

Chaos ahead for Care Homes

Owners and managers of care homes will this year have to cope with both reforms to the way in which they are regulated as well as the introduction of new rules on how their more vulnerable residents are assessed.

The Health and Social Care Act 2007 which is in the process of coming into force will provide enhanced public protection powers. These include a new power to issue warning notices and to issue fixed penalty notices for criminal breaches of regulations. As from 1st December the protection of the Human Rights Act is extended to people living in publicly funded accommodation with nursing or personal care.

Under the Act, providers of accommodation with care will be treated as exercising a function of a public nature. This means that people using these publicly funded care services will now be protected by the Human Rights Act.

The new Act also significantly increases fines for breaches of these regulations from £2,500 to £50,000 such as breach of a condition of registration. In England the reform is more widespread in that the current health and social care regulators will be merged to form a single Care Quality Commission. The intent is for a more proportionate approach to regulation such as the imposition of fixed penalty notices for more minor breaches of the regulations. Offences under the regulations are strict liability and if the regulator, who in Wales is the Care and Social Services Inspectorate (CSSIW) decide to prosecute, this can have disastrous consequences for a home in that a conviction will in most cases cause the registration to be cancelled.

The new Act expressly requires the Commission (and by inference CSSIW), to have regard to the need to take action that is proportionate to the risks posed. Homes with good track records should therefore face fewer inspections and lighter touch enforcement.

In Wales, organisational arrangements remain largely the same save for CSSIW gaining these new regulatory powers.

What will cause even more concern and in reality be a chaotic time for care homes, will be the coming in to force on 1st April this year of new rules governing the deprivation of liberty of residents under the Mental Capacity Act triggered by a European court decision. Caring for and treating people who need extra protection such as elderly residents with dementia may mean restricting their freedom to the point of depriving them of their liberty.

For every person being looked after in a care home, managers will have to consider whether any care and/or treatment takes away that person's freedom to do what they want to do (such as walking out of the home) to the extent that they are being deprived of their

liberty. If the care home believes that such care is in that person's best interests and there is no other way to provide that care, then the care home will have to ask the local authority to carry out an assessment with a view to authorisation. If authorisation is given the care home will have to make regular checks to ensure it is still necessary; remove the authorisation when no longer necessary and also ensure that the resident concerned and their representative is fully aware of their rights. Care homes will have to keep detailed records and make them available to regulators as CSSIW in Wales will have a monitoring role and will look at how these safeguards are being applied by care home providers.

There could be serious consequences of restricting a person's liberty otherwise than in accordance with these rules as this could amount to criminal offences of assault and breaches of the care homes regulations as well as claims in negligence being made against the care home owners if residents are harmed when they should have been supervised and were not. A relative or friend of a resident will be able to apply to a local authority for an assessment where the care home has refused.

Codes of Practice have been published and care home providers will need to consult these and monitor how the rules are being implemented. There is some information available on the Department of Health website but the forms required have not yet been published nor has any detailed guidance as to how to apply these rules.

http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_091868)