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In focus

Early warning Strengthening the safety net

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Jacqueline Rédarès, senior associate, and Lukas Rootman, partner, at CMS examine issues of health and wellbeing, building and fire safety, and other regulatory risks



The road that lies ahead

Managing health, safety and wellbeing in the care sector has always had its challenges. Never more so than over the last 18 months, as a result of the Grenfell Tower inquiry and Covid-19, thrusting the issues of health and wellbeing, building and fire safety, and other regulatory risks to the forefront. It is important to keep these issues in mind when investing in, financing, or operating care homes today.

Health and wellbeing

Care homes featured prominently in the news due to Covid-19, with issues around PPE, the mix of permanent and agency staff, and care home workers featuring in many publications on an almost daily basis.

Care homes are now operating with further mutations of the pandemic, along with other challenges such as easing restrictions, managing care and wellbeing, making tough decisions on the best approaches for future testing, and deciding on their approach to whether vaccinations should be mandatory of their often-vulnerable residents, and a workforce with diverse health, ethnic and religious needs.

In addition, the care workers' union, GMB has called for 'urgent action' to battle a 'mental health crisis' in the sector. Three-quarters (75%) of the 1,200 social care workers surveyed by GMB in December 2020/January 2021 confirmed that their work during the pandemic had had a serious negative impact on their mental health¹.

Meanwhile since May 2020 'Operation Koper' has been investigat-

ing deaths at some 474 care homes throughout Scotland.

Scottish Care described these investigations as 'wholly disproportionate... causing irreparable damage to the professional integrity of nurses and carers, who are exhausted beyond measure in fighting the virus.' As part of the investigation, the police-led information gathering process has been described as 'particularly distressing' with an extensive list of questions being put to care workers.

EVERYONE CAN
PLAY THEIR PART
IN INFLUENCING
BEHAVIOURS AND
IMPROVEMENTS
IF THEY HAVE
SUFFICIENT TIME,
KNOWLEDGE,
DIRECTION AND
MOTIVATION

Time, focus, and better understanding of frontline pressures needs to be given to the health and wellbeing of the workforce and that process needs to be led from the top. Both government

and employers are being called upon to address this.

Building and fire safety

It is important to keep in mind Covid-19 related risks may be high on the agenda, but they are not the only risks that operators and investors need to be considering.

Changes to fire safety legislation through the Building Safety Bill and Fire Safety Bill may not directly impact on care homes, but these may nonetheless have practical implications.

A care home is not usually a high-rise building, but our knowledge of fire safety does impact on the approach that is taken to the risks. Fire safety risk assessments have become more comprehensive. This is probably helpful to improve the safety of people working and living in care homes, but it does result in increased costs that should be planned for.

Care home operators should have comprehensive safety management arrangements in place, which identify what needs to be done to control any risks. The control measures should then be implemented and the effectiveness of these should be kept under review.

Regulatory risks

Across the UK throughout the pandemic, there has been the threat of regulatory intervention, not just by the Care Quality Commission (CQC) and the care inspectorates, but also Public Health England, the Health and Safety



Executive, local authorities and other professional bodies, such as the British Medical Association. Sometimes interventions and instructions from different bodies were contradictory.

The UK government announced an independent public inquiry into the general handling of the coronavirus pandemic, to be launched in spring 2022.

Although not focused on the care sector, it is expected that care homes across the UK will be reviewed as part of the inquiry, alongside the virus transmission through hospitals, care homes and the community.

The potential for criminal liability due to the exposure of care home residents and risks to their safety arising from the pandemic, continue to worry the sector. On top of regulatory risk, there are potential civil legal actions being investigated, alleging breaches of duty of care on behalf of families of residents who have died. The strength of such claims (and whether there is scope for collective redress) is not yet clear.

Recommendations

There is a long road ahead and the care challenges unfortunately are far from over. There is nervousness around the lifting of lockdown, the virus mutations and the easing of visiting restrictions in care homes.

There are also concerns around whether vaccination rates for residents and the workforce in the care sector are high enough. However, we suggest that there are positive steps that can be taken to deal with the concerns highlighted in this article:

1. Appoint a senior individual to

take responsibility for health and wellbeing. Communicate and consult with the workforce in order to establish a plan for any improvements which could be made. Assign resources to deliver change and check that the people with roles that can make an impact are engaged in the process. Everyone can play their part in influencing behaviours and improvements if they have sufficient time, knowledge, direction and motivation to do so

2. Ensure effective building and fire safety leadership and equipment is in place, audited annually, and with its effectiveness (especially escape routes and access through fire doors) being regularly reviewed
3. Examine your liability insurance policies, to check the precise scope of policy coverage in the event of any Covid-19 negligence claims. That will involve considering whether any policy exclusions are triggered in such circumstances, as well as ensuring that the limit of liability matches the size of potential exposures facing the business
4. Given the potential increased risk of claims, there are likely to be year-on-year increases in the costs of insurance premiums. Care home operators may be subject to greater scrutiny from underwriters during the renewal process. It would be prudent for care operators to anticipate that they will be allocating a greater percentage of their annual budget to insurance

premium payments and to start insurance renewals as early as possible

5. Be thinking ahead on the regulatory risks and possible future legal actions of some sort. Whether that comes in the form of participation in public inquiries, or CQC/Common Induction Standards reviews or in the form of responding to claims, certain preparatory steps can and should be taken now. A review of record keeping and paper trails should be carried out. Is the administrative 'house' in order and transparent? A number of months may already have passed since certain key events occurred. However, it could be many years before any legal processes complete

Our care operators and staff have worked tirelessly, often at considerable personal risk, fighting the virus and protecting their residents over the last 12-18 months. Staff health and wellbeing is essential and needs continued support and investment. Reviews of building infrastructure and your insurance in light of changing Covid operational requirements, and the anticipated building safety and fire safety legislation is also needed.

Finally, care home records need to capture their heroic management of safety and risks in the face of an unknown virus enemy and times of extreme pressure.

NOTE

1 <https://www.laingbuissonnews.com/care-markets-content/pandemic-taking-its-toll-on-mental-health-of-care-workers/>