

EXPLANATORY MEMORANDUM TO
THE CARE QUALITY COMMISSION (REVIEWS AND PERFORMANCE
ASSESSMENTS) REGULATIONS 2018

2018 No. 54

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department of Health and Social Care and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 Section 46 of the Health and Social Care Act 2008 (“the 2008 Act”) as amended by section 91(2) of the Care Act 2014 imposes a duty on the Care Quality Commission (“the CQC”) to conduct performance assessment reviews of the carrying on of such registered service providers and such regulated activities as may be prescribed and to publish reports of such assessments. The Care Quality Commission (Reviews and Performance Assessments) Regulations 2014 (“the 2014 Regulations”) (as amended by regulations made under that power prescribe some registered service providers and regulated activities in respect of which the CQC must conduct and publish performance assessments.
- 2.2 The purpose of these regulations is to extend the service providers and regulated activities in respect of which CQC must conduct and publish performance assessments.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Other matters of interest to the House of Commons

- 3.2 As this instrument is subject to the negative procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

- 4.1 The 2008 Act established the CQC and gave it functions to regulate health and social care services in England. Section 10 provides that any service provider who carries on a regulated activity without being registered in respect of that activity is guilty of an offence. Section 8 provides that a regulated activity is a prescribed activity which involves or is connected with the provision of health or social care in, or in relation to, England. The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 (S.I. 2014/2936) prescribe regulated activities.
- 4.2 Section 46 of the Health and Social Care Act 2008 as amended by section 91(2) of the Care Act 2014 places a duty on CQC to conduct reviews of the carrying on of such regulated activities as are prescribed in regulations made under that section and,

following each review, to assess the performance of such service providers as are likewise prescribed.

- 4.3 The Care Quality Commission (Reviews and Performance Assessments) Regulations 2014 (S.I. 2014/1788) as amended by the Care Quality Commission (Reviews and Performance Assessments) (Amendment) Regulations 2017 (“2014 Regulations”) prescribes the service providers and the regulated activities which are to be the subject to such reviews and performance assessments.
- 4.4 These Regulations revoke the 2014 Regulations and prescribe all service providers and all regulated activities to the extent that the regulated activities are activities, procedures or services which are described in column 2 of the Table.

5. Extent and Territorial Application

- 5.1 The extent of this instrument is England.
- 5.2 The territorial application of this instrument is England.

6. European Convention on Human Rights

- 6.1 As this instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

What is being done and why

- 7.1 Section 46 of the Health and Social Care Act 2008 (as amended by the Care Act 2014) places a duty on the CQC to carry out reviews, and assess and publish a report of its assessment, of the performance of such regulated activities and registered service providers as are prescribed. The assessment must be by reference to indicators of quality devised by the CQC and is provided by the CQC in the form of a rating of performance. By regulation 20A of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 (S.I. 2014/2936) a service provider who has received a rating of its performance must display its most recent rating on its website and at its premises.
- 7.2 When ratings were introduced in 2014 by means of the 2014 Regulations the focus was on ensuring that the CQC provided ratings for those sectors where a rating would have the most benefit. This was limited to NHS Trusts and NHS Foundation Trusts, GP practices, adult social care providers, providers of nursing care and nursing homes and independent hospitals. As at 31 December 2016, the CQC had given ratings to more than 26,000 locations and providers. In April 2017 the CQC published its ‘Review of CQC’s impact on quality and improvement in health and social care’. Across all sectors significant proportions of providers with poor ratings demonstrated an improvement in rating upon re-inspection. The CQC will continue to explore whether the public and commissioners use the CQC evidence and ratings when making decisions about care, what influences this and what effect it has.
- 7.3 Given this evidence, the Government believes it is important to rate all health and social care services providers in respect of the regulated activities which they carry out.
- 7.4 But, there are some registered service providers that the DHSC does wish the CQC to have a duty to rate. The reasons for this, which CQC supports, are because either the

number of providers is so small that ratings would not contribute to consumer choice; or the services are already regulated by other agencies so a CQC rating could confuse the public; or the sector is relatively low risk and is inspected by the CQC too infrequently to make a rating meaningful.

- 7.5 These regulations propose to extend the CQC's duty to undertake performance assessments and provide a rating for providers of all regulated activities unless (and to extent that) these regulations specifically exclude them.
- 7.6 The exclusion of a small number of registered service providers or regulated activities from CQC's rating regime are National Screening Programmes, primary dental care services, minor cosmetic surgery services, Health and Justice Services, Hyperbaric Chambers, Blood and Transplant Services, services licenced by the Human Fertilisation and Embryology Authority, independent pathology laboratories, independent podiatry surgery and children's homes undertaking regulated activities.
- 7.7 Diagnostic and screening procedures which are regulated activities are excluded if they are provided as part of a national screening programme by a body established solely for the purpose of such a programme. Public Health England provides quality assurance regarding services for these procedures. We would therefore not wish CQC to rate these services.
- 7.8 Primary dental care services including cosmetic dentistry, will be excluded from ratings unless carried on by an independent hospital, a NHS Trust or a NHS Foundation Trust. The sector is already regulated by the General Dental Council and the CQC with little variation in the regulatory compliance required by dental services. They are relatively low-risk and subject to lower frequency of inspection and therefore not adequate for rating. It would not be a good use of resources for CQC to increase the rate of inspection for these providers.
- 7.9 Minor cosmetic surgery procedures (apart from procedures to the eye which correct refractive error) are excluded if they do not require intravenous sedation, general anaesthesia or the insertion of an implant because it is not necessary as they can only be rated if they are a regulated activity – and so there is no need to exclude something from rating if it is not an anaesthesia or the insertion of an implant. The exclusion applies to a narrow range of procedures considered to be relatively low risk. For example, the surgical removal of skin lesion involving a scalpel.
- 7.10 Health and Justice Services i.e. regulated activities carried out in prisons, police stations, immigration removal centres, young offender institutions are excluded. In these settings, individuals using these services have extremely limited choice because of the restrictive circumstances and as such rating would be of limited benefit. Activities carried out in a sexual assault referral centre are also excluded unless they are carried out by a registered provider which is an NHS Trust, NHS Foundation Trust or provider of primary medical services. This is because CQC rate NHS Trusts, Foundation Trusts, and primary medical services at provider level, which means that CQC take findings from all these providers services and aggregate them up to give an overall rating at provider level.
- 7.11 Hyperbaric chambers are excluded from CQC's ratings regime because there are very few in England, and thus in practice patients hyperbaric therapy at the chambers which are the nearest geographically available to the patient. So rating of this activity would not help a patient in terms of making a choice of where they receive hyperbaric therapy.

- 7.12 Blood and Transplant Services are very small in number and are excluded from the ratings regime if the activity is the sole or primary regulated activity carried on by a registered service provider. There is little value in their being rated as the public is unable to exercise choice.
- 7.13 The carrying on of surgical procedures in connection with any of the activities listed in Schedule 2 to the Human Fertilisation and Embryology Act 1990 and for which a licence has been granted by the Human Fertilisation and Embryology Authority continue to be exempt from rating. Fertility services involving surgical procedures for collection of eggs or sperms will not be rated by the CQC. However, HFEA licensed providers may carry out other regulated activities, which would not be exempt.
- 7.14 The provision of diagnostic and screening procedures, by independent pathology laboratories, under a contract for services with another registered service provider are excluded unless they are carried on by a registered service provider which is an independent hospital, an NHS Trust and NHS Foundation Trust or a provider of primary medical services. The activities, usually involving testing and analysing blood and tissue samples, do not normally involve any direct contact with patients nor is the service delivered direct to patients. The public have no choice on where their samples are sent by a hospital or a GP. These types of services are subject to Clinical Pathology Accreditation and CQC rating would be of little value to the public.
- 7.15 Independent podiatry surgery, i.e. orthopaedic foot surgery carried out by a podiatrist or chiropodist, except where the registered service provider is an independent hospital, NHS Trust, NHS Foundation Trust or a provider of primary medical services are excluded. They are relatively low-risk and subject to lower frequency of inspection and therefore not adequate for rating. It would not be a good use of resources for CQC to increase the rate of inspection for these providers.
- 7.16 Children's homes undertaking regulated activities i.e. high level health care as opposed to basic first aid, have to register with the CQC in the same way as any other healthcare provider as well as register with the Office for Standards in Education, Children's Services and Skills (Ofsted) as a children's home. Where Ofsted have rated a children's home and the home is registered with CQC for provision of regulated activities, additional rating by CQC would be potentially confusing and therefore children's homes undertaking regulated activities involving healthcare provision, are excluded from CQC rating, except where the registered service provider is a NHS Trust, a NHS Foundation Trust or a provider of primary medical services for the reasons stated in paragraph 7.9 and how CQC rate these providers.

All providers referred to above are registered and will continue to be inspected by the CQC with some inspected more frequently, and some on a random and risk basis.

8. Consultation outcome

- 8.1 The Department of Health undertook a consultation from 12th September to 7th November 2017 seeking views on proposed changes to CQC performance assessment regulations to expand the scope of the CQC's duty to undertake performance assessment and rating of all providers of regulated activities with some exceptions described at paragraphs 7.9 to 7.19.

We received 38 responses from a range of organisations including from Clinical Commissioning Groups, Royal Colleges, the BMA, the CQC, individual clinicians,

independent providers, representative groups for people with learning disability and the voluntary sector. The overall response to extend performance assessment and rating by CQC to all but a small number of registered providers, is favourable, with over 70% of respondents who either 'strongly agree' or 'agree'. The criteria that we set out to identify providers that would remain exempt from rating, were considered to be justified and appropriate, by almost 60% of respondents. Around 20% who disagreed with the proposals, either disagreed with the ratings regimes outright or felt that all providers of regulated activities should be rated.

9. Guidance

- 9.1 The CQC will publish guidance for consultation on how it will inspect, rate and monitor providers falling within the scope of regulations that came into force on 31st October and these latest set of regulations.

10. Impact

- 10.1 The impact on business, charities or voluntary bodies is negligible. The cost per business is £9.81, taking up only 15 mins of business operation time. Businesses may benefit from increased public awareness of good ratings; conversely, some may have a negative impact should they receive a negative rating. This is left unquantifiable as it is difficult to predict how the public will react.
- 10.2 The impact on the public sector is relatively small. As CQC already has a similar framework in place to rating providers, it is expected the cost of making adjustments and a final rating will be small.
- 10.3 An impact assessment was not included as the total cost to businesses of the proposal is smaller than the threshold of £5m cost to businesses.

11. Regulating small business

- 11.1 The legislation applies to activities that are undertaken by small businesses.
- 11.2 To minimise the impact of the requirements on small businesses (employing up to 50 people), CQC has developed a ratings display toolkit to help providers meet the requirement to display their ratings on their premises and online.

12. Monitoring & review

- 12.1 The Department of Health and Social Care will keep the regulations under review in order to keep them up-to-date and relevant, to take account of changes in delivery or care and to ensure that the burden on business is justified and proportionate.

13. Contact

- 13.1 Any queries regarding this instrument should be referred to Meena Paterson at the Department of Health and Social Care by emailing:
ratings&exclusionsregulations@dh.gsi.gov.uk