

Applicants for registration who currently or have previously provided a care service

Guidance for Care Inspectorate staff

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When this guidance should be used

This guidance should be used when we get an application for registration where:-

- the applicant is an individual/ company/ partnership/other legal entity which is already providing or has provided a care service;
- the applicant is an individual who is also a director/partner/member of another entity, such as a limited company, which is already providing or has provided a care service;
- the applicant is a company/partnership/unincorporated association or other legal entity and one or more of its directors/partners/members is either already providing or has provided a care service as an individual; or
- the applicant is a company/partnership/unincorporated association or other legal entity and one of more of its directors/partners/members is also a director/partner/member of another entity, which is already providing or has provided a care service.

For the purpose of this guidance, the types of applicant, provider and service set out above are referred to as being “connected”.

Background

Section 60(3) of the Public Services Reform (Scotland) Act 2010 (“the Act”) says that before it grants an application for registration, the Care Inspectorate has to be satisfied that the new service will be able to comply (amongst other things) with the regulations made under the Act.

For example, we have to be satisfied that the service will be able to comply with regulation 4(1)(a) of The Social Care and Social Work Improvement Scotland (Requirements for Care Services) Regulations 2001, SSI 2011/210 (“the Regulations”) which says that proper provision has to be made for the health, welfare and safety of people using the service.

Purpose of this guidance

Sometimes we get applications for registration from applicants who are already providing care services or who are connected to existing providers.

For example, we might get an application from a partnership A, one of whose partners is also a director of a company B which is already a provider.

The purpose of this guidance is to help staff in deciding how to treat applications for registration when we have concerns about the quality of care being provided by an

existing or former care service, which is or was operated by the same or a connected provider.

The application is from an individual, company, partnership or other legal entity which is already providing or has provided a care service

If the existing provider and applicant are the same, it is clear we can look at information about other services the applicant already provides.

The registration inspector should liaise with the contact manager for the existing provider. Or, if there is no allocated contact manager, liaise with the inspector who last inspected the care service.

However, we have to remember there may be differences between the existing and new services which mean we can't really compare them. For example, the service type or client group might be different. Also, the two services may have different managers and staff with different levels of skill and experience. All this means that just because the existing service is performing poorly, the same can't automatically be said of the new service. We have to look at all these differences when deciding whether or not we think the new provider will be able to comply with the Regulations.

In other words, even if the existing service is providing poor quality care, we can't assume the new service will do the same. It will depend on the circumstances.

In all other cases

In other cases the position isn't as straightforward.

For example, say we get an application for registration from company A. One of A's directors, X, is also a director of company B. B provides a service which has grades of unsatisfactory and weak and has been issued with an Improvement Notice.

As it says above, we first have to remember there may be differences between the existing and new services which we would have to take into account.

Secondly, we have to think about the role X has in each company. For example, although X is a director of B, he might have no day to day responsibility for the care and support of B's people using the service. He might be responsible for finance or marketing or other non-care matters only. He might be only one of a large number of directors. In such a case we could decide that X has little or no control over the quality of care B is providing.

However, if X is the only director of B, we might decide that there is no-one else who could realistically be responsible for the management of B and the poor quality of care it provides.

Therefore, if X is wholly or mainly responsible for the management/day to day care as regards the existing service B **AND** will be wholly or mainly responsible for the

management/day to day care as regards the new service A, we could look at the quality of care B is providing when looking at A's application.

However, all companies, partnerships etc. are run differently and we should give X the chance to say what his roles and responsibilities are for each service before making any decisions.

To sum up, even if B is providing poor quality care, we can't just assume A will do the same just because both companies share a common director. There need to be similarities between services A and B and also X's role in both of them before we can take account of the care being provided in the existing service.

Shadow directors

Sometimes a person who isn't a director of a company will run and manage the company in place of the appointed directors or otherwise act as if they are a director of the company. Depending on how much control that person has, the law might regard them as being a "shadow" director.

This guidance also applies to shadow directors. For example, we may receive an application for registration from a company which has one director. However during the registration process we may deal with a third party who is not a director of the company but who nonetheless appears to making decisions about the application and is the main source of any information we are requesting. That third party may be acting as a shadow director.

Information about the connected service we can take into account

Information about the existing service we can take into account when looking at the application for the new service would include, but isn't limited to:-

- its current grades
- on-going enforcement action, including the outcome of any recently concluded enforcement
- any recent complaints we have investigated
- any recent notifications we have received from the service

Information about the connected service we can't take into account

Information about the existing service we can't take into account when looking at the application for the new service would include, but isn't limited to:-

- the regulatory history of the service when it was operated by previous providers which are not connected to the applicant
- information from a single unknown source which we can't verify (for example an anonymous web complaint which hasn't been investigated)

Information about the connected service we may be able to take into account

Information about the connected service we may be able to take into account when looking at the application for the new service would include, but isn't limited to:-

- the less recent regulatory history of the care service – there is no set limit as to how far back we can go when we are looking at the history of the care service. However the older the information is, the less relevant it may be. For example, the service might have a new manager or client group or have amended its policies and procedures since any past issues were flagged up. As a result, the circumstances might have changed so much that the historic information isn't or is only partly relevant. However if there has been a long standing concern which the service has never or only briefly addressed, this may point to a pattern which we might be able to take into account. It will be for the inspector to decide in each case how much weight we put on historic information e.g. if there has been no investment in the environment and the service continually fails to meet any environmental concerns identified at inspection.
- information we have received or gathered as part of a complaint we are still investigating but haven't concluded - again, how much weight is attached to this sort of information is for the registration inspector to decide. We have to be very careful if our complaint investigations aren't complete as further information might still come to light
- information we have received from known third parties – which we cannot verify -- we would have to think about how reliable the source of the information is and how likely it is to be true when looked at alongside the other information we have. We also need to be sure before we take any account of unverified information that we have permission from the third party to tell the applicant about it as part of our decision.

How do we make a decision?

In each case we must look at the information we have and decide what is relevant and what isn't. We must not decide we are automatically going to refuse all applications where any connected service is undergoing enforcement or has low grades. Likewise we must not decide that if we receive unverified information which is not favourable to the applicant we will always refuse the application. We might be able to take these things into account but we should set out the arguments in our written assessment of the application.

If we are thinking about refusing the application, we should speak to the applicant and get its view about the things we have concerns about before deciding. We should also use the Care Inspectorate's decision making model and discuss our

decision with our team manager, the case holding inspector and contact manager where appropriate to do so. Such discussions should be recorded on PMS.

We should also think about whether our concerns could be addressed by putting appropriate conditions on the registration of the new service rather than refusing the application outright. Each case has to be looked at on its own merits – otherwise we may lose any legal challenge the applicant makes, even if we have reached the “correct” decision. This is because the courts will not only look at the merits of the decision but also the process we have followed to see if it was fair. This is why proper recording of how we come to a decision is important.

Account must also be taken of the Scottish Government document entitled “Scottish Regulators’ Strategic Code of Practice” which was made under section 5 of the Regulatory Reform (Scotland) Act 2014. The Code applies to named regulators, including the Care Inspectorate and we must have regard to it when we exercise our regulatory functions. This will include deciding what conditions should be attached to a certificate of registration. In particular, the Code requires us to pursue outcomes which contribute to sustainable economic growth and to take business factors appropriately and proportionately into account in our decision making processes. However, it is the Care Inspectorate’s position that where compliance with the Code would be inconsistent with our statutory obligation to ensure that the safety and wellbeing of those who use and are eligible to use care services is to be protected and enhanced, the welfare of people using the service should take priority.

A link to the Code can be found here: -

<http://www.gov.scot/Resource/0046/00467429.pdf>.

The legal position

If we decide to refuse an application for registration wholly or partly because of the quality of care being provided by an applicant who is already providing a service or a connected service, we have to be able to link our decision to the Regulations. For example, if the existing or connected service is providing poor quality care and there are enough similarities between it and the new service, this might mean we decide we can’t be satisfied that the applicant will be able to make proper provision for service user welfare as required by regulation 4(1)(a).

Conclusion

When we get an application for registration from an applicant who is already providing a service or is connected to an existing provider, sometimes we will be able to look at the care being provided by the connected service including outcomes for people using the service when considering the new application. However, before deciding if we can link the existing and new services, we have to think about

- the differences between the two services as they might not be comparable; and
- the roles and responsibilities of any individuals who connect the provider and the applicant

If there is any doubt, legal advice should be sought.

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