

Social Care Newsbrief



**Includes a
fundamental
standards of care
special feature**

Mandatory COVID-19 vaccines for staff

Capacity assessments
and best interests
decision making

Fundamental standards of care – The cornerstone of your service

Issues to consider when
selling your care home
post-pandemic

**Contracts – Why we
need them and what
to look out for**

Welcome

Welcome to the Autumn 2021 issue of Hempsons Social Care Newsbrief. I wish I could call it our post-pandemic edition, but as I type this introduction, cases in the community continue to rise and challenges for the sector continue unbounded – not least with the requirement for all care home staff to be vaccinated, which is adding an additional challenge to the already difficult recruitment situation. You can find out more about vaccines in the article by our social care employment expert Martin Cheyne.

We've aimed to make this issue 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 mid-pandemic, and we need to ensure we keep every service at the top of its game to keep that recognition alive.

To help providers to do that, 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 special 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.

I've been running a series of articles, podcasts, and webinars on the fundamental standards as I believe there are lots of little things that everyone in a provider service can do to improve the lives of the people you support, improve staff engagement by giving every member of the team a small area to be a champion for, and hopefully boost your CQC rating too.

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.

And finally, 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. Hopefully, in Spring 2022 we will be inviting you back into our offices for in-person seminars, but in the short term we are exhibiting and I'm speaking at the Care and Dementia Show in Birmingham on 15 and 16 September, so do come and say hello if you are attending. I'm also speaking at the Northamptonshire Care Conference on 23 September and we are running a webinar on 29 September as part of our series on the fundamental standards of care.



Philippa Doyle, Partner
p.doyle@hempsons.co.uk

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Mandatory COVID-19 vaccines for staff

What do we know and what is to come?

We now have new legislation requiring care home staff to be vaccinated and there's a consultation due on mandatory vaccination in the wider NHS and social care sector. It's hugely controversial but here's some headlines of what we know.

The new legislation

On 22 July 2021, the government made the new Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021 will bring into force mandatory COVID-19 vaccines for those working in and attending care homes from 11 November 2021. Although the regulations are wide ranging and they require full vaccination, there are exemptions.

Exemptions include:

- Clinical reasons why the worker/visitor cannot have the vaccine
- Emergencies
- Urgent site maintenance
- Friends and relatives of residents need not be vaccinated
- Children (under 18)

The vaccine

The vaccine needs to be a complete course of an authorised vaccine. This means that for almost everyone, this is currently two doses.

Impact statement

The government's Health and Social Care Act 2008 Regulations 2021 statement of impact gives a wide variation in estimates, but its central estimate is that around 40,000 workers in care homes will not be fully vaccinated by 11 November 2021. Unless exempt, those workers will not be able to work in care homes, with the related costs of recruitment in the sector reaching £100 million.

Preparing for 11 November 2021

The clock is ticking. It was widely reported that there would be a sixteen week grace period to enable staff to obtain both of their vaccinations. We are now in that grace period and there is much to do:

- Employers should review the government's guidance titled 'Vaccination of people working or deployed in care homes: operational guidance' and look out for revisions. The latest revision is currently 16 August 2021
- Employers will almost certainly already have and be recording the vaccine status of staff. Any that do not,



will now need to begin. This will be sensitive health data, so consider your data protection obligations. The NHS app is likely to be the easiest evidence of vaccine, but the forms of evidence can vary

- Existing and future recruitment should refer to the anticipated need for COVID-19 vaccinations (including booster vaccines) and consider revising contractual documents to reflect the changes
- Consult with staff now. For those that have been reluctant to get their vaccines – we now have an absolute deadline. If they require two doses, they'll need to have had their first dose by 16 September 2021
- Be prepared to examine the vaccine exemptions for staff. This could take some time to research (see the government green book, chapter 14a)

What's to come

Whilst mandatory vaccines for care home staff has received huge media coverage, there is also now a government proposal to consult on further mandatory vaccination in the NHS and wider social care. The consultation has yet to begin, so any extension of mandatory vaccines is unlikely to be in place before 2022.



Read this article with supporting links

MARTIN CHEYNE,
PARTNER

m.cheyne@hempsons.co.uk



The majority of Martin's clients are health or social care organisations and he acts in the full range of claims before employment tribunals. He frequently defends factually complex and also legally novel claims, particularly in relation to disability, sex and sexual orientation discrimination and whistle-blowing allegations.

His advice practise includes executive and senior manager terminations, discrimination issues, TUPE, reorganisations, complex disciplinary matters and concerns with doctors (MHPS). Martin also provides bespoke training on employment topics ranging from TUPE and related procurement preparation, equal opportunities to disciplinary investigations and appeals.

A summary of this article first appeared on Care Home Management's website on 29 June 2021.

Capacity assessments and **best interests** decision making

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 who 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-judgmental.

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 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.

HELEN CLARIDGE, PARTNER
h.claridge@hempsons.co.uk



Much of Helen's caseload involves mental health and mental capacity issues. She regularly acts on behalf of care providers and commissioners in complex proceedings before the Court of Protection concerning deprivation of liberty and best interests.

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 around six years now but how well do providers, registered managers and staff teams know them?

Throughout 2021, 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, i.e., 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 come into force in 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, care staff are clear.

But remember regulation 11 – consent. Don't breach it, don't force feed, don't go against any best interest decisions and if someone is refusing to eat and drink report it ASAP. Get the best interest 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 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.

PHILIPPA DOYLE,
PARTNER
p.doyle@hempsons.co.uk



Philippa leads our social care team and specialises in CQC work, both for and against, which gives her a unique insight and the ability to offer pragmatic advice. She has over twenty years experience in the health and social care sector with a varied workload including information governance, safeguarding, Court of Protection and consent. Philippa is the first point of contact on our social care advice line and works regularly with colleagues in employment, commercial and dispute resolution, to meet the needs of providers



The often forgotten fundamental standards – how small changes can make a big difference

Join our webinar
29 September 2021
10.30 - 11.30am

Social care partner, Philippa Doyle will lead this free webinar on the fundamental standards on 29 September at 10.30am.

In this one-hour session, Philippa will take providers through the key wording of the legislation and deliver tips and ideas on how to improve the service providers deliver to those people they support, as well as hopefully improve their CQC rating.

The session will focus on the often forgotten standards, including dignity and respect, need for consent, nutritional and hydration needs, premises and equipment, complaints and display of performance assessments. These standards are just as important as the big ones of person-centred care and safe care and treatment but are rarely discussed in detail, so now is an opportunity to make little changes to benefit everyone.

Register online or email
events@hempsons.co.uk



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

Philippa Doyle – Partner
t: 01423 724028
e: p.doyle@hempsons.co.uk
www.hempsons.co.uk



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 drastically alter 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 providers 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 twelve months, 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 care 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 remote valuations and 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 permeameters are clearly set within the heads of terms and otherwise approved by your legal team. The intricacies of such agreement can often be heavily reliant on diligent drafting

- **CQC registrations** – the CQC has 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.

LISA DAVISON, PARTNER
l.davison@hempsons.co.uk



Lisa is a partner in our real estate team with substantial experience in advising institutional investors, developers and private operators in the health and social care sectors on a wide range of real estate matters.

Legal experts for the sale and purchase of care homes

Hempsons is experienced in advising on all elements of law and regulation that impact on the sale and purchase of care homes:

- Corporate structuring (asset sale v. share sale)
- CQC advice
- Freehold sales/purchases
- Leases
- Share sale and purchase agreements
- Business sale and purchase agreements
- Bank lending and security
- TUPE and employment law
- Due diligence

Contact

Faisal Dhalla


Partner

f.dhalla@hempsons.co.uk

07860 946 353

www.hempsons.co.uk

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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 business 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, and 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 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 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 better understand 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.

**JOLENA BULLIVANT-CLARK,
TRAINEE SOLICITOR**

J.Bullivant-Clark@hempsons.co.uk

Jolena joined as a paralegal in 2019 having previously worked for two national claimant personal injury firms. Prior to commencing her training contract, she ran a caseload of limited instruction clinical negligence files, while assisting other fee earners where required. Jolena currently sits in the corporate and commercial team where she assists with a range of matters.

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

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- CQC regulatory
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- Health and Safety
- Inquests and Coroners
- Judicial review
- Mental health law
- Safeguarding
- Tendering

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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

Legal experts for social care



Philippa Doyle
Health and social care advisory

t: 01423 724028
e: p.doyle@hempsons.co.uk



Helen Claridge
Health and social care advisory

t: 0161 234 2427
e: h.claridge@hempsons.co.uk



Martin Cheyne
HR and employment

t: 01423 724121
e: m.cheyne@hempsons.co.uk



Faisal Dhalla
Corporate

t: 01423 724019
e: f.dhalla@hempsons.co.uk



Stephen Evans
Mental health

t: 01423 724010
e: s.evans@hempsons.co.uk



Andrew Daly
Procurement

t: 01423 724015
e: a.daly@hempsons.co.uk



Richard Nolan
Dispute resolution

t: 01423 724108
e: r.nolan@hempsons.co.uk



Helen Hirst
Charities and social enterprise

t: 01423 724035
e: h.hirst@hempsons.co.uk



Oliver Crich
Commercial

t: 0161 234 2459
e: o.crich@hempsons.co.uk



Lisa Davison
Real estate

t: 0161 234 2469
e: l.davison@hempsons.co.uk

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

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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.



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