

Scottish Parliament Region: North East Scotland

Case 200601206: The Scottish Commission for the Regulation of Care

Summary of Investigation

Category

Scottish Executive and devolved administration: Ombudsmen; Complaints handling

Overview

The complainant (Ms C), who owns and manages a care home, complained that The Scottish Commission for the Regulation of Care (the Care Commission) refused to accept her complaint about the performance and competence of two members of staff under their complaints procedure.

Specific complaint and conclusion

The complaint which has been investigated is that the Care Commission failed to accept Ms C's complaint about the performance and competence of two members of their staff, which disregarded the requirements of the Regulation of Care (Scotland) Act 2001 and the Care Commission's complaints procedure (*upheld*).

Redress and recommendation

The Ombudsman has no recommendations to make.

Main Investigation Report

Introduction

1. On 24 July 2006 the Ombudsman received a complaint from the owner and manager of a care home, referred to in this report as Ms C, about The Scottish Commission for the Regulation of Care (the Care Commission)'s refusal to accept her complaint about the performance and competence of two members of staff under their complaints procedure.

2. The complaint which has been investigated is that the Care Commission failed to accept Ms C's complaint about the performance and competence of two members of their staff, which disregarded the requirements of the Regulation of Care (Scotland) Act 2001 and the Care Commission's complaints procedure.

Investigation

3. The investigation of this complaint involved obtaining and reading the correspondence between Ms C and the Care Commission. I made a written enquiry of the Care Commission, requesting a formal response to the complaint. In addition, I considered the Regulation of Care (Scotland) Act 2001 and the Care Commission's complaints procedure.

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

Complaint: The Care Commission failed to accept Ms C's complaint about the performance and competence of two members of their staff, which disregarded the requirements of the Regulation of Care (Scotland) Act 2001 and the Care Commission's complaints procedure.

5. Ms C wrote an undated letter to the Care Commission, received by them on 23 May 2006, in which she stated:

'I wish to make a formal complaint about the quality and accuracy of the inspection report issued following the inspection of [Ms C's care home], and also about your decision to publish the report while I was still in discussion about its content. I have been in discussion with [Officer 1] and [Officer 2] about various aspects of the report that were inaccurate and misleading but have made no significant progress, and whilst I appreciate your legal right to publish the report when you wish, I do not consider that

it was either in the public interest or my interest to publish it with so many inaccuracies in it. I believe the poor quality of the report damages both the reputation of my Home and also that of the Care Commission ...'

The letter then went on to list 31 concerns that Ms C had with the report and asked that the report be withdrawn from the Care Commission's website until her complaint had been investigated. Some of the 31 concerns were subjective assessments of the quality of the report and challenges to the Care Commission's professional judgement; others related to factual criticisms, such as typographical and grammatical errors.

6. The Care Commission's Comments and Complaints Co-ordinator (Officer 3) replied to Ms C on 24 May 2006. He stated:

'... You have raised a number of separate points with regard to the Inspection Report. Inspection is a statutory process and there is a procedure available to enable errors of fact within draft Inspection Reports to be brought to the attention of the Care Commission. The use of our Complaints Procedure is not, therefore, the appropriate method for the progression of concerns related to the content of Inspection Reports.

I must advise that the appropriate route for challenging an Inspection Report is by bringing an action of Judicial Review.

I have, however, forwarded your letter to the Regional Manager, [Officer 4], to bring the points that you are raising to his attention ...'

7. The Care Commission's Regional Manager (Officer 4) wrote to Ms C on 25 May 2006 stating: 'I shall contact you shortly to discuss the content of your letter further once appropriate investigations have been carried out'. From this point on Ms C was involved in two sets of correspondence with the Care Commission: one with Officer 3 disputing the refusal to accept her complaint under the complaints procedure and one with Officer 4 in which Officer 4 sought to address Ms C's concerns regarding errors in the report.

8. In an undated letter responding to Officer 3's letter of 24 May 2006, received by the Care Commission on 31 May 2006, Ms C wrote:

'... My complaint is about the poor quality and accuracy of the inspection report, and the decision to publish it whilst it was known to be in such a poor state and whilst its contents were still under discussion. Although I

did not want to personalise the points I made, the responsibility for writing the reports was clearly [Officer 1]'s, and the responsibility for deciding to publish it knowing that it contained so many inaccuracies and errors was presumably [Officer 2]'s. I believe it was clear from the content of my letter that I was not satisfied with the competence or performance of these Officers, for the reasons stated above and in my original letter.

The Regulation of Care (Scotland) Act 2001 section 64(1) states that 'The Commission ... shall establish a procedure by which a person ... may make complaints (or other representations) in relation to the exercise by the body in question of, or failure by it to exercise, *any of its functions under the Act* in respect of the person' (my italics).

The Regulation of Care (Scotland) Act 2001 section 27(5)(a) confirms that the preparation of an inspection report is one of the Care Commission's functions under the Act.

Your own Complaints Procedure defines a complaint as being 'an expression of dissatisfaction ... about the competence, attitude or performance of members of Care Commission staff whilst carrying out their duties'.

Ms C went on to ask Officer 3 to review his decision not to accept her complaint under the complaints procedure.

9. On 7 June 2006, Officer 3 replied:

'In your letter you have raised some questions in relation to the Regulation of Care (Scotland) Act 2001. In responding, I would draw your attention to the Act's separation of the statutory functions and advise that the Care Commission has a statutory duty to prepare, send draft and then publish inspection reports.

The appropriate time for challenge to a report is when the draft is received and an error response form is provided to allow for this to happen. This relates to factual matters only and does not extend to a challenge to the observations and other matters of professional judgement included in the report.

Over the last four years a number of complainants have attempted to use a complaint about the content of an inspection report to delay its publication. The Care Commission does not consider that this is reasonable or appropriate in the public interest.

Accordingly, whilst we investigate any complaints about the attitude, competence or behaviour of Care Commission staff whilst carrying out their duties, this will not affect or delay the publication of the inspection report.

In your original letter you helpfully identified some grammatical errors within the report. The errors will be brought to the attention of the operational staff concerned. However, I would re-iterate that the Care Commission Complaints Procedure is not appropriate for use as a method to challenge the professional assessment of how the National Care Standards are being applied in any care service.'

Officer 3 then went on to provide details of the Ombudsman and advised Ms C how to contact her if she was dissatisfied with the Care Commission's response.

10. On 12 June 2006, Officer 4 wrote to Ms C:

'Further to my letter to you of 25 May 2006, I have now had the opportunity of reviewing your concerns.

I apologise for the typographical errors identified. These will be rectified and the report re-issued on the website. Additionally, I am aware you have raised issues where disagreement remains between yourself as Provider and the Care Commission as Regulator.

I am satisfied that appropriate discussion on these issues has taken place and accordingly some matters with which you disagree will remain in the revised report ...'

11. In a letter dated 17 June 2006, Ms C replied to Officer 3's letter of 3 June 2006, and raised three points:

'1. In my second letter to you I explained why I thought the Regulation of Care (Scotland) Act 2001 allowed me to complain about the quality of an inspection report. Please would you give me an explanation of why you

disagree with my interpretation of the Act. I'm afraid that your explanation 'I would draw your attention to the Act's separation of the statutory functions' leaves me none the wiser, so I would appreciate a fuller explanation.

2. I am mystified by your comments [about using the complaints procedure to delay publication]. I am not happy if you are insinuating that I only made my complaint as a way of delaying its publication. I made my complaint because it was a very poorly written report and I believed it needed to be improved prior to publication – a point accepted by [Officer 4], who has agreed to belatedly correct the grammatical and typographical errors in the report. I would appreciate an explanation as to why you included the comments ... in your letter.

3. Do I understand correctly ... that you are now going to investigate my complaint about the competence and performance of the two officers concerned in writing and deciding to publish the report? ... I appreciate that 'this will not affect or delay the publication of the inspection report', even if it was somewhat stating the obvious, as the report has already been published for some weeks. However, I would like confirmation that you are going to investigate my complaint on the basis you allude to in your letter.'

12. Also on 17 June 2006, Ms C replied to Officer 4 thanking him for correcting the typographical and grammatical errors in the report.

13. On 4 July 2006, Officer 3 replied to Ms C's letter of 17 June 2006: '... In your letter you sought an explanation why I disagreed with your interpretation of the Regulation of Care (Scotland) Act 2001. In answering your question I would like to make it clear that my response is based on advice provided to me by the Head of Legal Services of the Care Commission.

The Care Commission is required under Section 25–27 of the Act to inspect care home services at least twice per annum, at least one of which must be an unannounced inspection. Before finalising a report for publication, the Care Commission is legally obliged to give the person providing the service an opportunity of commenting on a draft of the report. There is no requirement on the Care Commission to incorporate the views

of the provider or to make any changes to the report prior to publication. The Care Commission routinely revise any draft reports to redress any errors of fact identified by the provider. I should like to make it very clear that evaluative statements of professional opinion of the inspection staff are not factual errors for these purposes. In addition, the appeal mechanism set out in section 20 of the Act relate only to intended enforcement action or refusals of registration by the Care Commission and clearly do not extend to the content of inspection reports. This is not at all unusual in the area of administrative law and, as a consequence of this, any challenge to the terms of a finalised inspection report should proceed by way of an action of judicial review and not the Care Commission Complaints Procedure.

With reference to your unhappiness that I may have been insinuating that you only made your complaint as a way of delaying publication, it was not my intention to do so and I am sorry if you took that to be the case. My reference related to the request in your letter ... in which you requested that the Inspection Report be withdrawn 'until' our 'complaint investigation was completed'.

As you will have seen from ... my letter of 7 June, the Care Commission has accepted that there were a number of grammatical and typographical errors within the Inspection Report. Officer 4 was advised of this, has spoken to Officer 2 and staff concerned and will arrange for their correction. The matters concerned, however, will not be investigated within the Care Commission Complaints Procedure.'

14. In a letter dated 8 January 2007, responding to my enquiries, the Care Commission told me:

'As you will note from the enclosed correspondence:

1. The Care Commission accepted that there were grammatical and typographical errors within the inspection report, arranged for their correction and issued an apology to [Ms C] for these errors.
2. The Care Commission issued an explanation to Ms C of the procedure which exists to address disagreements regarding the content of draft inspection reports and the Regional Manager confirmed that this process had been properly undertaken.
3. The Care Commission provided details of its statutory duties in relation to publishing inspection reports and explained why [Ms C's] concerns were

not being investigated in terms of the Care Commission's Complaints Procedure.'

Conclusion

15. Section 64 of the Regulation of Care (Scotland) Act 2001 requires that the Care Commission establish a procedure by which a person may make a complaint regarding the way in which the Care Commission has carried out, or failed to carry out, any of its functions under the Act in respect of the person. The Care Commission's complaints procedure defines a complaint as 'an expression of dissatisfaction ... with the competence, attitude or performance of members of Care Commission staff whilst carrying out their duties'.

16. I can see why, initially, the Care Commission decided not to consider Ms C's complaint under their complaints procedure. Her first letter of complaint (at paragraph 5 above) did not make clear that her complaint was about the competence and performance of Officer 1 and Officer 2. I can also see why, given that the majority of the 31 points of concern raised by Ms C represented subjective criticisms rather than matters of factual accuracy, the Care Commission interpreted the letter as a challenge to their inspection report's assessment and findings. In addition, I can understand why the Care Commission, as an inspection body, would wish to ensure that their complaints procedure is not used inappropriately as a way of challenging decisions.

17. However, Ms C made clear in her second letter (see paragraph 8 above) that the inaccuracies she perceived in the inspection report raised concerns about the competence and performance of Officer 1 and Officer 2. She stated clearly that she was making a complaint about the performance and competence of staff and described why she felt such a complaint was valid under the complaints procedure. Regardless of whether Ms C's complaint was justified or not, I can see no good reason, having considered the terms of the Regulation of Care (Scotland) Act 2001 and the Care Commission's complaints procedure, why the complaint, as set out in Ms C's second letter, was not accepted under that procedure.

18. The Care Commission explained several times during their correspondence with Ms C that the route to challenge the content of an inspection report was to pursue an action of judicial review. In my view this misinterpreted Ms C's complaint. Although Ms C did state in her original letter that she wished for the inspection report to be withdrawn until corrections were

made, the complaint she then pursued with the Care Commission was about the competence and performance of staff, rather than a challenge to their professional judgement or an attempt to have the report's findings changed. In my view a reasonable interpretation of Ms C's complaint would have been that, if inaccuracies were published in an investigation report, that raised concerns about the competence and performance of staff and those concerns should be investigated.

19. I consider that it would have been perfectly possible for the Care Commission, in dealing with Ms C's complaint under their complaints procedure, to make clear that they would not be considering her subjective opinion of assessments made by Officer 1 and Officer 2 and would only be considering the performance and competence of those officers in relation to the alleged factual errors in the published report.

20. I do note the Care Commission's argument that the appropriate place to highlight concerns regarding the factual accuracy of a draft inspection report is when a draft version of the report is sent out to interested parties for comment. However, in my view, that such a procedure exists should not prevent someone from making a complaint once a report is published if they have concerns about the published report's factual accuracy and the way that reflects on the competence and performance of staff.

21. The matter would have been different if Ms C's complaint was entirely founded on subjective matters. Had that been the case, the Care Commission would have been quite right to refuse to accept Ms C's complaint under the complaints procedure on the grounds that subjective criticisms represented a challenge to the content of the inspection report and the professional judgement of their inspectors. However, Ms C's concerns regarding matters such as typographical and grammatical errors were capable of being objectively verified and related back to Officer 1 and Officer 2's competence and performance.

22. In commenting on a draft of this report, the Care Commission maintained that in recognising, correcting and apologising for the errors highlighted by Ms C at an early stage they had acted in line with the Key Principles (Accessibility, Effectiveness, Clarity, Confidentiality, Impartiality and Fairness) of their Complaints Procedure. They said their actions led to a formal investigation being redundant. They also said their actions complied with advice previously

provided by the Ombudsman that, where it is obvious errors have occurred, they should be acknowledged, corrected and apologised for.

23. I note the Care Commission's comments at paragraph 22. While the Ombudsman does encourage bodies under her jurisdiction to resolve complaints as early as possible and to be open in acknowledging fault where appropriate, the expectation is that action will be taken in line with any relevant policy or procedure. In this case, Ms C's complaint fell within the Care Commission's own definition of a complaint and Ms C, legitimately, wished to invoke the Complaints Procedure. It is commendable that the Care Commission wished to deal with the complaint quickly and that fault was acknowledged. Nonetheless, the Care Commission operates a published procedure for dealing with complaints and it is reasonable for members of the public who wish to complain about the Care Commission's service to expect that their complaints will be dealt with in accordance with that procedure. That did not happen in this case.

24. I, therefore, conclude that the Care Commission failed to follow their complaints procedure, by choosing not to consider a complaint about the competence and performance of their staff under that procedure. Consequently, I uphold Ms C's complaint.

25. Although I conclude there was maladministration in this case, I am of the view that there is no unremedied injustice to Ms C. While she was denied the opportunity to have her complaint dealt with under the correct procedure, I note that her concerns were investigated by the Care Commission. Indeed, Officer 3 looked into Ms C's concerns, corrected the factual issues she complained about, apologised to her and spoke to Officer 1 and 2 in light of the concerns raised.

26. Given that the Care Commission did effectively consider Ms C's concerns (albeit outwith their complaints procedure), acknowledged fault and issued an apology, I have no recommendations to make in this case.

20 June 2007

Explanation of abbreviations used

Ms C	The complainant
The Care Commission	The Scottish Commission for the Regulation of Care
Officer 1	Care Commission Officer who inspected Ms C's Home
Officer 2	Care Commission Team Leader
Officer 3	Care Commission Comments and Complaints Co-ordinator
Officer 4	Care Commission Regional Manager

List of legislation and policies considered

The Regulation of Care (Scotland) Act 2001

The Care Commission's complaint procedure