

# Care Homes Briefing

Solicitors

Number 56

## Potential implications of the Mental Capacity Act 2005 for care home operators

Parts of the Mental Capacity Act came into force in April this year and the rest is due to come into force in October. This is likely to have wide-ranging implications for care home operators, including:

### Assessment of capacity

The Mental Capacity Act provides a single test for capacity. Capacity is defined as being both time-specific and decision-specific; it will therefore be important for care home operators to assess capacity at the relevant times. It will certainly not be the case that capacity can be assessed on admission and then forgotten. A resident's capacity may fluctuate from day-to-day and the person may have capacity to make decisions on some matters but not others.

### Best interests test

Although the statutory test reflects the previous common-law test, the Act requires various issues to be considered to determine best interests and that the approach adopted is the least restrictive of the patient's rights. It will also be important to ensure that there is proper documentation of the way the statutory best interests test<sup>1</sup> has been applied and to ensure that the statutory consultees have been duly consulted. On

occasion, this will no doubt be misunderstood to amount to a power of veto, which it is most certainly not.

### Lasting powers of attorney

The ability to appoint an attorney under a lasting power of attorney to act as a healthcare proxy will be a new development for English law and may, on occasion, lead to conflict with the care team if the attorney takes a different view of what should be done. There is likely to be ample opportunity for conflicts to arise.

### IMCA

The new Independent Mental Capacity Advocate provisions are already in force. Experience to date would suggest that many professionals have misunderstood the application of this part of the Act<sup>2</sup>.

### New offence

The provisions containing the new offence of neglect or ill-treatment of a person lacking capacity are already in force. This may lead to increased references to the police to prosecute and put pressure on care homes where relatives are dissatisfied by the service provided.

<sup>1</sup> A checklist is available from RadcliffesLeBrasseur

<sup>2</sup> See our Mental Capacity Act briefing on IMCAs

## Code of Practice

The Code of Practice for the Mental Capacity Act has the same status as the Code of Practice for the Mental Health Act. Therefore it must be followed, unless there is a good reason not to, and it will be important to ensure that staff are aware of and follow the provisions of the Code. If staff are to depart from those provisions, there will need to be a clear reason given and it will be good practice for staff to record such reasons.

## Protective care

In July, the Mental Health Act 2007 was finally passed, enacting the Government's proposals to provide protection for residents where their care plan amounts to

a deprivation of liberty<sup>3</sup>. These provisions are to be inserted into the Mental Capacity Act and, although they are not yet in force<sup>4</sup>, they will require an application for authority to the relevant local authority or PCT where a resident's care plan amounts to a deprivation of their liberty. Further detail on how the process will work in practice is awaited, however this is clearly going to require additional paperwork from care home operators, and is likely to have widespread implications for those with severe dementia or severe learning disabilities.

This briefing of necessity highlights only some of the more obvious implications of the Act. The Act has the scope to have very wide implications across the care home sector and careful legal advice should be sought where difficulties arise.

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<sup>3</sup> Providing a solution to the Bournewood problem

<sup>4</sup> It is currently anticipated that they will come into force in April 2008