HEMPSONS

Social Care Newsbrief

Welcome

Welcome to the Summer 2022 issue of Hempsons Social Care Newsbrief. 2022 has so far had a shocking start, with ongoing Covid issues, recruitment and retention challenges, fuel costs and the cost of living crisis so we've tried to make this edition of the Newsbrief a positive one overall and provide you with hints and tips to improve your service and the lives of the people you support.

Social care does an amazing job, which was highly recognised during the pandemic, and we need to ensure we keep every service at the top of its game to keep that recognition alive.

We have a bumper edition of our Social Care Newsbrief this summer, reflecting how much is going on in the sector. We have articles on how to make yourself heard with the regulator from Rachael Hawkin and the implications of unlawful discharge from me and Jolena Bullivant-Clark. We also provide an update on Liberty Protection Safeguards.

Also, we've got a refresher from Helen Claridge on capacity assessments and best interest decision making, an article from Jolena Bullivant-Clark on the importance of getting contracts right and a feature from me on the fundamental standards of care – the cornerstone of the CQC requirements that you and your team are required to adhere to every day.

We're seeing CQC being ever-vigilant in taking enforcement action against providers, so everything you can do to demonstrate that you are meeting the regulations exactly how CQC want, is going to be a step in the right direction. Whilst CQC are becoming more digital in their approach to inspections, they will still be "crossing the threshold" and you need to be prepared to showcase your service and demonstrate how good you are.

Other useful articles cover commentary on the Procurement Bill 2022 and for those providers who have decided to move out of the sector, our social care real estate lead, Lisa Davison takes you through the steps you need to follow to make that process as smooth as possible.

Our social care advice line remains open for calls on any legal issues you are facing. You can email me to sign up for our newsflashes, podcasts and webinars.

We were really keen to have you all back into our offices for an in person seminar but are conscious of how busy you are, and have therefore made the decision to move to a series of four webinars which I hope you are able to attend and share with your teams. We've aimed to cover a wide range of areas so there's something for everyone. Click on the QR codes throughout to book your places!

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See all our social care resources

Regulating the regulator – make yourselves heard

Throughout the pandemic, the CQC have kept their regulatory approach under review to recognise the changing pressures health and social care services find themselves under.

The new legislation

In 2020, routine inspections were paused and the Emergency Support Framework devised. December 2021 saw CQC postpone inspections in hospital settings to assist with the vaccination roll out. In February 2022, CQC reviewed and updated its regulatory approach with:

- inspections from 1 February occurring for all health and social care services where there is evidence of risk of harm, including those areas previously postponed
- prioritised activity to help create greater capacity within social care
- increased focus upon urgent and emergency care systems

CQC's regulatory approach has evolved to assist the sector. The way in which they are regulated has not evolved, or changed. Providers are the CQC's regulators. If you do not feel that your inspection has been fair or balanced then only you can raise an issue.

In undertaking inspections, the mandatory need for a fair and balanced approach by CQC and the processes they follow, have not changed.

Any concerns you have should be raised within one year of the issue arising, but we would encourage raising concerns with CQC sooner rather than later to try and resolve issues as soon as possible.

Contact the individual you have been dealing with at CQC in the first instance, after which you will need to make a referral to the complaints team (complaints@cqc.org.uk). It's a totally separate team who will review your complaint and investigate. Alternatively, contact the national customer service centre and if you're still not satisfied with the outcome, make contact with the Parliamentary and Health Service Ombudsman via your Member of Parliament.

If, as a provider, you have concerns as to whether due process has been followed, or consider there to have been a failure to adhere to the principles of the Regulators' Code, prompt action should be taken.

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We are here to help with your dealings with the CQC. Find out more from our CQC resources page **https://hpsns.co/CQC**

Stay up to date with legal issues for the sector with our social care blog **https://hpsns.co/scblog**

Straight talk – the implications of unlawful discharge

In this case, the daughters of two care home residents who died of COVID-19 brought a judicial review of policies and guidance released in March and April 2020. These related to discharge of patients from hospitals and admission to care homes and allowed for asymptomatic patients to be admitted without the requirement for self-isolation or testing. The claimants successfully sought a declaration that the Secretary of State for Health, NHS England and Public Health England, had acted unlawfully or irrationally by failing to take into account data which suggested that COVID-19 could be transmitted asymptomatically when drafting the documents.

The judgment of the court is not as critical of the government's policies and decisions during the pandemic as some reports suggest. It was recognised that governmental decisions were made in the context of a novel disease, where scientific evidence was rapidly developing, and the situation was highly pressurised. In addition, they noted practical limitations such as a worldwide lack of PPE, limited availability of testing and significant staff shortages in the care home sector.

The claimants suggested that transfer of patients from hospital into care homes should have been conditional on an assessment of the ability of each care home to provide safe care, and that each patient should have been tested before discharge to a care home. This was dismissed as "*hopeless*" and it was said that the government "*could not sensibly wait for every care home to be assessed*". So, whilst the finding was that the government didn't always act on all of the available evidence, our view of this judgment is that the court will be cautious in retrospectively criticising decisions made during the pandemic and will take into account all of the circumstances.

The claimants in these proceedings were not seeking compensation and there is no suggestion in this judgment that bereaved families will be entitled to bring claims against care homes. The judgment, whilst perhaps validating concerns of families who felt the government did not do enough to protect their loved ones, does not necessarily create a cause of legal action. However, even in the absence of this judgment, the likelihood of claims can never be ruled out entirely.

In order to bring a claim for clinical negligence, it must be established that a duty of care is owed to the patient. Clearly, in this context, a care home will always have a duty of care towards those discharged into its services. Claimants would then need to establish that admitting an asymptomatic patient and not requiring them to self-isolate amounted to a breach of that duty of care. In our view, this is likely to be difficult to establish, given that care homes were doing their best to continue operating in unprecedented circumstances, and trying to follow changing guidance. Expecting a care home to go above and beyond recommendations and delay admissions in a time where all health and social care services were under pressure, could be considered too far.

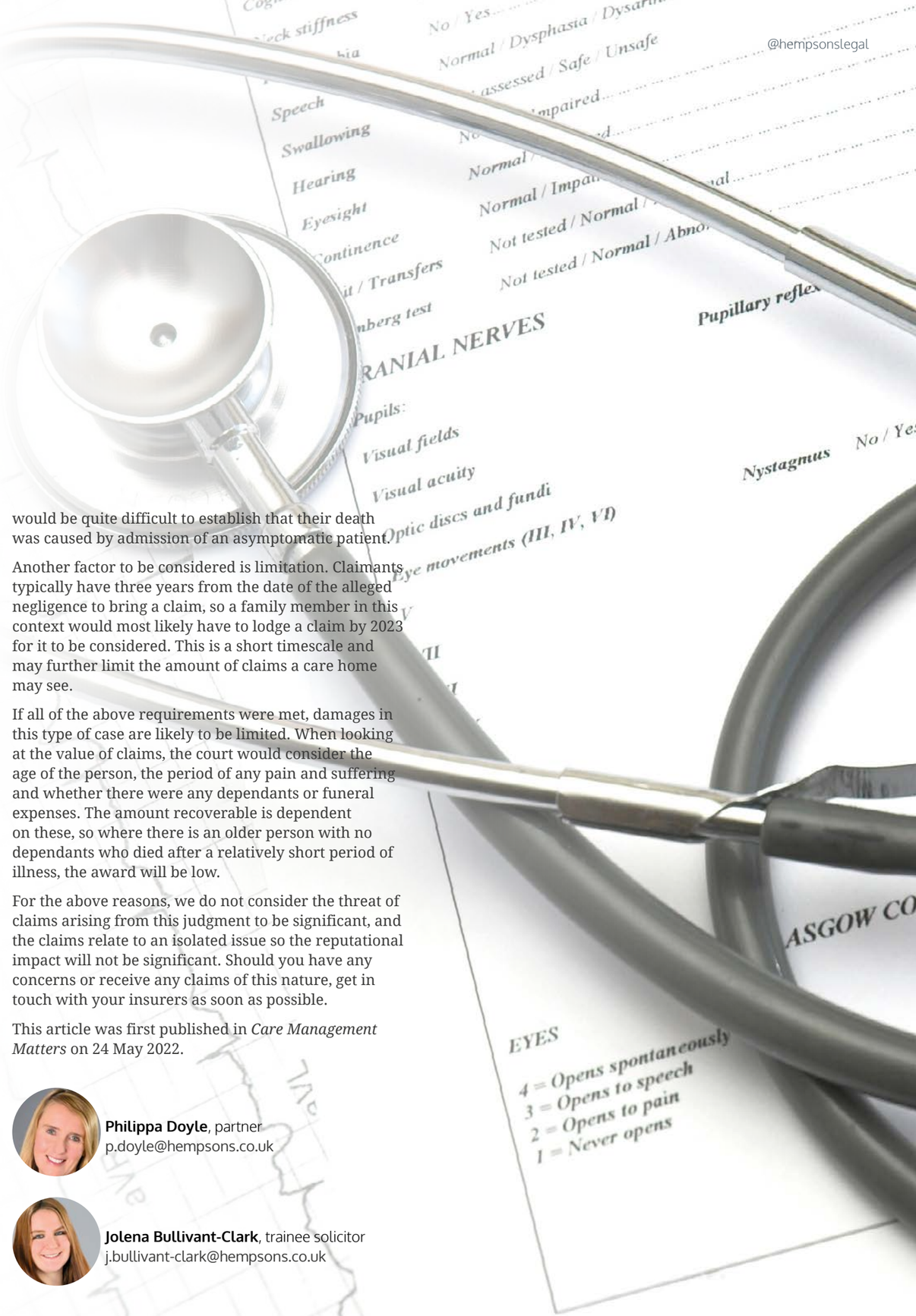
Even if a breach of duty was established, a claimant would need to prove that the breach of duty caused or materially contributed to the death of the patient. To put it simply, they would need to show that if the care home had required asymptomatic patients to self-isolate on admission, that person would not have died. In this context, a care home patient would already have significant co-morbidities and frailties, and it would be quite difficult to establish that their death was caused by admission of an asymptomatic patient.

Another factor to be considered is limitation. Claimants typically have three years from the date of the alleged negligence to bring a claim, so a family member in this context would most likely have to lodge a claim by 2023 for it to be considered. This is a short timescale and may further limit the amount of claims a care home may see.

If all of the above requirements were met, damages in this type of case are likely to be limited. When looking at the value of claims, the court would consider the age of the person, the period of any pain and suffering and whether there were any dependants or funeral expenses. The amount recoverable is dependent on these, so where there is an older person with no dependants who died after a relatively short period of illness, the award will be low.

For the above reasons, we do not consider the threat of claims arising from this judgment to be significant, and the claims relate to an isolated issue so the reputational impact will not be significant. Should you have any concerns or receive any claims of this nature, get in touch with your insurers as soon as possible.

This article was first published in *Care Management Matters* on 24 May 2022.



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Liberty Protection Safeguards – an update

What?
As contained in the Mental Capacity (Amendment) Act 2019 (yet to come into force), the Liberty Protection Safeguards ("LPS") are due to replace the current Deprivation of Liberty Safeguards.

LPS will provide a new framework for the protection of those aged 16 and over, in any setting who need to be deprived of their liberty, to ensure they receive required treatment or care.

The LPS reform will impact:

- mental health and acute NHS trusts
- CCGs (ICSs)
- local authorities
- independent sector providers – health and social care

Guidance in August 2021 set out intentions for a three assessment approach, greater input from family members and additional scrutiny by approved mental capacity professionals where there are objections to proposals.

The proposed Code of Practice will be a single code, covering both updates to the Mental Capacity Act 2005 ("MCA") and the new LPS.

When?
On 17 December 2021, the government announced the start date of April 2022 could not be met. On 10 March 2022, the government set out an overview timeline for next steps, confirming the implementation date will be set at the end of the consultation period.

On 17 March 2022, the LPS public consultation launched with publication of the draft Code of Practice and regulations. The public consultation will run until 7 July 2022.

Visit **https://hpsns.co/MCAcop** to access the open consultation, Code of Practice and draft regulations

Responses are not anticipated until the winter. It will be at least another six months after the consultation closes before the new regime comes into effect.

Once implemented, CQC and Ofsted will monitor and report upon LPS (England only) and there will be parallel running of LPS and the current Deprivation of Liberty Safeguards for one year. Existing authorisations will continue until they expire.

It is essential to prepare now, by reviewing resources required, continuing to make applications under the current regime and focusing on good MCA practice. Everyone affected by the new LPS regime should read the draft Code of Practice and engage with public engagement events, to have your say, assess resources and prepare.

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Capacity assessments and **best interests decision making**

Who regulates the regulator?

A refresher
How providers apply the Mental Capacity Act 2005 is a key aspect of any CQC inspection and can mean a drastic difference in enforcement, rating and future inspection timetable.

This article provides a refresher of the key points of this legislation in terms of capacity assessments and best interests decision making. We also offer some key considerations which arise mainly from our experience of CQC reports and enforcement action.

The core principles
1) a person must be **assumed to have capacity** to make his own decisions unless it is established that he lacks capacity
2) a person is not to be treated as unable to make a decision unless **all practicable steps to help him** to do so have been taken without success
3) a person is not to be treated as unable to make a decision merely because he makes an **unwise decision**
4) an act done, or decision made, on behalf of a person ho lacks capacity must be in his **best interests**
5) before the act is done, or the decision is made, regard must be had to whether its aim can be as effectively achieved in a way that is **less restrictive** of the person's rights and freedom of action

Assessing capacity
A capacity assessment should be criteria-focussed, evidence-based, person-centred and non-judgemental.

There are the following questions to ask in assessing capacity:

1) Is the person able to make a decision?

A person cannot make a decision for himself if he is unable to:
- **understand** the information relevant to the decision
  - relevant information includes the reasonably foreseeable consequences of the decision including not taking any action
  - they need not understand every aspect of the decision but should understand the salient factors
- **retain** that information for long enough to make the decision
- **use or weigh** that information in order to make the decision
- **communicate** the decision by any means

2) Is there an impairment or disturbance in the functioning of the person's mind or brain?

This is usually a clinical question although the impairment or disturbance does not need to be a formal or permanent diagnosis. For instance, it can include the symptoms of drug or alcohol abuse.

3) Is the person's inability to make the decision because of the impairment or disturbance of the mind?

Questions 1 and 2 above have to be linked together in order to lead to a lack of capacity. If your capacity documentation or proformas do not include the requirement for this link then you may wish to consider amending them.

Making a decision in a person's best interests
Who is the decision maker is not a simple question. When a decision relates to treatment, care arrangements or accommodation, this might be a doctor, nurse, social worker or, in some cases, the court. For day-to-day care,

it will be the carer responsible for that care provision. If there is a lasting power of attorney or court appointed deputy, they may be the decision maker.

For assessing best interests, there is a non-exhaustive checklist of considerations as follows:

- assumptions should not be made on the basis of age, appearance, condition or behaviour
- the person's wishes, feelings, beliefs and values (current and those expressed before losing capacity to make the decision, including within an advance decision or statement)
- whether the individual will regain capacity and when
- encouraging the person to participate in the decision as fully as possible
- a decision must not be motivated by a desire to bring about death
- the views of anyone named by person as someone to be consulted
- whether there is a lasting power of attorney or deputy

Key issues and considerations
It is not for a service user to prove they have capacity. They are presumed to have capacity in relation to a specific issue until an assessment demonstrates that they do not.

Be wary of generic capacity assessments. "*Miss X lacks capacity*" on its own is of little assistance and will not go down well with CQC inspectors. Capacity is time and decision-specific and documentation should reflect this.

Be clear in your documentation especially in relation to:

- the decision at issue
- the options for moving forward
- the salient details of the decision
- the efforts taken to maximise capacity and encourage the person's involvement
- the elements of the capacity test including the link between the inability to make a decision and the impairment/disturbance
- the chronology of a best interests decision and the key players

Whilst consistency of understanding and implementation is important, it would be too onerous and disproportionate to employ exactly the same process for each capacity assessment and best interests decision. For instance, for everyday and relatively trivial interventions, it would not be necessary to demonstrate a detailed capacity assessment and best interests process for each and every intervention. The more serious the decision and its consequences, the more thorough the capacity assessment and best interests process and the more detailed the recording.

If you would like further information or to arrange bespoke training, please contact a member of our social care team.

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CQC – care staff training

"The sessions really brought the regulations to life."

Paul McCay, chief executive
Wilf Ward Family Trust

How well do you know the fundamental standards?

As a registered manager of a regulated activity you are responsible for ensuring your service operates in accordance with the fundamental standards set out in the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014.

If CQC identify a breach of these fundamental standards during an inspection it is likely they will take action. The nature of the action will depend on the severity and number of breaches.

It's a business-critical requirement for all registered managers and care staff to be clear on what your responsibilities are.

Every service should ensure they have a copy of the fundamental standards and that policies and procedures are in place to support them.

We offer a bespoke training package for registered managers on how to ensure you are meeting the fundamental standards.

Ensure you are clear on, and operating in accordance with:

Reg 9 – person centred care
Reg 10 – dignity and respect
Reg 11 – need for consent
Reg 12 – safe care and treatment
Reg 13 – safeguarding
Reg 14 – meeting nutritional and hydration needs
Reg 15 – premises and equipment
Reg 16 – complaints
Reg 17 – good governance
Reg 18 – staffing
Reg 19 – fit and proper persons employed
Reg 20 – duty of candour
Reg 20A – display of performance assessments

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Fundamental standards of care

The cornerstone of your service

The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 have been with us for over six years now but how well do providers, registered managers and staff teams know them?

Throughout 2021 and 2022, in a series of articles, podcasts and webinars, Philippa Doyle, head of our social care team, has been breaking each standard down into bite size chunks and looking at quick wins and key points that every service can take on board.

The theory being that if you can point to how you meet the wording of the regulations, you should find your team are more engaged, those people who you support have their lives enhanced and CQC are impressed – helping you ever nearer to that sometimes illusive green star of outstanding.

Person-centred care

This is all about knowing the people you support and treating them as individuals.

Care must be "*appropriate, meet needs and reflect preferences*".

Appoint person-centred care champions in your service and as part of their day-to-day job get them to spend time with each person you support to make sure you're helping them live life the way they want to live it. Preferences are important. Help your clients to express choice – or show them what choice is on offer to enable them to become individual. But don't limit those choices to what you do in your service – the world is still their oyster. Help them access it. Make sure your service is represented as their home, rather than them being "*in a home*".

Dignity and respect

This is linked to person-centred care – dignity and respect isn't just privacy – closing doors and curtains should be a given. It's about supporting autonomy, independence and involvement, that awful 21st century phrase of "*supporting people to live their best life*". Remember the protected characteristics under the Equality Act too – age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation. Don't let your service or staff be caught out.

Need for consent

Care and treatment of service users must only be provided with consent, or if someone is unable to give consent, a decision is made in accordance with the Mental Capacity Act 2005, ie, that a valid Best Interests Decision is made.

But even someone assessed as lacking capacity, can often still give consent on a basic level. "*Would you like a cup of tea?*" "*Would you like a bath?*" "*Can I help you brush your hair?*" "*No I want to do it myself*". It links back to dignity and respect and person-centred care – support people to do what they can for themselves, and ensure you have consent to support them with what they can't.

Where Best Interests Decisions need to be made – always remember this isn't just about asking the GP, it's about consulting all those with an interest in P's welfare and looking to make the decision that P would have made for themselves, if they were able to. Make sure all the detail is clearly documented in their records so there is no doubt as to what decision has been taken and who was involved in that process.

Safe care and treatment

This is one of the biggest standards to get right and the one that forms the basis for many ratings changes in services. There are nine key steps a provider and their service must take to provide safe care and treatment. Good record keeping, documents and evidence are at the core of meeting this standard. Risk assessments, mitigating risks, premises and equipment checks, medicines management, infection prevention and control and shared care are all big areas on their own where it is easy to fall from the standard. This is another big area where you could appoint champions and share responsibility amongst the team.

Tips

- have your facilities team do daily or weekly walkarounds of the service to identify any remedial work requirements, as well as responding daily to odd jobs
- appoint medicines management champions – audit MAR charts to make sure there are no gaps
- appoint IPC champions – do spot checks on PPE and mask wearing. CQC are taking enforcement action on providers where PPE is not worn correctly, but remember you can pull them up too if they're not wearing their masks properly. It's your service so you must be in control and can act if someone isn't following the rules, to protect residents, staff and visitors
- with shared care, make sure there are clear lines of responsibility as to who will deliver what kind of care and who to contact in the event its required. Every care file should have GP/dentist/social worker contact details clearly identifiable, and any questions should always be asked – don't make assumptions!

Safeguarding service users from abuse and improper treatment

Safeguarding isn't just about the manager making a local authority referral. It's about every staff member knowing what safeguarding means, and what it looks and feels like – if in doubt, report it, to the local authority and CQC under your notification obligations under regulation 18 of the Registration Regulations.

All individuals must be protected from abuse and improper treatment.

Systems and process must be established and operated effectively and efficiently to allow investigations to take place immediately there is any suspicion.

And remember your DoLs authorisations here too – make sure you get your renewals in on time, chase the local authority and watch this space for news on the new Liberty Protection Safeguards which should have come into force in 2022, but are still subject to consultation until July 2022.

Meeting nutritional and hydration needs

This one doesn't apply to everyone – it does apply if care and treatment involves the provision of accommodation by the provider, so care homes and supported living or if there is an overnight stay on premises used for a regulated activity. Respite services will be covered but also if meeting nutritional and hydration needs is part of the commissioning arrangements, some domiciliary care services may have clients where nutrition and hydration is required and some where it isn't.

Confused?
Don't be. Just make sure you are clear on each person you are required to monitor food and fluid intake for, and those who have a special diet.

Make sure the care plan is clear, the kitchen staff are clear, P is clear, and care staff are clear.

But remember regulation 11 – consent. Don't breach it, don't force feed, don't go against any best interests decisions and if someone is refusing to eat and drink report it ASAP. Get the best interests decision making process in place as soon as possible.

What does the regulation say?
Nutritional and hydration needs means:

(a) receipt of suitable and nutritious food and hydration which is adequate to sustain life and good health. Not takeaways and sausage rolls

(b) receipt of parenteral nutrition and dietary supplements when prescribed by a health care professional. Follow what they say, don't make your own decisions, but do refer back if something doesn't feel right

(c) meeting reasonable requirements arising from preferences or their religious or cultural background. Be careful with kosher or halal foods but also don't keep serving scrambled egg for breakfast if the person didn't like it when they were younger

(d) If necessary, support a person to eat or drink. Make sure staff are properly trained to do this. Support is not force-feeding. Ensure your staffing ratios are correct

Premises and equipment

(1) All premises and equipment used by the service provider must be:

- *clean*
- *secure*
- *suitable for the purpose for which they are being used*
- *properly used*
- *properly maintained*
- *appropriately located for the purpose for which they are being used*

Points to consider

- consider appointing an equipment champion
- consider creating an auditing schedule and ensuring it is followed
- do all staff know how to use all equipment?
- ensure training is up to date on equipment as well as the equipment itself being fit for purpose and what the client needs
- ensure you know your client's needs and preferences and act on them. Detail them in the care plan to make sure everyone knows

Remember you must maintain standards of hygiene. These little things help make the difference and make your home the person's home, and not just "*a home*".

Receiving and acting on complaints

Any complaint must be investigated, with necessary and proportionate action taken in response to any failure identified by the complaint or investigation.

Tips

- have a complaints process
- have a complaints log
- investigate in a timely way
- feed back actions (and feed into duty of candour)
- analyse feedback and share with staff – this is the one thing that CQC pick providers up on most for failing to do
- staff feedback and lessons learnt exercises are invaluable
- learning outcomes, making big or small changes to the service because of that feedback and investigations and then showcasing to CQC will help to evidence an open culture
- have a compliments feedback process as well as complaints
- make it as easy as possible for residents and families to give feedback
- do regular surveys, 1:1s, and/or feedback groups
- get people talking and inputting into anything that shapes the service

Good governance

What is good governance? What does it look like?

It's everything. The whole system approach to how you run your service.

What does the regulation say?

(1) Systems or processes must be established and operated effectively to ensure compliance with the requirements in this Part

It's all about assessing, monitoring, improving, managing, mitigating risk, maintaining documents and records, auditing and learning. It's about knowing these fundamental standards and constantly striving not just to meet them, but to exceed them.

What could a good governance champion do?

This refers to regulation 12 – safe care and treatment.

Auditing is a fantastic way of ensuring anomalies are picked up and addressed as soon as possible. Spreading the work and ownership of different areas of the business will also help drive up quality and standards.

Person-centred care champions, or equipment champions can feed back into a governance plan. Reviewing themes and trends can help identify areas of the service that could improve or a need to deliver care differently.

Staffing

This is another area where, if you get it wrong, CQC will come down hard on you.

Providers must have sufficient numbers of suitably qualified, competent, skilled and experienced persons in order to meet the requirements of this part.

No one will tell you what sufficient means – you need to evidence to CQC that your dependency ratios are safe and appropriate to meet your client's needs.

Make sure personnel files, practising privileges files, agency contracts and any associate paperwork is clear, you have the right people for the job and their mandatory training, DBS and relevant processes are all up to date. It's your responsibility to keep this information under constant review and make sure it's all there for CQC to inspect.

Staff are the biggest outlay in any service – make sure you have the best!

The regulation also requires you to ensure they receive such support, training, professional development, supervision and appraisal as is necessary so be an outstanding provider and ensure that as an ongoing embedded part of your culture and service, that training and support is an ongoing part of the service.

Fit and proper persons employed

This regulation links to staffing. Persons employed for the purposes of carrying on a regulated activity must:

a) be of good character
b) have qualifications, competence, skills and experience
c) be able to properly perform tasks which are intrinsic to the work

You must have recruitment procedures established and operating effectively and you must have personnel files with all relevant information in them including ID, DBS, etc.

Make sure you act when something isn't right. Get HR support if you don't have an in-house team. Not taking action with poorly performing staff can very quickly have a wide-reaching effect on the rest of the service, staff, clients and your rating.

Duty of candour

- registered persons must act in an open and transparent way. When something goes wrong, you must notify the relevant person and provide reasonable support
- get an investigation under way and report back
- include an apology and do it in writing
- duty of candour goes a long way to maintaining relationships with clients and their families – being open and honest is often all that people want

Requirements as to display of performance assessments

This is easy – get your CQC certificate and rating on display! In your office and on your website. Make it prominent and easy to see. CQC will take prosecution action if it's not there.

The fundamental standards are the cornerstone of what you do. Get them right and everyone benefits – the service, the staff team and most importantly, the people you support!

I deliver bespoke training on the fundamental standards to all providers of regulated activities. Get in touch for a quote and discussion on how we can help you with anything CQC related.

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The Procurement Bill 2022 – new procurements, same old challenges?

On 12 May 2022, the Procurement Bill was published in the House of Lords and is currently being debated. The intention is for the Bill to make its way through the legislative process and obtain royal assent sometime in 2023, with a minimum period of six months' notice before 'going-live'.

The government has stated that the Bill will: create a simpler and more flexible system for public procurement; open up public procurement to new entrants such as social enterprises, allowing them to compete for and win more public contracts; and embed transparency throughout the commercial lifecycle so that public spending can be properly scrutinised.

As stated in a previous Hempsons article, the Bill is lengthy and there will be much to consider over the coming weeks and months. Changes are likely, to at least some extent, prior to royal assent and we are informed that much of the detail may be included in (yet to be published) secondary legislation. However, one aspect of the Bill which does not, on the face of it, appear to make revolutionary changes to the current regime is around procurement challenges and remedies. The remedies available to bidders remain broadly the same.

Remedies available

Prior to a public contract being entered into, the remedies of an order (a) setting aside a decision of the contracting authority (b) requiring the contracting authority to take certain action(s) and (c) for the award of damages, all remain available.

The Bill maintains the concept of the automatic suspension on contract making in circumstances in which a claim is issued prior to the contract being entered into. However, interestingly, this appears to be limited to circumstances in which a claim is issued during the standstill period, as opposed to any point prior to the contract being entered into, as is the case under the current legislation (it is worth noting that the standstill period outlined in the Bill is a period of eight working days from the publication of a contract award notice rather than the current 10 calendar days running from the issuing of standstill letters).

It was envisaged that the current test applied by the Court in deciding if the automatic suspension should be lifted (ie is there a serious issue to be tried?; are damages an adequate remedy for the parties?; where does the balance of convenience lie? (known as the American Cyanamid test)) would be replaced by a simple, single limb test which provided for suspensions to be lifted where there were overriding consequences for doing so.

The Bill, in fact, requires the Court to take into account:

(a) the public interest, including the public interest in:
  (i) upholding the principle that public contracts should be awarded, and contracts should be modified, in accordance with the law
  (ii) avoiding the delay in the supply of goods, services or works provided for in the contract or modification
(b) the interests of suppliers, including whether damages are an adequate remedy for the claimant
(c) any other matters that the Court considers appropriate

It will be interesting to see how such a test (which is, in many ways, arguably not dissimilar to the existing one) is applied by the Court, how different the analysis will be in practice and the extent to which the existing case law will be applied.

Post award, the remedy of ineffectiveness essentially remains, but will now be known as the remedy of *"set aside"*. Damages will also be available in such circumstances, although the need for the Court to impose a civil financial penalty when making an order of set aside is not included.

Also, set aside will be available if the Court is satisfied that the claimant was denied a proper opportunity to seek a pre-contractual remedy because *"the breach became apparent only after the contract was entered into"*. This is new and, if it remains, may well be the focus of much (satellite) litigation.

Limitation periods

The general 30 day limitation period, commencing from the date the claimant knew or ought to have known of the circumstances giving rise to the claim, in which a claim must be issued remains the same (as does the ability of the Court to extend this period to a maximum of three months).

The *"long stop"* date by which a claim for set aside must be started is six months from the date of the contract was entered into, as is the case with a claim for ineffectiveness under the current regime. However, how that long stop date interacts with the 30 day limitation period is seemingly different and may need some clarification.

Proposals not adopted

On publication of the government's response to the consultation which followed the publication of the green paper, *Transforming Public Procurement*, it was clear that several of the original proposals made, such as imposing a cap on the level of damages available to claimants, were not, in fact, going to be adopted.

One proposal in the green paper which was of particular interest to procurement litigators was the abandoning of the need for contracting authorities to issue standstill letters following evaluation and prior to entering into the contract with the preferred bidder. It had been proposed that the contracting authority would, instead, disclose to each bidder a suite of documentation created during the evaluation, both in relation to its own bid and that of the preferred bidder (redacted as appropriate). It was felt by many litigators that this could lead to a great deal of complaints/litigation/requests and applications for disclosure. Despite the government's response to the consultation confirming its intention to proceed in this way, the Bill, in fact, requires contracting authorities to issue to each bidder an *"assessment summary"*, setting out information regarding the assessment of that bidders bid and that of the preferred bidder. The type of information and level of detail to be included in such a document is not specified but it may well be that this document will essentially replicate standstill letters as we know them now.

Regarding practicalities of procurement of claims, such as the use of written pleadings to expedite claims and reduce costs; a fast track system; and enhanced (early) disclosure requirements, these previously raised proposals are not addressed in the Bill. It appears that issues such as these may be dealt with via a revision of the current Technology and Construction Court ("TCC") Guidance Note on Procedures for Public Procurement Cases and/or through amendments to the Civil Procedure Rules.

Conclusion (and a note of caution)

Therefore, as stated above, the changes may not be revolutionary. However, if introduced, they will no doubt generate points of dispute whilst those involved in procurement get to grips with the new landscape.

Finally, a warning. Whilst procurement professionals will continue to watch, with interest, how the Bill develops over the coming months, it is, of course, essential to remember that the existing legislation will apply until the new regime goes live. Compliance with the current rules remains essential.

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The Court of Protection **- a brief introduction**

What is it?
The Court of Protection is a specialist court established under the Mental Capacity Act 2005 to determine issues relating to individuals who lack capacity to make specific decisions.

The Court of Protection has the power to make decisions concerning personal welfare and healthcare, as well as property and financial affairs.

When could you be involved in the Court of Protection?
One or more of your service users may be the subject of Court of Protection proceedings. As a care provider, your involvement in Court of Protection cases may be formal, or informal varying from the following non-exhaustive list of issues:

- application of the Mental Capacity Act 2005 and Code of Practice
- capacity assessments and best interests decisions
- disclosure requests
- assessments to ascertain whether identified care needs can be met
- attendance at round table meetings
- facilitating visits by advocates and litigation friends (whether in person or remotely)
- deprivations of liberty
- discharge and conveyance plans
- behavioural contracts

Considerations
Court of Protection proceedings have the best interests of the individual subject to the proceedings at its core.

Initial involvement by care providers will likely be with a view to assisting the court and parties with information gathering. Ensuring notes and assessments (in particular capacity assessments and best interests decisions evidencing proper application of the MCA and Code of Practice) are sufficiently detailed, clear, contemporaneous and easily accessible is key to being able to comply with requests in a timely manner.

Court of Protection proceedings are subject to what are known as transparency orders, prohibiting information from being disclosed to the public, such as the name of the individual, their family members or witnesses requiring care and consideration.

Please get in touch if you would like further information or to arrange bespoke training.

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Issues to consider when selling your care home **post-pandemic**

The effects of the COVID-19 pandemic have placed unprecedented challenges on healthcare professionals across the world, particularly in the social care sector. From the restriction on visitors to the increased regulatory measures and pressures of a restricted workforce, each factor has its own economic and personal consequences and has put a huge strain on the care sector.

These added pressures have forced many social care operators to alter drastically the way they operate, both in the short and long term. This in turn has caused providers to reconsider their plans for the future and in some instances accelerate their sale plans.

Should you wish to consider selling your care home during these uncertain times, the next steps are crucial in ensuring you can realise the maximum potential from the sale of your facility.

Is now the right time to sell?
There are many factors which may drive a sale. Some may have been brought about by the pandemic, and others simply attributable to the provider's own exit strategies. Either way, continuity of the facility for the benefit of the patients is key, and with the social care landscape changing considerably over the last two years, this poses a challenge for buyers and sellers alike.

The practical hurdles brought about by the pandemic saw the vast majority of ongoing sales being suspended. However, there are signs the market is recovering well, with growing confidence in the sector from both buyers and funders. The healthcare sector has always been considered a safe sector to lend in and there is no sign of this changing.

We have also seen a renewed appetite for investment in the regions outside of the traditional cities. This reflects the current changes in society with a shift to home working and therefore wanting more local amenities, including care facilities. Regional areas are therefore becoming more popular with buyers looking to capitalise on this.

Who is my potential buyer?
The decision as to who to sell your car home to is a personal one. However, it seems prudent, particularly in the current market, that marketing through a specialist agent will ensure the price achieved is maximised and enables you to consider all offers on their own merits. Selling straight to a large corporate may bring about a speedier conclusion but may not necessarily be in the best interests of the seller or its residents.

Other factors you may wish to consider are whether your staff and residents will have continuity in standards of customer service and care you have provided. A lot of time and effort goes into building a successful care home and you need to be comfortable that a potential buyer will protect the team you have built up, protect your brand, your residents and everything that has made it a success. For continuity purposes you may also end up staying on at the care home for some time post-sale. In such instances, it is imperative you can work collaboratively with the incoming party.

How can I maximise property valuations?
Your care home is a valuable asset so if you have decided to sell it remains critical to obtain a valuation from an independent expert with specialist experience before you put the business on the market and accept

an offer. The health and social care sector is complex, and care homes vary significantly in terms of how they are run, what assets and property they hold and the ratio of private to publicly funded residents. There are many key factors which will impact on value. This, coupled with the additional practical challenges we face today with a lack of comparable up-to-date market data makes it more important than ever to instruct a broker with specialist experience and access to a good supply of buyers.

There are some concerns around whether values would be prejudiced by the uncertainty the pandemic has caused, but this is yet to be seen. Banks are being very realistic about values and acknowledging that a dip in turnover is temporary and completely justified, given the lockdown periods and strict regulatory measures.

In any market, when selling your business you want to get the best possible value for it. The best way of achieving this is by preparing for sale at the earliest opportunity.

This includes:

- **look at efficiencies within the care home** – many operators have taken the opportunity to look at running costs and make potential savings. Lower running costs in turn increases profitability and maximises values
- **look at sustainability of income** – are there ongoing issues to address around resident numbers and how the income of the care home will be maintained?
- **look at liabilities of the care home** – obtaining mortgage/loan settlement figures at an early stage. Are there any early repayment charges?
- **look at maintenance and repair** – ensure all assets such as kitchen equipment, lifts etc are maintained and the building is otherwise in good repair and decoration
- **look at getting your house in order** – gathering key documentation for due diligence purposes at an early stage including management accounts, resident lists, assessments, title deeds to the property, lease (if applicable), employee list/ contracts, the Care Quality Commission (CQC) registration details

How can I ensure the sale goes through quickly and efficiently?
Each sale is unique, and timeframes will vary depending on individual circumstances. The legal process itself can take anything from eight weeks to twelve months. However, to give you the best footing, it is always good practice to agree a thorough set of heads of terms at the outset of a transaction.

Given the changing landscape in social care, there are a number of emerging risks to sellers which, together with the commercial terms of the deal, need to be approached with caution and addressed at heads of terms stage:

- **deferred consideration** – this is where only part of the price is paid on completion of the sale and the balance later. The buyer may well have been depending upon future income to generate cash to pay the balance of the purchase price. However, this should be approached with caution as there may be added uncertainty as to how income will be structured in the future, whether care homes will be subject to future restrictions and ultimately whether the buyer will have the necessary funds to pay the balance when due
- **cost undertakings** – it has become common practice in more recent years for buyers to pick up the seller's legal bill if the sale does not proceed. If this is to be agreed, make sure the parameters are clearly set within the heads of terms and otherwise approved by your legal team. The intricacies of such agreements can often be heavily reliant on diligent drafting
- **CQC registrations** – the CQC is still suffering a backlog of work due to the pandemic, with applications taking up to twenty weeks to progress. This can cause significant delays to transactions and highlights the importance of engaging regulatory bodies in the transaction as soon as possible

Selling a care home is quite different from selling other businesses. There are a great number of specialised legal and financial issues that must be handled correctly. Employing a specialist healthcare lawyer and accountant with experience in the care home sector will ensure you are guided through the complex procedures required when transferring your facility to a new owner.

Conclusions
If nothing else, the pandemic has taught us that the future is unpredictable. With that in mind, it isn't surprising that sellers are continuing to approach the market with caution.

However, care homes and other residential facilities are expected to remain viable businesses in the medium and long term, with a pent-up demand from a wide pool of buyers and readily available funding options continuing to be available. With a well thought out exit strategy and a team of specialist advisers and realistic expectations, you will be best placed to focus on continuity of a care home robust enough to sustain any future changes to the social care landscape.

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Contracts – why we need them and what to look out for

A contract sets out the terms and conditions of the relationship you are entering into with a commissioner, service provider or other organisation. In very basic terms, the contract covers:

- who is doing what; the obligations upon both parties to the contract and how these should be met
- how much you and/or the other party is being paid, how and when
- each party's rights and obligations to bring the contract to an end, including in the event of the relationship breaking down

Having a written agreement provides certainty to both parties and protects your interests in the event that there is any confusion or difference in interpretation, including as to the scope of the arrangement and/or each party's responsibilities. However, there is a danger of accepting, or tendering on the basis that you will accept, the other party's standard contract without either reading or fully understanding the terms and their implications.

For consumers there are legal protections against unfair terms being imposed on them by businesses. Between organisations and businesses, however there is much more freedom to contract, and less protection in the event that the terms are unbalanced. There are, as there often are in law, exceptions to this general rule, but the "*basic*" position is one of "*buyer beware*".

Historically the courts (and to date Parliament) have considered that largely it is for businesses to sort out their contracts without much need for protection and have left business to business arrangements largely unregulated. This may well make sense between two large well-resourced businesses, but the relevant legislation does not differentiate between a multinational businesses with offices worldwide, and a team of lawyers at HQ, and a smaller entity such as a care home. As such, every organisation needs to know what it is signing up to when it agrees a contract, or it may find itself stuck with the terms proposed, however unfair these are felt to be.

The essential guidance is therefore to read the contracts you are agreeing to be bound by. The law assumes that if you have signed a contract, that you have in fact read it. Except for a very small number of contract types, the law does not require contracts to be signed at all.

Terms to look out for

When reviewing any contract you should, as a minimum, understand the provisions covering:

Parties	Who are the people/organisations signing up to the contract? Is it with the commissioner or supplier you expected or a third party? Are you signing up as an individual or on behalf of your organisation?
Is it clear what you are being paid for/you are getting what you are paying for?	Is the contract clear on what will be supplied by who, and when, and what the consequences are for delay? Are there any key performance indicators for the parties to work to?
Risks	Is it clear under the contract where all risks sit at each stage of the contract? For example, if you are buying expensive equipment, who bears the risk (and obtains insurance) for the cost of delivery?
Term of contract	How long does the contract last? Can it be extended automatically? Do you understand how the contract is to be brought to an end, and are any notice provisions clear?
Price and payment	What gets paid and when? Is the party entitled to withhold payment for non-performance of the contract?
Variation	Is either party entitled to vary or renegotiate certain terms of the contract? Is this a mutual or a unilateral right?
Employment issues and TUPE	Will the contract result in a TUPE transfer of employees? Is this clearly provided for in the contract? What rights and liabilities do you have regarding transferred employees?
What happens if it all goes wrong?	What are the rights of termination? For example, does the contract have a no-fault termination clause to allow earlier than expected termination? Is there any liability for a termination payment?
Liability	To what extent are the parties liable for any defaults? Are there any exclusions/caps on liability? Is the party required to take out a specific insurance policy?
What happens at the end?	Is there any ongoing responsibility regarding confidentiality, provision of information, collection and delivery of patient records? Are there likely to be any large charges for moving stored paper from one supplier to the other?
GDPR	What terms are in a contract covering GDPR? What information will be passing between the parties?

With basic supply contracts, if you have read and understood the agreement you may rarely need specific legal advice on the terms. Of course, if you do not understand certain provisions then you should consider seeking such advice if the contract is of sufficient value or complexity.

Organisations tendering for contracts (especially those which are being procured by public sector bodies such as local authorities and in most cases will be caught by the Public Contracts Regulations 2015) should strongly consider asking clarification questions during the tendering process in order to challenge and/or seek to understand better any unclear or unfair terms. Raising these during the procurement process and before the tender is submitted provides the opportunity to determine whether the contractual risk is commercially acceptable and often results in the commissioner amending the terms in question.

Our specialist commercial team can help you with any of the points raised in this article, or any other contractual issues that may arise.

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News

Hempsons summer social care webinar series

Hempsons experts will give the following legal updates in our summer social care webinar series:

5 July Liberty Protection Safeguards update
7 July Getting ready to sell
12 July Employment law – where are we now
14 July CQC update

To register please visit our website
https://hpsns.co/scwebinarsJuly

haysmacintyre and Hempsons hospice and care benchmarking report

The "*Hospice and care benchmarking survey report 2021*" is the fourth study compiled by haysmacintyre LLP and Hempsons, with the aim of sharing best practice in the sector and enabling management and trustees to assess their own structure, governance and monitoring procedures against other comparable charities.

The survey was constructed to offer a broad range of benchmarks and we have expanded the survey to capture additional information on training provided to trustees, how risk registers and reserves policies have been adapted in response to the pandemic, what information is provided in management accounts to trustees, and to explore if there have been any changes experienced in discussions with funders.

Download the report here
https://hpsns.co/HHreport

Drama highlighting challenges in the care sector

Hempsons recently collaborated with not-for-profit organisation Harrogate Neighbours to welcome some 50 guests (families, stakeholders and local businesses) to enjoy a performance of "*Fighting for Life*" – a play written by Brian Daniels to tell the story of one family's struggle to access care for their elderly parents. The evening event was designed to highlight the very real issues and challenges that many families face when seeking help and support for their loved ones towards the end of their life.

The evening concluded with a Q&A session after the performance with a panel made up of Sue Cawthray, Philippa Doyle and Brian Daniels where guests were able to ask questions relating to the topics presented.

Speaking on behalf of Harrogate Neighbours, Sue Cawthray, CEO said, "*The play was incredibly insightful and brought the issue so many families face to the forefront. As a care provider we want to be a pillar of support to residents, relatives, staff and all those dealing with end of life or bereavement*".

Helen Hirst, an associate in Hempsons charities and social enterprise team also commented that "*as a firm, we place a lot of emphasis on ties with the local community. Teaming up with Harrogate Neighbours in this way enables us to show support for some of the issues facing the sector, as well as being involved in a local community event which was a big success*".

For more information
https://hpsns.co/hnffl

Social care legal advice line

Hempsons is experienced in advising on all elements of law and regulation that impact on the social care sector:

Our expertise

- charity law
- commercial property
- community care law
- contracts
- corporate law
- CQC regulatory
- data protection and security
- disputes and litigation
- employment law
- fundraising
- health and safety
- inquests and coroners
- judicial review
- mental health law
- safeguarding
- tendering

> *Hempsons offered invaluable legal advice and support that led directly to the successful outcome of a challenging care home issue. They were clear and reassuring in their dealings with us, the charity, and the commissioner, resulting in an entirely satisfactory outcome. Strong legal support and an immediate response when required exceeded our expectations.*
>
> HS4LC

Social care advice line

Hempsons social care advice line is open between 9am and 5pm, Monday to Friday. Our team of experts offer providers up to 15 minutes free legal advice.

Call **01423 724056** quoting **'social care advice line'** or email **socialcare@hempsons.co.uk**

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HEMPSONS

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 social care sector

- acquisitions
- 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

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 five 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

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