



Mental Care Act Highlights Risks for Care Homes – An insurance perspective

All care providers should seek legal advice in relation to potential risk factors arising from the Mental Care Capacity Act 2005, which became effective in part in April and will become fully enforceable in October 2007.

According to the Care Home Insurance Service (CHIS), there are two main risk factors associated with the Act that could potentially cause concern for care providers and their underwriters:

- The lasting powers of attorney (LPAs).
- Regular reviews of your resident's mental capacity.

Many care providers will be asked by residents or their families about 'living wills' which will become known officially as lasting powers of attorney (LPAs). CHIS' recommendation to all care providers is to facilitate this arrangement only, not to become involved in the process. Facilitation could mean you recommend a number, more than one, of lawyers who can effect an LPA — ask your local law firms, or consider the family's own lawyer who may be the most appropriate person to organise the LPA.

David Waters, Director of CHIS, says, "By not becoming involved in the process, we're trying to make sure that no claim can be made against you for any potential conflict of interest."

"Care home providers need to be aware that when an LPA is created, the creator is considered to be of sound mind, so the LPA, if it is ever invoked, may not be invoked for many years. It is possible an action taken now for all the right reasons could be considered to be a conflict of interest in future years, so best to avoid the risk by not being involved in the creation of the LPA in the first place," says Mr Waters.

"CHIS had a care home client who had one resident who became infatuated with his carer. The resident moved on to a new home when the carer left our client's employment to be with her. The resident subsequently dies and in his will had left everything to his carer. The resident's children (by this time 50+ year old adults) took exception to this, tried to get the will revoked, failed and so brought a legal action against our client who had since retired. No-one could have foreseen this, but with the Mental Capacity Act 2005, I believe care providers will be expected to be responsible for these type of situations if they arise in the future, unless you can evidence that you were not involved."



The second area of risk relates to reviews of a resident's mental capacity. Under the Act, it will become necessary for every care provider to regularly review whether a resident continues to have mental capacity or not. Whatever your and your carers views, this will need to be recorded and CHIS suggests this record is made within your resident's care plan.

CHIS advises before deciding any resident is losing their mental capacity to the extent that they are unable to care for themselves and their assets, to involve other healthcare professionals and their family, so it is not just the decision of the care provider that can subsequently be questioned, but is the collective decision of the resident's GP, nurse, geriatrician, priest, family, next of kin and/or anyone else who keeps regularly in contact with your resident and whom you would consider has your resident's best interests at heart.

"CHIS clients can rest assured that we have discussed the potential effects of the Mental Capacity Act with the lawyers behind our legal expenses policy and our principal carriers have all confirmed to us that, providing you are able to evidence (that's down to record keeping) the steps you have taken as being reasonable, then should the worst happen and a claim be brought against you, they will indemnify you," said Mr Waters

CHIS recommends that all care providers talk to their legal advice line, lawyers and liability underwriters to confirm they are aware of the Mental Care Capacity Act and will provide both advice and indemnity where you have acted reasonably.

For further information in relation to the Act, an excellent handbook has been provided by the NCA on behalf of the Department of Constitutional Affairs. This is available from the NCA, for both NCA members and non-members, and they can be contacted on 0207 831 7090.

