

Social Care Newsbrief

CQC complaints

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Welcome

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

In this issue, Philippa Doyle talks about challenging CQC, which can be an unpalatable proposition, but is sometimes very much in your best interests. Being the regulator does not make them immune from error on occasion.

We like to feature clients we have worked with and this month we put the spotlight on Lister House Limited who we were delighted to assist with a recent challenge. We do not simply work with people when things have not gone as planned – you can read about our support of Brightening Minds who exist to help the adult social sector improve their CQC ratings and achieve that outstanding care that we all want to see.

Corporate Partner Faisal Dhalla looks at issues to consider for those contemplating purchasing a care business. Whilst undoubtedly there are challenges facing the sector, not least the continued uncertainty as to how inadequate public funding of the sector is to be addressed mid-term; there are also opportunities and it is always exciting to be working with those who are seizing them.

We have now run several hugely successful social care focussed seminars – our May dates are now confirmed, and as usual we will have some excellent external speakers so it is not all about the law! We would love to see you there.

For those who find themselves in need of a conversation with a sector specialist lawyer, we operate our social care advice telephone line which you can call for some free legal advice on a range of issues.

After winning the Best Professional Services Advisor at the inaugural Care Home Awards in 2017 we are delighted to have been shortlisted as a finalist in the same category for the 2018 awards.

We hope you find something of interest within this newsbrief. We always enjoy hearing from those that read our newsbriefs so do get in touch:



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"After winning the 'Best Professional Services Advisor' at the inaugural Care Home Awards in 2017 we are delighted to have been shortlisted as a finalist in the same category for the 2018 awards. Hempsons have also been shortlisted as a finalist for the 'Outstanding Care Home Service Award' at the Dementia Care and Nursing Home Expo 2018."

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CQC complaints

They may be your regulator, but that doesn't stop you complaining about their conduct

The CQC and its inspectors should treat you, your staff and your clients with courtesy and respect.

If they don't – complain! Send an email to complaints@cqc.org.uk

The CQC will only find out about a rogue inspector if you tell them, so make sure you do!

The CQC has a separate Customer Services Team who can and will investigate inappropriate conduct and will take action where required. You do need to make sure you have evidence though and make your complaint in a timely way.

If you, your staff, or your clients feel at the end of an inspection day that you've had more than just a tough inspection, make sure you take contemporaneous notes or witness statements that record straight away how the process made you feel, or what the inspector said or did that you felt was inappropriate or made you feel uncomfortable.

Send that information to the CQC complaints team. They will come back to you and often ask more detailed questions, but they will put those complaints to the

inspector (where appropriate) and it can result in an inspector being moved from your area, being required to attend re-training and can impact on the outcome of your inspection report, particularly if their conduct meant the inspection became biased.

Most inspection teams are skilled and professional and hopefully you never do have cause to complain. But just as your clients are encouraged to complain to the CQC about you if you are in the wrong, make sure you do the same with the regulator!

A complaint can go hand in hand, or even be a precursor to a Factual Accuracy Response. It can carry significant weight if made straightaway after an inspection, before the draft report is even produced, as it sits as a separate, true reflection of feelings on the day, without having any clear indication of what a report might say, and certainly cannot be perceived as sour grapes for getting a report that is below what you might have expected.

Poor inspectors produce poor reports. An inspector with a fixed agenda, whether that be based on vexatious comments or feedback from disgruntled ex-employees, families or a health or social care professional, can set an entire inspection off on the wrong foot, with an inspector who is looking for deficiencies and losing sight of evidence of good practice.



No one is perfect. No provider is perfect and no inspector or inspection team is perfect.

The inspection day(s) should feel challenging.

You and your staff should be prepared to justify your actions, your policies and your procedures. But the inspection is still supposed to be a fair reflection of your service as delivered on the day of inspection.

When submitting your Factual Accuracy Response make sure you include the fact that you have made a complaint about the inspector or the inspection team and send a copy of that complaint and your statements in with the Factual Accuracy submission. The Factual Accuracy process requires an internal CQC manager, independent to your inspection team, to review submissions prior to finalisation of the report, and a timely complaint can cause them to pause and take stock of the inspection regime.

Don't worry about whether making a complaint will impact on your service and report. Not making a complaint and feeling that the inspection process and report is unjust will have a far greater impact on your organisation and staff, than a feeling that you have "fallen out" with your local inspector. The CQC can and should change your nominated contact for your service going forward if the relationship has truly broken down.

Adult Social Care Inspectors have, on the whole, come from the same background as providers. Most are excellent and supportive and will work with you to continually strive to improve your service but a bad inspector can be deeply damaging to staff moral and to the reputation of your service so do utilise the complaints process and don't accept bullying and inappropriate conduct as part of the inspection regime.

PHILIPPA DOYLE, ASSOCIATE
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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 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.



Client spotlight:

Lister House Limited

In this issue we are turning the spotlight on Lister House Limited, a care home provider on the outskirts of Bradford, owned by Sally Allen. The company aims to provide quality care for both elderly people and younger residents.

How did the company come about?

The company was set up in 1989 and opened its first home Lister House the following year. It was a relatively small home – just 18 beds – in a converted Victorian vicarage and expanded to 32 beds in 2000. It mainly takes elderly clients who need nursing or just residential care. In 2003, the company built Sherrington House on land in front of it, aimed predominately at younger people – 18 upwards – who needed care. This was to meet local demand for this type of beds. Both homes are just half a mile from Bradford Royal Infirmary and Ms Allen says staff have always had good relationships with the consultants from there.

What are the company's aims?

Lister House aims to provide quality care in a pleasant environment for residents. "It has gone pretty well overall. Both homes were popular and we had good feedback from residents and their relatives," says Ms Allen. "Our Care Quality Commission ratings were "requires improvement" but with many "good" ratings for the individual areas they assess – Sherrington House was inspected in January 2017 and given "requires improvement" but "good" for caring and effectiveness. But in May 2017 we had a CQC inspection from a team we had not met before who behaved differently to other teams we have encountered."

Their report rated Lister House as "inadequate" and put that home into special measures. Normally homes in special measures are inspected again within six months and have an opportunity to show they have improved before any action is taken. But Lister House was almost immediately served with a notice of proposal and then a notice of decision – effectively meaning it would be closed down.

"It had an immediate impact on the business. The local press had a field day and the local authority stopped placing new residents with us because we were in special measures," says Ms Allen. "Over time that has meant our occupancy has dropped – we were full at the time of the inspection but ended up with 10 empty beds. In a small business, that has an immediate impact. We have had to cut back on costs, including staff costs although luckily we have been able to do this through natural wastage as people left and students who had been working for us returned to university. But some valued staff chose to leave because of the report which was very sad.

"We had a lot of support from fellow care home owners, residents and their relatives. Initially I did not think I needed legal support and tried to deal with it myself. But I was in completely uncharted waters."

Legal assistance

Ms Allen got in touch with Philippa Doyle, from Hempsons, who she describes as "coming to my rescue and being the voice of reason in all this!" Having assessed the position, Hempsons advised her to appeal to the first tier tribunal, arguing that the proper process had not been followed because the home had not been given an opportunity to improve and be reinspected. This appeal was successful. "Hempsons has been a shoulder to cry on through all of this," says Ms Allen. "I've had sleepless nights about it because we employ 120 staff and I was worried what would happen to them and, of course, our residents".

"We were reinspected at Lister House on January 4 this year by a different team and it was an entirely different atmosphere. We were "requires improvement" overall but with three "goods" – so we were out of special measures and the threat of closure went away. The local authority agreed to start placing people with us again, although initially only one admission per week."

Future plans

Ms Allen's immediate priority is to rebuild the business and ensure the home has full occupancy again. To do this she needs to build up staff numbers again. "The staff were very upset by the original report and needed lots of TLC. It has taken a lot of time to build their confidence up. I hope in a months' time – when Sherrington House is due to be inspected again – we will get a "good" rating," she adds.

Brightening Minds

partners with Hempsons to support the adult social sector to improve CQC ratings

"Do you want to achieve great results in your next CQC inspection?"

Feel in control of your next CQC inspection with tips, suggestions and support from experienced practice-based workshop facilitators and other working colleagues in the adult care sector.

Attend our 'Preparing for your CQC inspection' workshop and work together with other providers in the sector to share good ideas, problem solve ongoing challenges and avoid pitfalls to improve your service and service ratings. Benefit from the knowledge and practice based experience of a broad range of practitioners through the participation in a workshop with a 100% recommendation rate from hundreds of providers. Achieve continuous improvement through discussions, advice, guidance and consultation on issues that are current and challenging to you and your sector colleagues. Develop your professional networks to support you in your role and help you meet your full range of regulatory responsibilities.

Facilitators have experience of supporting organisations achieve Outstanding and can help with practical solutions to getting the basics right too.

In the adult care sector we are often told what we have to do to be compliant and meet our regulatory responsibilities. What we found is often missing, is help and support for the sector to best describe to CQC inspectors what we do well in our services and how we are committed to continuous improvement. Brightening Minds brought practitioners working in adult health and social care services together to deliver workshops to help each other with advice, guidance and practical support on how to:

- prepare for your inspection by learning and practising a method that involves a whole team approach
- celebrate your services successes and have positive conversations about your operational challenges
- learn how to describe the beneficial impact of what you do has on the people you support and the positive difference you make to peoples' everyday lives
- increase your organisational confidence through having teams that feel well prepared for inspections
- improve your CQC rating through evidence based conversations with your inspectors
- have confident conversations about what works to help you provide a great service

- share good practice across the sector that really makes a positive difference.

Update your organisation on the latest changes to the CQC's Key Lines of Enquiry.

Workshops help you keep up to date with ongoing changes related to service delivery in the sector. Learn about new themes you must be prepared for to help you be ready for a confident conversation about your practice and the continuing developments within your service. Hear from your colleagues about current inspection themes in your local area and share ideas on how different services are meeting these challenges.

Improve your confidence at your next CQC inspection by effectively preparing you and your team to showcase your service. Achieve continuous improvement for your service through the sharing of good practice from your operational colleagues. Achieve an inspection rating that you feel is reflective of the service you provide.

Talk to Hempsons and Brightening Minds about available workshops in your region.





What to consider when purchasing a care home – The legal aspects

Buying a care home is a complex business transaction which will require considerable time and dedication on your part. Whilst the rewards will no doubt be satisfying, the legal process is not always straight forward and it requires input from specialist legal advisors who are experts in both business law and health and social care law.

If you are about to embark on a care home purchase, you should carefully consider the following:

Structure

Care homes are often operated by their owners through limited companies. Therefore, you need to consider at the outset whether the transaction should be undertaken by way of a purchase of the shares in the company or by way of a purchase of the business and assets of the company. Much will depend on tax. As a buyer, you would pay 0.5% stamp duty on a purchase of shares whereas a business and asset purchase is likely to result in a greater stamp duty liability. However, a seller will be keen to consider the implications of things such as entrepreneurs' relief and capital gains tax.

Due diligence

As a buyer, have you undertaken sufficient 'due diligence' on the care home? Have you looked at critical things such as whether the care home has a satisfactory CQC report or whether the care home has been the subject of any litigation or major investigations? Are you satisfied that the care home has been complying with regulatory requirements? You should not only undertake legal due diligence but also finance, tax and operational due diligence.

CQC

As a buyer, you will need to be registered with the CQC before you can take over the care home. This process can take several weeks and will need to be factored into the timing of the transaction. However, if the purchase will be undertaken by way of a share purchase of the seller's company which operates the care home, the company should already be registered with the CQC. As a result, the process is easier as you will not require a separate registration. You will simply be stepping into the shoes of the company's existing registration.

Local authority funding

Are any of the residents of the care home funded by the local authority? If so, as a buyer, are you familiar with the local authority's contract with the care home? If you are buying the shares in the company which operates the care home, is there a 'change of control' clause in the local authority contract which needs to be addressed? Such 'change of control' clauses need to be carefully handled and often require prior consultation with the local authority before the purchase can complete.

Employees

As a buyer, are you familiar with the terms and conditions of employment of the employees at the care home? Do they fit in with the terms and conditions you wish to adopt? If you are buying the business and assets of the care home, TUPE will apply (it will not apply in a company share purchase). TUPE is the Transfer of Undertakings (Protection of Employment) Regulations 2006. The purpose of TUPE is to safeguard the employment relationship and contracts of employment of employees, if the business which they are in changes from one owner to another. Both buyer and seller have several obligations to comply with under TUPE. Do you understand what those obligations are and what the consequences would be if you fail to comply?

Financing your purchase

If you are seeking bank funding for the purchase, you will need to ensure that you fully understand the terms of any loan and security documentation you will be required to enter into with your bank. If you are using a limited company for the purchase, your bank may require a personal guarantee from you. Further, if you are purchasing the care home by way of a company share purchase, you will need to ensure that any security currently registered against the target company is discharged prior to completion of the sale.

FAISAL DHALLA,
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Faisal specialises in the sale and purchase of health and social care businesses – in particular, care homes and dental practices. Faisal is experienced in business law and the regulations which apply to business sales and purchases in the health and social care sector.

Lasting Powers of Attorney - Considerations for providers

What is an LPA?

An LPA is a legal document registered with the Office of the Public Guardian, which names another (an 'attorney') to make best interest decisions on their behalf ('the donor'). Anyone who currently has capacity can appoint an attorney to make decisions on their behalf, should they lose the capacity to do so themselves in the future.

An attorney must be 18 or over with capacity and is most commonly a spouse, family member or friend. The LPA must include a certificate completed by an independent third party, confirming the donor had capacity when they appointed the attorney.

What can an attorney do?

This is dependent upon the type of LPA and any restrictions or conditions.

Health and welfare LPAs authorise attorneys to make decisions regarding the donors personal welfare, social activities, residence, day to day care, assessments, contact and medical treatment, yet only where the donor lacks capacity. An attorney cannot overrule an advance decision made by the donor, yet beyond this attorneys potentially have extensive decision making powers in relation to the donor's health and welfare.

Property and financial affairs LPAs relate to the management of bank accounts, tax affairs, funding entitlement, bills, receipt of benefits and buying or selling property.

It is important that providers are aware of any service users in their care who have an attorney and the LPA should be reviewed to determine what decision making

powers they have. For example, if a medical treatment decision is required and the individual lacks capacity, it is important to establish whether a health and welfare attorney has been appointed, or whether the decision must be based upon a best interests analysis under the Mental Capacity Act.

Is the attorney acting in your client's best interests?

Attorneys must act in accordance with the donor's best interests, applying the best interests check list (see the Mental Capacity Act 2005 Code of Practice) and consulting those with an interest in the donor's welfare.

If there are concerns that an attorney is acting contrary to the donor's best interests, an application can be made to the Court of Protection. The Court of Protection can determine not only the decision in question but also the validity of an LPA, give directions and if required, remove an attorney.

RACHAEL HAWKINS
TRAINEE SOLICITOR
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Rachael graduated from the University of York with an LLB (Hons) Law Degree, before undertaking a Postgraduate Diploma in Bar Practice.

Following this, Rachael worked closely with a variety of healthcare providers as a clinical negligence paralegal, whilst also completing a Post Graduate Diploma in Legal Practice.

In September 2017, Rachael joined Hempsons as a Trainee Solicitor and is currently working in the Healthcare Advisory Team.



Social care regulatory seminars

Seminar dates

Social care seminars

9 th May	09:30 – 13:00	Harrogate
16 th May	09:30 – 13:00	Manchester

We are also speaking at:

Dementia Care and Nursing Home Expo 2018

26th April 13:15 Theatre 13 – NEC Birmingham

Independent Care Group Annual Conference

21st Nov Harrogate

We are running free seminars in May 2018 for social care providers.

These seminars will give updates on a range of legal and practical issues that will be of interest to all those involved in the management and running of social care provision.

Topics to include:

- Procurement law essentials – examining why processes are run, how to improve your chances of success and an examination of the challenge process if you are unsuccessful
- DOLS – an update
- What are buyers looking for? – how to engage with buyers, a practical and operational guide
- Getting ready to sell – the legal perspective
- Q&A sessions

If you have any questions, please contact our events team on events@hempsons.co.uk

To register for this event please visit our website:
www.hempsons.co.uk/events/social-care-seminars-may-2018



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 comments: "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 the 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.

Legal experts for social care



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Hempsons gives you certainty in an ever changing legal landscape.

Our health sector expertise means we are leading on many of the key issues facing the NHS Social care sector

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- Charity law
- Clinical negligence
- Construction
- Contracting
- Crime
- Dispute resolution
- Employment
- Environment and sustainability
- Governance
- Health and safety
- IP, media and technology
- Healthcare
- Integrated care
- Joint ventures
- Life sciences
- Medical law
- Mental health
- Mergers
- New care models
- Outsourcing
- Practitioners
- Private client
- Procurement
- Real estate
- Regulatory
- Social care
- Social enterprises
- Strategic estates partnerships
- Sustainability and transformation plans

About Hempsons

Hempsons is a leading national law firm specialising in health and social care, practitioners, real estate, charities and social enterprise sectors across the UK. Our highly experienced lawyers provide a number of cost-effective solutions for a range of private and public healthcare organisations, from employment law through to clinical negligence.

We aim to achieve our clients' objectives and provide support down to the last detail whether the issue is big or small, challenging or simple. We work with over 200 NHS organisations including NHS trusts, Foundation trusts and commissioning bodies, with services delivered by a team of over 130 specialist healthcare lawyers. A significant number of our employees hold dual qualifications, combining medical, dental or nursing qualifications with their legal credentials.

You can find a list of our employees including their specialisms online.



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IN PEOPLE

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