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27 June 2019

Dear Angela and Karen,

Re: Request for clarification regarding Case Managers being registered

Thank you for your letter which I received by email on 9st May 2019 requesting clarification as to whether Case Managers are regulated by the Care Quality Commission (CQC) and, if so, under which regulated activity.

I should say firstly that it is not possible to provide a definitive answer as to whether all Case Managers and Case Management companies must register with CQC, given their very varied duties and the differing circumstances of their involvement. While I am happy to provide a general response the matters you raise, you may also wish to take your own legal advice, as may individual Case Managers and Case Management companies.

As you know, registration with CQC is required by Section 10(1) of the Health and Social Care Act 2008 ('The Act') which states that:

"Any person who carries on a regulated activity without being registered under this Chapter in respect of the carrying on of that activity is guilty of an offence."

The phrase "carries on" is not defined in the above legislation but CQC generally takes this to mean the person, i.e. legal entity, that has ongoing direction and control of a regulated activity, although please note that the specific guidance to which I refer on page 3 below relates to the regulated activity ('RA') 'personal care' only.

Those activities which are subject to regulation by CQC are set out in Schedule 1 to The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 ('The Regulations'). If any of these RA's are provided at any time, then registration will be required, even if there are periods when it is not provided. There are a number of exceptions to specific RA's in Schedule 1, as well as

general exceptions relating to more than one RA in Schedule 2 to the Regulations.

There are two parts to your question:

- 1) Whether, in the course of a Case Manager's work, regulated activity is typically provided and if so, which regulated activity/ies; and
- 2) Whether and under what circumstances the Case Manager, or the body employing them, is likely to be carrying on those regulated activities?

I will attempt to deal with each of these in turn.

1. Whether, in the course of a Case Manager's work, regulated activity may be provided and if so, which regulated activities

In your letter you describe the services typically required by the service users with whom Case Managers work. You say, in particular, that these may be children or adults who have been disabled by traumatic injury, typically by a road accident, playing sports, trip or fall, assault or medical negligence. You describe the disabilities sustained as tending to be brain injury, spinal cord injury, various orthopaedic conditions and cerebral palsy. Such persons may require a range of interventions to meet their changing needs and, while it is not possible to comment on specific cases in this letter, it seems likely that they will require care that would constitute regulated activity ('RA'). This could, most obviously, include the RA's of 'personal care' and 'treatment of disease, disorder or injury'.

Having said that, it is worth noting that some of the care provided may not be regulated activity. For example, therapy provided by physiotherapists and occupational therapists is not captured by the RA 'treatment of disease, disorder or injury' because this RA is defined as treatment provided by or under the supervision of a healthcare professional (see page 6 below).

The statutory definitions of the regulated activities are in Schedule 1 of the aforementioned Regulations. You will find them here:
https://www.cqc.org.uk/sites/default/files/20150510_hasca_2008_regulated_activities_regs_2104_current.pdf

As you know, CQC has also published guidance about the regulated activities which you will find here:

https://www.cqc.org.uk/sites/default/files/20151230_100001_Scope_of_registration_guidance_updated_March_2015_01.pdf

It is beyond the scope of this letter to consider each of the RA's and, in any case, different activities may be provided in each case, but it seems reasonable to conclude that regulated activity (most likely 'personal care' and 'treatment of disease, disorder or injury', but there may be others) is likely to be provided in some cases (and indeed, there are several case management companies already registered with CQC to provide these RA's). That is not to say regulated activity will always be provided and therefore that ALL Case Managers and Case Management companies will require registration. But rather that they will, if they carry on RA.

2. Whether and under what circumstances the Case Manager, or the body employing them, is likely to be carrying on those regulated activities.

You say, in your letter, that typically a Case Manager may receive referrals from a variety of sources including solicitors, insurers, financial professional deputies, NHS and Local Authority commissioners, families on behalf of service users and the service users themselves. The role of the Case Manager is to work with the service user to coordinate and manage resources to improve the injured person's abilities and to maximise their potential. The CMSUK defines Case Management as:

“a collaborative process which assesses, plans, implements, co-ordinates, monitors and evaluates the options and services required to meet an individual's health, social care, educational and employment needs, using communication and available resources to promote quality cost effective outcomes”.

I note that you also say that:

“When required an individual or team will be recruited by the case manager to perform these roles [some of which are personal care] with and for the service user.”

You go on to describe the differing responsibilities of the Case Manager dependent on the source of the funding and the arrangement in each case. The level of involvement between the Case Manager, the carer or care agency employed and the service user also varies. While, in some cases, you say that Case Managers may have no face to face contact with the service user,

“Others who work with complex needs will be heavily involved with the service user and their families, meeting regularly, managing review meetings with the multidisciplinary team (MDT) and supervising, managing support workers/carers/rehabilitation assistants and personal assistants.”

Personal Care

It is this 'supervision' and the management of the carers who deliver personal care to the service user that may bring those Case Managers and Case Management companies that do it into regulation, unless an exception applies in the Regulations.

As stated above, CQC interprets to 'carry on' this regulated activity as meaning to have ongoing direction and control of the activity. So the issue is the extent that Case Managers have ongoing direction and control of this RA, sufficient to say that they are carrying on.

As you may know, an exception exists to the RA 'personal care' in Schedule 1, sub-paragraph 1(3)(b):

“(b) the introduction of carers to an individual (other than a service provider) by a person (including an employment agency or an employment business) having no ongoing role in the direction or control of the service provided to that individual”

Thus, if all that the Case Manager was doing was introducing the carer to the service user, without any ongoing role in the direction or control of the service provided, then the exception would apply and registration would not be required. However, if the Case Manager supervises and manages the carer, then this may constitute a role in the ongoing direction and control of the service provided to the service user and thus, may trigger the registration requirement. Your question is what level of supervision and management would be required.

To answer that, CQC has published guidance called “Personal Care: Ongoing Direction or Control of The Service”, available here: - https://www.cqc.org.uk/sites/default/files/documents/20120223_800199_v2_00_personal_care_and_ongoing_direction_external_version_for_publication.pdf

Section 3 of this guidance states:

“The regulated activity of personal care **APPLIES** in the following circumstances:

- A person, an employment agency or employment business (referred to as the 'provider'), introduces a care worker to an individual, and
- The provider does ANY of the following:
 - Monitors the service provided to the individual and, as a result of this monitoring, takes responsibility for replacing the care worker for any reason.
 - Seeks the views of the person receiving the service or acts as their advocate and, as a result, advises or directs changes to the activity of the care worker (such as changes to the frequency of visits, or the type of care provided, or the way in which the care worker performs the agreed tasks).
 - Arranges a rota of care workers so that visits and care are provided when required by the individual.
 - Continues to charge the individual for the service being provided by the care worker, excluding where arrangements have been made to enable a one-off introduction fee to be paid by instalments.
 - Agrees to organise cover for any sickness or leave that may arise – other than when the individual makes an independent request to the provider to introduce another care worker to cover leave or sickness.
 - Reviews the care plan, including making changes as necessary, in consultation with the individual.”

Section 4 of the guidance states:

“The regulated activity of personal care **DOES NOT APPLY** in the following circumstances:

- A person, employment agency or employment business (the provider), introduces a care worker to an individual and has no further involvement at all, or
- In addition to the introduction, any activity by the provider is restricted to the following:
 - Introducing an additional or replacement care worker if the person receiving care is not satisfied with the existing care worker and asks for an additional or replacement care worker. This further introduction is because the person receiving care has requested an additional or replacement care worker and is not as a result of monitoring by the provider who may have identified a need for a change.
 - Providing a range of practice guidance (usually referred to as 'procedures') as an extra service to the person receiving care. The care worker can follow these procedures once employed if the person directs them to do so. The provider who introduced the care worker does not monitor the performance of that worker in respect of these procedures.
 - Making an assessment of the needs of the individual, but only in order to determine the type of care worker required or the most suitable worker. Or the provider might arrange for someone (usually referred to as a case worker or assessor) to carry out an assessment of needs. This is not the same as writing a care plan detailing the activities needed to deliver the personal care required.

For example, this type of assessment might determine such things as the person's needs for help using the toilet in the morning, preparing their breakfast, although they can eat independently, and help with a mid-morning shower and getting dressed. Such an assessment may be carried out only to enable the provider to recruit and introduce a care worker who can be available for the time required and who has the skills needed. The assessment is not ongoing.

- o Charging a 'one-off' fee for the introduction – even though part or all of the fee may be reimbursed by the provider if either the care worker or the person receiving care terminates their agreement with each other. The fee may be paid in instalments and may or may not be related to the length of the contract.

- o Contacting the person receiving care to make sure that they are satisfied with the service of making the introduction. This contact is only for the purpose of quality assuring the introduction process, not for monitoring or controlling or directing the service being provided by the care worker.

- o Agreeing to carry out a payroll function for the person who is employing the worker. This function must have no influence on the direction and control of the service being provided. There should be a clear separation between the introduction and the provision of the payroll service. Ideally, such an arrangement will be under a separate contract from the one of introduction, to emphasise the separate nature of the provider's activities."

Reading your letter and recalling the conversations we have had about this, it is not possible for me to say, absolutely, that Case Managers and Case Management Companies will necessarily undertake the activities discussed in Section 3, rather than only those in Section 4. But I think it reasonable to conclude that they may and that, in some cases, registration for 'personal care' is likely to be required.

The exception in sub-paragraph 1(3) also includes: -

“(c) the services of a carer employed by an individual or related third party, without the involvement of an undertaking acting as an employment agency or employment business, and working wholly under the direction and control of that individual or related third party in order to meet the individual's own care requirements”

The meaning of “related third party” is set out in Sub-paragraph 1(4):

“(4) In sub-paragraph (3)--

"carer" means an individual who provides personal care to a person referred to in sub-paragraph (1);

"related third party" means--

(a) an individual with parental responsibility (within the meaning of section 3 of the Children Act 1989) for a child to whom personal care services are to be provided;

(b) an individual with power of attorney or other lawful authority to make arrangements on behalf of the person to whom personal care services are to be provided;

(c) a group of individuals mentioned in either of paragraphs (a) or (b) making arrangements on behalf of one or more persons to whom personal care services are to be provided;

(d) a trust established for the purpose of providing services to meet the health or social care needs of a named individual.”

I note section 3 on page 2 of your letter, in which you state that Case Managers are sometimes commissioned by a Financial Deputy, who may have such a power or authority. If so, then the exception is likely to apply to those Financial Deputies, in which case they are unlikely to require registration for this RA. The exception could also apply to Case Managers *IF* the Court of Protection has specifically given authority to the Case Manager. I understand that Financial Deputies can make a request for lawful authority to be given to Case Managers. Where they do so and it is granted, then the exception is likely to apply. It could also apply *IF* the Case Manager has been identified as a recipient of a direct

payment. In that circumstance then that will also satisfy the 'lawful authority' requirement.

Treatment of disease, disorder or injury

This RA is defined in paragraph 4 of Schedule 2 to the Regulations, as the provision of treatment for a disease, disorder or injury by or under the supervision of a health care professional, or a team which includes a health care professional (but please see the full definition in Schedule 1 to the Regulations). For the purposes of this regulated activity, the term 'health care professional' is defined in sub-paragraph 4(4) of Schedule 1 as:-

“(i) a medical practitioner,
(ii) a dental practitioner,
(iii) a dental hygienist,
(iv) a dental therapist,
(v) a dental nurse,
(vi) a dental technician,
(vii) an orthodontic therapist,
(viii) a nurse,
(ix) a midwife,
(x) a biomedical scientist,
(xi) a clinical scientist,
(xii) an operating department practitioner,
(xiii) a paramedic, or
(xiv) a radiographer”

As referred to on page 2 above, physiotherapists and occupational therapists are not included in the above. If the Case Manager is not a health care professional and no health care professional provides or supervises the service the Case Manager provides, or there is no health care professional included in the team, then this RA is not provided and registration for it is not required.

A general exception exists in Paragraph 5(1)(c) of Schedule 2 to the Regulations:

(1) Medical or dental services provided (otherwise than in conjunction with the provision of accommodation in a hospital) only under arrangements made on behalf of service users by--
(c) an insurance provider with whom the service users hold an insurance policy, other than an insurance policy which is solely or primarily intended to provide benefits in connection with the diagnosis or treatment of physical or mental illness, disability or infirmity.

This exception applies to the regulated activity 'treatment of disease, disorder to injury' (it does not apply to the regulated activity 'personal care' because the provision of personal care is not a medical or dental service). I note in your letter that Case Managers may be commissioned by insurers. The exception only applies if the insurance claim relates to an insurance policy held by the service user (such as motor insurance). If it relates to a damages claim against the insurance policy of another person, the exemption would not apply.

Summary

To summarise, it seems likely from the information provided in your letter that regulated activity (most likely 'personal care' and 'treatment of disease, disorder or injury') may be provided in some cases with which Case Managers and Case Management Companies will be involved. Where those Case Managers or Case

Management Companies have involvement in the ongoing direction and control of personal care, to the extent that they cross a line that gives them such an ongoing role, then they may be carrying on the RA 'personal care'. CQC's guidance entitled "Personal Care: Ongoing Direction or Control of The Service" will assist in determining whether the level of involvement crosses the line that triggers the requirement for registration. Where the Case Manager or Case Management company provides treatment by or under the supervision of a health care professional, they may be carrying on the RA 'treatment of disease, disorder or injury'. Where they do so and where none of the exceptions in Schedule 1 or Schedule 2 to the Regulations apply in that case, then the Case Manager or Case Management Company is likely to need to apply for and be registered with CQC.

I hope this adequately answers your questions. Should you have any further questions or need to discuss the advice, please let me know.

Thank you again for contacting us.

Yours sincerely,

Andy Brown
Registration Advisor