new ways at looking to "thwart" the application of TUPE at the end of the contract to avoid incoming contractors having to bear the expense of taking on the existing workforce. For example, one of the main expenses in taking over employees from an incumbent service provider is the financially onerous responsibility of providing a broadly comparable pension scheme to ex Council employees who participate in the Local Government Pension Scheme (LGPS). One of the consequences of the risk of taking on this responsibility, has been the increasing use of "fragmentation".

Whilst in the short term this may assist local authorities in achieving savings, there is concern over the standards of service being provided to service users. It may also give rise to doubts as to just how committed some care providers, who appear to be 'chasing turnover', are to this business in the long term. However, for committed care providers, fragmentation is a concern. We have had a lot of experience dealing with the mitigation of liabilities for incumbent service providers, where the services have been fragmented.

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