

Mental Health Act 1983 Code of Practice Consultation

The Care Quality Commission (CQC) welcomes the opportunity to comment on the Department of Health's (DH) Review of the Mental Health Act (MHA) 1983 Code of Practice.

As the independent regulator of health and adult social care in England, the Code informs how we carry out our own MHA functions and how our assessments of how providers meet their MHA responsibilities. Our comments here are also informed by our role as a UK National Preventative Mechanism (NPM), established in compliance with the Optional Protocol to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).

CQC's purpose is to ensure health and social care services provide people with safe, compassionate, high-quality care and we encourage services to improve. We monitor, inspect and regulate services to make sure they meet fundamental standards of quality and safety and we publish what we find, including performance ratings to help people choose care.

Our assessment process is informed by all available statutory guidance and the Code will continue to help us to regulate, inspect and monitor services against these areas and the care and treatment received by people affected by the MHA.

We fully support the objectives of the review given the changes and updates in legislation, policy, case law and professional practice. We welcome the work completed between our organisations to address the practice concerns highlighted in our own Mental Health Act Annual Reports. We note the areas of the Code where our involvement in other national programmes has helped to influence the change. This includes our work with the Crisis Concordat, Winterbourne View Joint Improvement Programme and Section 135 and 136 consultation.

We feel the embedding of human rights and equality issues throughout the Code has synergy with CQC's fundamental standards of care approach to regulation.

The following key messages for our consultation return have been developed with our Service User Reference Panel. We believe they should be used to inform ongoing reviews of the Code and its application in practice by CQC and providers:

- The key to good care and treatment is involvement of the service user at all stages, including a commitment to advanced decision making and statements of wishes and feelings.
- The Code needs to clearly identify what is considered to be good practice and what they should expect as an absolute right and necessity for the service they receive. For people using services this will assist them with understanding when they should raise a concern or complaint.
- It should be clear throughout the Code that relatives, carers and significant others will only be involved in their care and treatment when the service user wants them to be. Service users felt confidentiality should be key when the use of advocates or representatives is

considered, to ensure the person is helped to involve significant others as opposed to this being an expectation.

- Service users feel the Code should highlight where options for choice continue to exist when detained. This will allow the service user greater involvement and empowerment throughout each stage of their care.

Whilst we support the Codes review, we have been unable to evaluate each area of the Code in the timescale provided. However we intend to take this opportunity to review and strengthen our manner in which we exercise our power to make formal proposals to changing the contents of the Code under section 118 of the Mental Health Act. We welcome further consideration in partnership with DH in how we can exercise this important power and work together to strengthen the protection offered to people affected by the Mental Health Act.

Formal Proposals

During our internal consultation there have been some key proposals that we would like to offer and ask these are considered as our formal proposals for change;

Code of Practice Review

In recognition of the significant impact on the Code of Practice of developing legislation, policy, case law and our own observations on practice we recommend a review of how future updates to the Code may be carried out. As CQC continues to improve our regulation and act on the side of people who use services we will build on our understanding of areas requiring improvement. Our new approach will offer us access to more intelligence than ever before on the quality and safety of services underpinned by the Code. We would welcome further consideration with DH of how we may protect patients by, where necessary, using our intelligence to achieve the greatest impact for improving the quality of care and protection of patients and using revisions to the Code to realise this aim.

Proposal: DH to consider how they may increase the opportunities for reviewing the Code in accordance with Section 118 of the MHA or alternative ways to ensure the Code is up to date, relevant and responsive to our reports and intelligence on the quality and safety of services.

Code of Practice Content

Our new regulatory approach and ratings will enable us to highlight good and outstanding care. We have set out our plans to strengthen our response when we find care requiring improvement and take action where we find inadequate care. This could result in de-registering providers or by requiring them to improve through our civil and criminal enforcement actions.

To support this work we will need our own staff and providers to have a clear understanding of the expectations that are placed upon them by the Code. This will help us to use our regulatory inspection function to reduce the variations we have observed by providers applying the Code and for this reason we strongly encourage the use of consistent language throughout the Code. We suggest this could be achieved by defining the following terms used in the Code;

- Must: These should link directly to the expectations and duties in the statute
- Should: This reflects area that could directly impact on peoples human rights or are reflective of established practice e.g. seclusion, restraint. DH believes any departure would require the detaining authority to be able to offer full documented reasons in all but exceptional circumstances.
- May/Could: Areas which are not currently underpinned by an evidence base but are considered to be good practice.

We believe this would have a positive impact on the ability of people who are affected by the MHA to be clear on requirements of the Code. This would preferably be included in the introduction and could be reiterated in our own guidance to inspection teams who will collect evidence of the service.

Proposal: DH to ensure the consistent use of language throughout the Code to be transparent to patients and those working with the MHA

Clinical Commissioning Groups

Our own monitoring and inspection reports have demonstrated that some failures to comply with the Code have been due to local commissioning. We have raised concerns with DH that the Code of Practice is not considered statutory guidance for commissioners.. We would welcome further consideration or guidance on how the practical effect of a failure to have regard to the Code should be managed if the failure was on the part of the commissioning bodies and impacted on the ability of a registered provider to comply with the legal responsibilities under the MHA and the Code.

Proposal: DH to work with NHS England to ensure the status of the Code and the expectations for Clinical Commissioning Groups in relation to the Code is clear. This may be further strengthened by information from NHS England on how concerns of non-compliance with the Code by Clinical Commissioning Groups should be escalated

The absence of any reference in the Code to the important duty contained within Section 140 of the MHA¹ should be addressed. The new Clinical Commissioning Groups have a greater ability to influence local systems and increase the effectiveness of services. We have previously highlighted the variable availability of the Section 140 notices reported to us by providers and Approved Mental Health Professionals. We feel the addition of specific Section 140 guidance would help to drive change locally through joint monitoring and reviews of local arrangements for people requiring admission.

Proposal: DH to include specific guidance to the creation, monitoring and review of local Section 140 agreements.

Care Quality Commission

We offer a revised form of words for reflecting the CQC in the Code. We believe this accurately reflects the work of CQC and our approach to using the Code in practice. Further guidance on how we intend to use the Code will form part of CQC's own regulatory guidance for providers which will be frequently updated as we develop and align how we carry out our MHA and HSCA methodology and frameworks.

The Care Quality Commission

xvi The Care Quality Commission (CQC) make sure health and social care services provide people with safe, effective, compassionate, high-quality care and encourage them to improve. CQC is responsible for the registration, inspection and monitoring of health and care providers, including mental health providers, under the Health and Social Care Act 2008. The CQC has specific duties in the Mental Health Act to act as a general protection for patients by reviewing, and where appropriate, investigating the exercise of powers and the discharge of duties in relation to detention, community treatment orders (CTOs) and

¹ S.140 MHA - *It shall be the duty of every Clinical Commissioning Group [England] and of every Local Health Board [Wales] to give notice to every local social services authority for an area wholly or partly comprised within the area of the CCG or LHB specifying the hospital or hospitals administered by or otherwise available to the CCG or LBH in which arrangements are from time to time in force. —*

(a) for the reception of patients in cases of special urgency;

(b) for the provision of accommodation or facilities designed so as to be specially suitable for patients who have not attained the age of 18 years."

guardianship under the Act. The CQC also has a duty to appoint Second Opinion Appointed Doctors and ensure they respond to requests for treatment reviews.

- xvii A provider's exercise of powers and discharge of duties under the Act will inform CQC Health and Social Care Inspections and its monitoring of the MHA. Where the principles and guidance of the Code are not implemented, the CQC may use its regulatory powers to facilitate change and improvement in local services as a failure to apply the MHA and its Code of Practice can amount to a breach of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2010 or Care Quality Commission (Registration) Regulations (2009).*
- xviii Providers and professionals should not use the Code in isolation. They will also need to consider relevant developments in professional practice, National Institute for Health and Care Excellence (NICE) and professional guidelines, legislation and case law to ensure they are consistently delivering the highest standards of care and professional practice. The Code refers to relevant material not included in the Code but these references are not exhaustive. The new introduction and guiding principles encourage commissioners of services, health and care providers and professionals to deliver a holistic, whole person approach to care that is reflective of clinical best practice and quality. CQC in its monitoring of services will seek to ensure that this takes place.*

Conclusion

We hope that the substantive comments and suggestions provided by our staff within annex A are helpful but these are offered as professional views and practical suggestions of change to inform the consultation alongside the returns made by other stakeholders.

We will continue to work with the steering group and DH team to review the responses to the pre-consultation document over the coming weeks.

Through the work we have completed internally and with the DH we have been encouraged by the passion and dedication to delivering a stronger Code to benefit patients by all involved. The responses we offer from staff across our organisation have led to this being one of the most detailed consultation returns we have ever provided. We believe this to be reflective of the national commitment to improving care and parity for people who access mental health services and continued debates on how we can all work together to deliver outstanding mental health services particularly for those affected by the MHA.

We look forward to continuing to work with DH in improving and strengthening the Code to improve care for all those affected by the MHA. We will also be committed to using the wider consultation returns to DH to review and inform the development of our own approaches across mental health services.

Annex A: Review of the Mental Health Act 1983 Code of Practice: Detailed Consultation responses from CQC