

Scottish Parliament Region: Central Scotland

Case 200502898: The Scottish Commission for the Regulation of Care

Summary of Investigation

Category

Scottish Executive and Devolved Administration: Policy/administration

Overview

The complainant, Ms C, raised a number of concerns about the way in which The Scottish Commission for the Regulation of Care (the Care Commission) handled the inspection of nursery premises owned by her.

Specific complaints and conclusions

The complaints which have been investigated are that:

- (a) it was inappropriate for the inspection and subsequent report to have been carried out by officers against whom Ms C had complained (*not upheld*);
- (b) criticisms levelled against Ms C's establishment in the inspection report were not put into context (*not upheld*); and
- (c) the inspection was not carried out in accordance with the Care Commission's procedures (*not upheld*).

Redress and recommendations

The Ombudsman recommends that, in order to avoid confusion, when making recommendations to service providers the Care Commission should ensure that they are clear, specific and measurable.

The Care Commission have accepted the recommendations and will act on them accordingly.

Main Investigation Report

Introduction

1. On 30 January 2006, the Ombudsman received a complaint from Ms C concerning the inspection of her nursery which had taken place on 21 November 2005. She said that she had been sufficiently concerned about the way in which the inspection was conducted that she made a formal complaint on 6 December 2005 but she was then dismayed to learn that the report would, nevertheless, be issued according to the original timetable. She considered this to be entirely inappropriate. Ms C believed that, in the circumstances, the issue of the report should have been delayed until the outcome of her complaint was known. Furthermore, she alleged that when the report was subsequently issued it detailed criticisms about the nursery which concerned her and were not placed in context. She further complained that the inspection was not carried out properly and that the situation in its entirety threatened her business and its reputation.

2. The complaints from Ms C which have been investigated are that:
- (a) it was inappropriate for the inspection and subsequent report to have been carried out by officers against whom she had complained;
 - (b) criticisms levelled against Ms C's establishment in the inspection report were not put into context; and
 - (c) the inspection was not carried out in accordance with the Care Commissions procedures.

Investigation

3. The investigation of the complaint involved obtaining and reading all the relevant documentation, including correspondence between Ms C, her MSP and the Scottish Commissioner for the Regulation of Care (the Care Commission). I have had sight of the relevant inspection report, the Care Commission's complaints file and details of the Care Commission's Complaints Review Committee's consideration of Ms C's complaint. I have also made reference to the appropriate sections of the Regulation of Care (Scotland) Act 2001 (the Act) and the Care Commission's Complaints Procedure. On 17 April 2007 I made a written enquiry of the Care Commission and their response was sent to me on 11 May 2007.

4. While I have not included in this report every detail investigated, 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.

(a) It was inappropriate for the inspection and subsequent report to have been carried out by officers against whom Ms C had complained

5. Ms C was not present when an unannounced inspection was carried out on her premises on 21 November 2005 but she said that, as she learned that some of her staff had been upset by the conduct of the officers concerned, she raised a complaint with the Care Commission on 6 December 2005. It was her view that no further action should have been taken with regard to the inspection until her complaint had been resolved and she was, therefore, aggrieved to learn that the inspection report would be issued regardless.

6. I am aware from information available to me that on receipt of Ms C's letter of complaint (see paragraph 5) the Care Commission decided to undertake a formal investigation and the matter was placed with a team manager from another part of Scotland to which the nursery was located. The Care Commission later confirmed to Ms C's MSP (on 16 February 2006) that the investigation process was separate from the inspection process. Their concern being to ensure that a provider could not use the complaints procedure to delay or prevent publication of an inspection report which could then be ultimately against the interests of parents and children.

7. The MSP was also advised of the Care Commission's statutory duty under the Act (see paragraph 3) to prepare a draft report, allow the provider (that is, Ms C) an opportunity to comment and, thereafter, publish. He was advised that while the Care Commission was committed to openness and co-operative working with providers, and were happy to discuss and correct agreed errors of fact that occur in inspection reports, there was no right of appeal against the content of an inspection report.

8. This information was again confirmed by the Care Commission in their letter of 11 May 2007 when replying to my enquiry. They emphasised their duties in terms of the Act (see paragraph 7) but confirmed that providers like Ms C had the opportunity to comment on the draft inspection report and, whilst all comments were fully considered, there was no obligation for the Care Commission to incorporate the views of the provider or to make any changes. The Care Commission said that they routinely revised draft reports to amend any errors of fact but that 'evaluative statements of professional opinion from

the inspection staff are not considered as factual errors for these purposes'. From the evidence available to me, Ms C was sent the draft report on 15 December 2005 asking her to identify any errors of fact before 5 January 2006. The Care Commission subsequently acknowledged the points raised by Ms C and confirmed that they would be considered.

9. The Care Commission generally commented that over recent years a number of complainants had attempted to use their complaints procedure to delay the publication of an inspection report. The Care Commission did not consider this to be in the public interest. Accordingly, while they said that they would investigate any complaints about the attitude, competence or behaviour of staff while carrying out their duties, this would not affect or delay an inspection report if the Care Commission officer(s) concerned had the evidence to support the judgement in their report. They confirmed that their complaints procedure (Section 1.6) emphasised this fact by stating 'The complaints procedure cannot be used as a vehicle to challenge legal or policy decisions' and also confirmed that as inspection is a statutory process it, therefore, fell within this category.

(a) Conclusion

10. The Care Commission have explained that they were obliged under statute to provide an inspection report (see paragraph 7). They have also confirmed that the complaints process is entirely separate from the inspection process and, therefore, cannot be used to delay an inspection report (see paragraph 9). In all the circumstances, I am satisfied that it was appropriate for the officers concerned in the inspection to continue to issue their report despite the fact that Ms C had made complaints against them. I do not uphold the complaint.

(b) Criticisms levelled against Ms C's establishment in the inspection report were not put into context

11. Ms C was unhappy with the terms of the inspection report as certain comments made concerned her and were not placed in the correct context. However, as has already been stated above (see paragraphs 7 to 9) inspections are carried out by professional officers whose job it is to make evaluative statements about what they see during a visit. While Ms C disputes these, the Care Commission are not under any obligation to change the report if the provider's view conflicts with that of their professional officers. I do not consider this to be unreasonable. Ms C made a complaint about the way

officers acted during the visit and this later became a separate investigation. She then had the opportunity to comment on any errors of fact in the draft report (see paragraph 8) but the Care Commission have emphasised that disagreements with the opinion of professional officers did not amount to errors of fact. Nevertheless, in their response to me of 11 May 2007, the Care Commission pointed out that as a consequence of Ms C's dissatisfaction with the inspection report, a manager from a different team from that of the inspecting officers was appointed to carry out a review of the process and the evidence gathered. This manager was also present at a feedback meeting where all the evidence gathered during the inspection was discussed.

(b) Conclusion

12. It is clear that Ms C was unhappy with the terms of the inspection report and she complained about these. The Care Commission took her complaints seriously (see paragraph 11) but they were under no obligation to amend their report in relation to professional officers' findings. Ms C was given the opportunity to make comments on the facts and it appeared that she did not dispute the facts as given in the report; rather she was unhappy with the detail surrounding them. She felt that there was insufficient information given about the context of those facts. Taking the foregoing into account, I am not of the view that the Care Commission acted incorrectly. Accordingly, I do not uphold this aspect of the complaint.

(c) The inspection was not carried out in accordance with the Care Commission's procedures

13. Ms C maintained that, although the inspection to her premises was carried out on 21 November 2005, the Care Commission applied both old and new standards. Specifically, she said that a comment was made about the fact that, on the day of the inspection, less than 50% of her staff were qualified. She said that this requirement ceased to be enforceable in March 2005 (that is, before the inspection).

14. The appropriate section in the inspection report records that, 'Of the ten members of staff in attendance at the beginning of the inspection, only three child care staff and the depute manager had a recognised child care qualification'. In their response to me of 11 May 2006, the Care Commission said that the requirement set for Ms C to achieve in relation to this was, 'When advertising for new staff, care must be taken to ensure that the level of qualified to unqualified staff is met'. At the time of the inspection only four of the ten staff

had a relevant qualification, which the Care Commission considered to be too low. The point was made that no reference was made to a 50% rule as Care Commission staff were alert to the fact that this standard had been removed.

15. I sought further information from the Care Commission on this particular aspect of the matter asking how, or when, Ms C would know when (or if) she had achieved the correct ratio of staff and I was advised that this recommendation related directly to what the Care Commission considered to be the poor outcome for children who attended the nursery. The Care Commission implied that when improved outcomes for children were being achieved, Ms C would know that her staffing ratio was improved. The Care Commission also said that it was their intention to move towards a position where all staff either held a suitable qualification or were seeking to achieve a qualification.

(c) Conclusion

16. Ms C maintained that the Care Commission were applying incorrect and out-of-date procedures when inspecting her premises and in this regard she made specific reference to the '50% rule'. I am clear that it was not recommended that Ms C employ another qualified staff member order to take her qualified to unqualified staff ratio to 50:50. The comment referred to made reference to the fact that care must be taken in future recruitment to ensure that 'the level of qualified to unqualified staff is met'. While Ms C's contention is, therefore, incorrect and I do not uphold the complaint, I have a concern about the advice given to her on this point.

17. In their explanation (see paragraph 15), the Care Commission refer to their comments about staffing being related to poor outcomes for children but I have seen no reference to such poor outcomes in the report. Also, I find the explanation confusing. It is insufficiently specific, relying as it does on improvements in the outcomes for children, another variable requiring to be assessed.

(c) Recommendation

18. The Ombudsman recommends that, in order to avoid confusion, when making recommendations to service providers the Care Commission should ensure that they are clear, specific and measurable.

19. The Care Commission have accepted the recommendations and will act on them accordingly. The Ombudsman asks that the Care Commission notify her when the recommendations have been implemented.

22 August 2007

Explanation of abbreviations used

Ms C

The complainant

The Care Commission

The Scottish Commission for the Regulation
of Care

List of legislation and policies considered

The Regulation of Care (Scotland) Act 2001

Extract from Section 1.6 of the Care Commission's Complaints procedure

'The complaints procedure cannot be used as a vehicle to challenge legal or policy decisions of the Care Commission. For example, where an individual service provider is unhappy with any terms or conditions the Care Commission proposes to attach to their certificate of registration, any appeals must be made following the statutory appeal mechanisms under the Regulation of Care (Scotland) Act 2001. Similarly where a group of service providers or their representative body has an issue of general concern, this should be raised directly with the Chief Executive of the Care Commission as a policy matter for discussion and consideration outwith the complaints procedure.'