

HEMPSONS

# Social Care Newsbrief

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## Welcome

Welcome to the latest edition of Hempsons' Social Care newsbrief, a round-up of some of the hot legal topics in the social care sector.

In this issue, Martin Cheyne explores the complex issue of sleep-ins and Helen Edwards looks at the Law Commission's proposals for replacing DOLS.

Our guest author, Tracey Clarke of Virtual Administration, talks us through the potential pitfalls of the new GDPR regulation, and we highlight a key upcoming event for your calendars – the Dementia, Care and Nursing Home Expo 2018.

Our client spotlight lands on Future Directions CIC, a not-for-profit social care provider based in Oldham. We talk to MD Paula Braynion about the organisation's journey, the challenges it has faced and its plans for the future.

We hope you find something of interest within this newsbrief. If you want more information or to follow something up, please get in touch.

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Health & Social  
Care Advisory

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# Spring social care seminars – a review

Integral to Hempsons' commitment to the health and social care sector is the provision of free high quality education and training on legal topics for the sector. It was in that vein that we welcomed more than 100 people – mainly social care providers – to our Spring social care seminars held in Harrogate and Manchester.

Hempsons' specialists provided presentations on key aspects of the regulatory environment that social care providers must operate within. Philippa Doyle, Associate, explained key changes coming into force in May 2018 in data protection law, and explained the implications of the new General Data Protection Regulation to providers and what it means for them and their businesses. As a result of this presentation Philippa has been invited to give a number of presentations to individual businesses who are keen to ensure that they are ready for the new regime. Data security is and will remain a key issue upon which providers need to ensure they have robust systems and

processes, and it is an area that CQC will be inspecting and monitoring once the new Regulation is in force. Fiona Easton-Lawrence, Solicitor and Helen Edwards, Associate spoke about the Care Act 2014 and safeguarding responsibilities: a number of providers have experienced difficulty with some Local Authorities who have not shared allegations or reached disproportionate or unjustified conclusions and there was discussion as to how these issues can be tackled within the context of the applicable legal framework, which is now on a statutory footing.



Adam Hartrick, Partner and Head of the Advisory teams in the North spoke to the audience about a recent case involving CQC, setting out for providers steps that CQC must take in relation to challenges to the factual accuracy of inspection reports, and there was lively discussion as to different experiences that participants were willing to share.

We were particularly pleased that Kathryn Reid, Regional CQC Inspection Manager attended, with two of her colleagues, and they gave a presentation setting out how CQC seek to regulate so as to inspire improvement by setting clear expectations, monitoring and inspecting and rating services, celebrating success and tackling failure. Statistics were shared setting out the numbers of services that had been rated, noting that about two thirds of nursing homes had been rated as good or outstanding – a lower proportion than domiciliary care agencies or residential homes where there appear to be a greater number of good or outstanding services. Kathryn and her team explained that they are looking to assess a service by how it makes individuals feel – drawing on the famous Maya Angelou saying:

***“People will forget what you said, people will forget what you did but people will never forget how you made them feel”.***

Particularly well received by the audience was the willingness on the part of Kathryn and her team to take questions, which they duly did, and answered a vast number both in the main session but also in discussions that attendees were able to have with them before the seminar and during the refreshments break. Hempsons are grateful to Kathryn and her team for their willingness to present and participate in our seminar.

Our Autumn programme will, by popular request, include a dedicated session on employment law with updates focussed to the social care sector: the operation of the deprivation of liberty safeguards and recent legal developments in this arena: and we will take a look (with the help of an external speaker) at the market in the sector from a commercial perspective. We look forward to welcoming you.

## Adam Hartrick, Partner

Adam has an interest in issues relating to mental health, capacity and consent and he frequently advises on these areas, including the Mental Health Act 1983 and the Mental Capacity Act 2005. He has represented clients in the Court of Protection, in Family Division proceedings (including seeking emergency treatment Orders) and in judicial review proceedings.

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# “Sleep-ins” – a bad dream?

Sleep-ins have become a difficult and worrying problem for many social care providers in recent years. It is an issue live in current politics and one which is subject to regulatory intervention and litigation.

## The background

Traditionally, staff in the social care sector who undertake sleep-in shifts for clients have been paid a set sum, or allowance, for each sleep-in shift. The expectation is that the staff can and should sleep on site but they may be called upon to assist a client at night. Very often this is in conjunction with other “waking nights” staff. That allowance varies between providers but has tended to range from around £15 to £45 for the night.

Those sleep-in allowances are not at national minimum wage levels but when the National Minimum Wage Regulations were originally implemented in April 1999, they were not expected to have any impact on support workers who were undertaking sleep-in shifts. The Low Pay Commission recommendations were:

“for hours when workers are paid to sleep on the premises, we recommend the workers and employers should agree their allowance as they do now”.

However, when implemented, the National Minimum Wage Regulations did not expressly adopt the Low Pay Commission’s recommendations and even in 2003, the Low Pay Commission was recommending clarification of the guidance and Regulations.

In more recent years there have been a number of challenges to whether the National Minimum Wage should apply to sleep-ins, with well known cases of *Whittlestone –v- BJP Home Support* and *Esparon (trading as Middle West Residential Care Home) –v- Slavikovska* and, in May 2017, the *Mencap* case. In these three cases, the sleeping employee has been found to be “at work” whilst asleep and so their sleeping time is therefore included in the National Minimum Wage calculations. In the latest *Mencap* case, the President of the Employment Appeal Tribunal found that it was always a question of fact whether an employee was “working” whilst asleep.

## The current position

The introduction of much higher National Living Wage rates were predicted to have a substantial impact on the social care sector. This has proven accurate and brought the issue of sleep-ins into sharp focus:

- The *Mencap* case is only one of a number of similar claims affecting the sector, with some unions actively promoting claims by both existing and former staff;
- Local Authorities and other commissioners for social care are struggling with funding;
- Many commissioners, though inconsistently not all commissioners, have continued to themselves pay only allowances for “sleep-ins” without recognising or taking into account the looming crisis amongst providers;
- HMRC is the regulator for the National Minimum Wage. They are responsible for investigating complaints, applying penalties and imposing back pay, as well as “naming and shaming” offenders and they have begun examining sleep-in payments more consistently;
- The political consensus that was beginning to develop was overtaken by the 2017 general election and wider politics.

## “Waking up”

Mencap have indicated that they will appeal the Employment Appeal Tribunal judgment to the Court of Appeal but that is not likely to be considered until early 2018.

Mencap, having lost their appeal, began political campaigning in earnest. They combined their campaigning alongside other social care providers and industry organisations and this has begun to re-establish some political momentum and media attention. Political leaders are again aware of the crisis. There is potentially £400 million owed in sleep-in back pay to thousands of workers in the sector. The most immediate and obvious action taken by government as a result was in July 2017: HMRC suspended their enforcement of the National Minimum Wage for sleep-ins.

Whilst HMRC enforcement is currently suspended, this cannot continue indefinitely and it remains to be seen what substantive proposals the government have. Nevertheless, it is unlikely that government will suddenly and entirely exonerate all social care providers of their National Minimum Wage responsibilities.

In the meantime, users of social care who hold personal budgets have tended to be lost in the debate. They too pay sleep-in allowances and they may also be caught by the underpayments and back pay problem either with the agencies they use or if they employ covers directly. Any response by the government, including legislation, should take account of these service users too.

## The future

There remains an expectation that government will not remove all potential liabilities for all social care providers (and those holding personal budgets). Providers should therefore review their sleep-in arrangements to fully understand whether there are potential back pay liabilities. A precedent was perhaps set in 2015. Faced with volumes of holiday back pay claims, the government imposed a legislative limit on back pay claims, reducing the six year limit to two years. This may be something the government would consider here.



The question of whether sleep-ins count as part of the National Minimum Wage though is still a question of fact but assuming they do, providers should:

- Consider the value of potential back pay claims
- Ensure that the quantification and valuation of back pay is based on current National Minimum Wage rates
- Develop strategies for the future to accommodate back pay liabilities as well as future payments. These may include:
  - accurately establishing the nature of sums taken into account for the National Minimum Wage
  - Sleep-ins do not necessarily need to be paid at National Minimum Wage rates if overall pay for staff is compliant with the Regulations
  - liaise with commissioners and negotiate increased payments
  - review all contracts to potentially cross-subsidise minimum wage gaps
  - consider all terms and conditions of employees and whether they are sustainable going forward.
  - use reserves
  - join with or continue participating in the political debate.

## Martin Cheyne, Partner

The majority of Martin’s clients are health or social care organisations and he acts in the full range of claims before Employment Tribunals.

Martin frequently defends factually complex and also legally novel claims, particularly in relation to disability, sex and sexual orientation discrimination and whistle-blowing allegations.

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# Client Spotlight – Future Directions CIC



This issue, our client spotlight focuses on Future Directions CIC, a not-for-profit social care provider based in Oldham. Future Directions was originally set up in 2012 as a subsidiary of Calderstones NHS Trust, and spun out to become a separate entity in April 2015. We spoke to CEO Paula Braynion about the organisation's journey so far, the challenges it has faced, and plans for the future. Paula previously worked in the NHS as a Director of Operations, Deputy Chief Executive and Director of Nursing.

## What does

### Future Directions do?

Future Directions provides care and support to people with complex needs including learning disabilities, autism, mental health, forensic histories, acquired brain injury and dementia. It provides support to people in their own homes as well as the community, and is flexible in how much support it offers – from a few hours a week to 24-hour support.

### Why choose the CIC model?

A CIC is a Community Interest Company, a type of limited company which exists to benefit the community rather than private shareholders. These were introduced in 2005 and have proved a popular model ever since, with an estimated 10,000 registered in the first ten years of existence. Future Directions is able to operate as a company – with the ability to hire staff and have its own governance structure – without the more stringent governance demands required of a charity. The regulatory regime is less intense, meaning that the organisation can be more efficient and cost effective.

## Legal assistance

When, by April 2015, it made sense for Future Directions to become a separate legal entity, the organisation turned to Hempsons' Charities and Social Enterprise team is highly experienced leading on spin-out projects, covering bodies with multi-million pound contracts through to smaller organisations with smaller budgets.

“Hempsons were invaluable in helping to explore the different models initially, and then to assist with the legal formation and set-up. They worked with both boards through the separation process and made it as seamless as possible for all parties.”

When asked if she has any advice for organisations considering a similar move, Paula says: “Go for it!” She describes the process of becoming a CIC as “the best thing that ever happened to us”, describing Future

Directions' increased responsiveness to commissioners' needs, its ability to adapt to new developments in the social care sector, and the opportunity to live out its own values, which were all key factors in the decision.

## Expansion plans

Based in the North West, Future Directions has a growth strategy that involves growing incrementally and expanding outwards, providing the organisation with financial resilience in challenging times. The organisation now has 70 locations across the North West and has been awarded the 'Good' rating by the CQC, and an 'Outstanding' in the 'well-led' category.

As well as running residential social care facilities, Future Directions runs many additional projects, including a scheme for young people with autism, a supported scheme for vulnerable adults and projects aimed at getting people moved back into their communities.

## Progress made on Winterbourne

Future Directions was developed out of a need for creative responses to the 'Winterbourne View – Time

for Change' Report, which in 2014 suggested radical changes to the way in which people with learning disabilities are treated in the UK. Winterbourne View Hospital was discovered, in 2011, to be the site of physical and psychological abuse inflicted on people with learning disabilities in the public funded hospital, and after a Panorama investigation exposing the abuse, the hospital was shut down. The ramifications were widely felt throughout the social care sector.

Paula reflects that while significant progress has been made since the publication of the report, more can still be done. “More focus is needed on developing community solutions, and more resources are needed,” she comments. “It's crucial to get it right, to make a difference to people's lives.”

At the end of our interview, Paula is heading out of the door to a 'Bring Your Dog to Work Day' gathering in the park; a regular opportunity for service users to enjoy playing with pets they might not be able to keep themselves, and another example of how Future Directions is working to improve the quality of life of its clients.



For more information about Future Directions, please visit [www.futuredirectionscic.co.uk](http://www.futuredirectionscic.co.uk)

# What are your obligations with The General Data Protection Regulation (GDPR) – are you going to be ready?

The new data protection compliancy involves making sure you and your team/associates are familiar with the GDPR, enabling you and your company to be fully compliant with the different processes, systems and policies you are required to have in place by 25 May 2018.

Certain types of personal data must be treated with particular care due to the sensitive nature of that personal data. This is of course common sense. 'Health' comes under what the ICO (Information Commissioner's Office) calls the 'special category', making it a mandatory obligation to comply with the GDPR and more especially if you work in the health professional field.

As with any new legislation which generates mandatory requirements with which to comply, the initial response is to panic and stress over yet another set of red tape regulations to bow down to, more paperwork and things you have to remember. Just too much, especially with it being seen as a 'dry subject' – not the easiest of topics to get excited about.

We want to put a stop to those scare-mongering tactics. Data protection is not that frightening! Good old fashioned common sense and a balanced approach are what is needed. The majority of professionals in the field

of health have experienced the wrath of CPD (Continuous Professional Development), that fear of being randomly picked every two years by selection to be brutally grilled and audited. The HCPC, the regulators of health, psychological and social work professionals are not monsters, in the same way the ICO is not there to hold you at gunpoint.

As long as you take it seriously and have a solid plan of action in place with areas like:

- Your team is properly trained with an understanding about breaches
- A chain of command – who are the processors, who is the data controller and who is the data protection officer
- A good understanding about 'consent' and 'the right to be forgotten'
- How all your systems are data mapped – what the information flow is
- The fundamental policies in place
- Privacy impact assessments (posh name for risk assessments) carried out
- Information notices in place
- Audit of your internal and external data processing activities
- A data protection breach register for recording breaches.

There are many more areas that need to be addressed, here are some:

- Technology used for processing data
- Subject access requests



- Privacy by design
- Updating your terms of business and associate contracts
- Appointment of Data Protection Officer (if required)
- Breaches and fines.

The right for individuals to be forgotten is going to be the biggest theme that runs throughout this legislation. Transparency, making your organisation available to be contacted on all your materials, website, email signatures, newsletters is absolutely paramount.

Any person new to this legislation will likely feel daunted by its implications and wish to stick their head in the sand and hope it won't affect them. But taking a positive approach, looking at what needs to be put in place, who is to be responsible for compliancy as part of your organisation, what are the likely potential breaches within your systems and processes are just a few steps towards making sure you're ready and super organised.

There is definitely no need to panic, there is plenty of time to schedule in all the different tasks required to be compliant in readiness for May 2018. It's all about staying calm, being organised and thorough. We all do battle on a day-to-day basis running our own businesses, fire-fighting whatever problems get thrown at us. Further hassle in dealing with more mandatory legislation can feel exhausting, eating further into your precious time and brain capacity. The best way is to seek advice and assistance, find a way of tackling this added mandatory obligation, making sure you properly understand what you must do.

## Philippa Doyle, Associate

Philippa is the Hempsons contact for information governance. Philippa has a broad range of experience in advising health and social care providers on legal and practical matters. Philippa's social care experience includes the successful challenge of a Local Authority's care home fee rate, a Judicial Review concluded following mediation and extensive negotiations, as well as successfully challenging a Local Authority contract monitoring regime and challenging Care Quality Commission inspectors and reports.

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## Tracey Clarke

Director, Virtual Administration

Tracey founded Virtual Administration in 2006, growing a team of Virtual PAs providing professional secretarial / personal assistance to independent therapists, healthcare professionals and other small businesses. She brings 25 years' experience with a strong background in local government administration, health and business admin.

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# The end of DOLS?

On 13 March 2017, the Law Commission published its report on the Deprivation of Liberty Safeguards (“DOLS”) with proposals for their replacement.

The report calls the DOLS “overly technical and legalistic” and sets out how the current regime is “in crisis and needs to be overhauled” as a matter of “pressing urgency”.

The proposed replacement system is called the Liberty Protection Safeguards. The key aspects of this new system include:

- It applies to ages 16 and above (DOLS is 18+)
- It covers any setting (not just care homes and hospitals) including travel between one and another
- Responsibility for authorisation belongs with the body commissioning the care, for instance Local Authorities or Clinical Commissioning Groups.
- It is a front-loaded system in which authorisation is sought as part of the care planning process
- Urgent authorisations are replaced by a statutory authority to deprive someone of their liberty temporarily in an emergency to allow life-sustaining treatment or prevent a serious deterioration
- Introduction of an Approved Mental Capacity Professional comparable to the Approved Mental Health Professional in mental health legislation.

These are significant changes and address many of the problems arising out of the current system. However, the key question at the moment is how far down the government list these changes are in the current climate.

In conclusion, we are one step closer to a world without DOLS. However, it is likely that this is, as yet, some way off.

**Helen Edwards, Partner**

Helen works across a wide range of health and social care issues in different jurisdictions including the Coroner’s Court, the Family Division and the First Tier Tribunal (health and social care). Helen regularly advises organisations and provides training in relation to information governance, safeguarding, funding and community care.

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# CQC guidance for providers

The Care Quality Commission (CQC) is the regulator of health and adult social care in England. They make sure health and social care services provide people with safe, effective, compassionate, high quality care and we encourage care services to improve.

#### The CQC’s role is to:

- Set clear expectations
- Monitor and inspect
- Publish and rate
- Celebrate success
- Tackle failure
- Signpost help
- Influence debate
- Work in partnership

#### Existing, new and future on-line resources provided by the CQC include:

- New Key Lines of Enquiry and Rating Characteristics, effective from November 2017 [https://www.cqc.org.uk/sites/default/files/20150327\\_asc\\_residential\\_provider\\_handbook\\_appendices\\_march\\_15\\_update\\_01.pdf](https://www.cqc.org.uk/sites/default/files/20150327_asc_residential_provider_handbook_appendices_march_15_update_01.pdf)
- Equality and Human Rights: good practice resource, September 2017 [https://www.cqc.org.uk/sites/default/files/20170913\\_equality\\_outstanding\\_ehr\\_resource\\_1.pdf](https://www.cqc.org.uk/sites/default/files/20170913_equality_outstanding_ehr_resource_1.pdf)
- New proposals to expand the scope of performance assessments of providers regulated by the Care Quality Commission (September 2017) Consultation [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/643771/New\\_Consultation\\_Scope\\_of\\_Performance\\_Assessments.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/643771/New_Consultation_Scope_of_Performance_Assessments.pdf)
- The State of Care in Mental Health Services from 2014 to 2017, CQC Publication <https://www.cqc.org.uk/publications/major-report/state-care-mental-health-services-2014-2017>

#### Keep up to date with CQC guidance:

- CQC Guidance for providers <http://www.cqc.org.uk/content/guidance-providers>
- Subscription to CQC monthly bulletin <http://www.cqc.org.uk/content/get-our-newsletter>
- CQC provider online community [www.cqc.org.uk/organisations-we-regulate/get-involved/join-our-online-communities-providers](http://www.cqc.org.uk/organisations-we-regulate/get-involved/join-our-online-communities-providers)

**Philippa Doyle, Associate**

Philippa has a broad range of experience in advising health and social care providers on legal and practical matters. Philippa’s social care experience includes the successful challenge of a Local Authority’s care home fee rate, a Judicial Review concluded following mediation and extensive negotiations, as well as successfully challenging a Local Authority contract monitoring regime and challenging Care Quality Commission inspectors and reports.

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# Social care advice line

Hempsons operates a successful free advice line for social care providers.

The social care team at Hempsons is well placed to assist with a wide range of legal issues including areas such as CQC inspections and CQC reports, employment issues, local authority safeguarding alerts and disputes with local authorities.

**Hempsons' social care advice line is open between 9.00am and 5.00pm, Monday to Friday** and offers up to 15 minutes of valuable preliminary advice on a range of issues social care providers face including:

- Regulatory expertise
- Health and safety
- Employment and HR law
- Real estate
- Corporate and commercial
- Dispute resolution

Associate Philippa Doyle commented: "Social care providers are working in an increasingly challenging market and come across a whole range of issues often linked to regulatory bodies or management of staff. We find that on many occasions a telephone call to a specialist lawyer who understands their environment, and has come across similar issues, is able to offer not only useful advice, but can quickly give some peace of mind."

*"With increasing integration between health and social care, the benefit of talking to a solicitor from Hempsons is not only their expertise in specific areas of law, but also a full understanding of the NHS and wider political environment you operate in."*

To access the Advice Line simply call **01423 724056** quoting 'social care advice line' or email [socialcare@hempsons.co.uk](mailto:socialcare@hempsons.co.uk).

## Legal experts for social care



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# Dementia, Care and Nursing Home Expo 2018

**25-26 April 2018**

**NEC Birmingham**



Hempsons' Social Care team will be exhibiting at the Dementia, Care and Nursing Home Expo at the NEC Birmingham on the 25-26 April 2018. It will be our first year exhibiting at the show and we're looking forward to meeting the delegates over what will hopefully be a valuable and informative couple of days.

The event gathers together 200 exhibitors in the care, residential and nursing home sector and has a roster of around 100 expert speakers. Delegates include care, nursing and residential home owners and directors, as well as domiciliary care business owners and dementia specialist carers. 2018 sees the first ever Dementia, Care and Nursing Home Expo Awards, recognising achievements in the areas of Care Home Tech, Care Home Service and Overall Innovation.

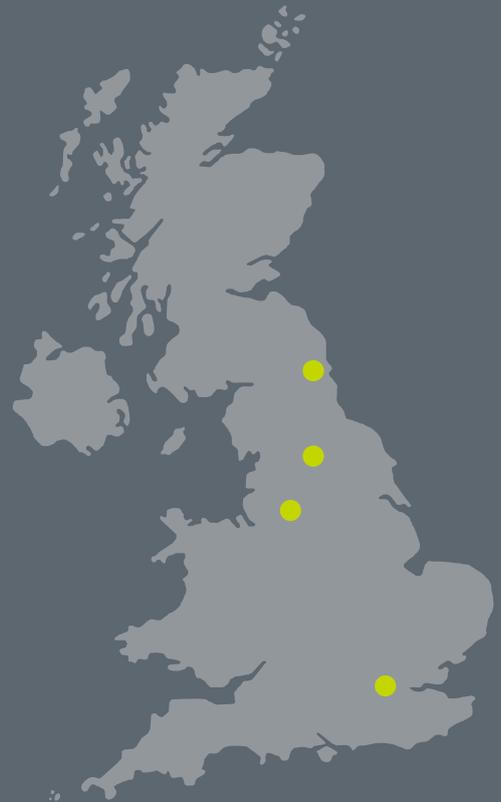
**If you're attending the show, please come and see us at stand 6020.**



## About Hempsons

### Supporting providers in delivering quality services

Hempsons is an award winning law firm committed to the health and social care sector, with a dedicated national team of experts across four offices in the UK. Hempsons is able to support and advise providers in relation to all aspects of their business activity, including CQC regulatory issues, health and safety matters, employment law and Coroner's Inquests. We also have a superb corporate commercial team who can support providers looking to expand their business, negotiate commercial agreements and contracts, tender for business or deal with disputes of a commercial nature. We are experts at challenging decisions through the mechanism of Judicial Review, something we have successfully accomplished in partnership with the Independent Care Group in North Yorkshire for the benefit of its members.



[www.hempsons.co.uk](http://www.hempsons.co.uk)

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