

The Nursing Home Support Scheme



Described by the Minister for Health as 'A Fair Deal' for all, the NHSS poses a number of legal issues for doctors, according to **John Costello** of Beauchamps Solicitors

The Nursing Home Support Scheme (NHSS) set up under the Nursing Homes Support Scheme Act 2009 (the Act) came into force on 27 October 2009. It sets up a new voluntary scheme of financial support for people who require long-term nursing home care and is often referred to as the 'Fair Deal'.

The scheme is the same for public and private care and anyone who is assessed as in need of long-term nursing home care who applies will now make a contribution to their care costs based on their means.

It does not cover short-term provision such as day care. Individuals already in receipt of subvention under the previous nursing home subvention scheme can retain their existing arrangements or opt to transfer to the new scheme.

The scheme involves a co-payment arrangement be-



tween the person and the State. Essentially, the person contributes up to 80 per cent of assessable income and up to 5 per cent of the value of any assets they own towards the cost of their care. The State will then pay the balance.

A person will never pay more than the cost of their care regardless of their means. Prior to nursing home selection, the

scheme involves three main steps: a care needs assessment carried out by a healthcare professional to consider whether long-term nursing home care is appropriate; a financial assessment; and an optional step of an application for a nursing home loan (an interest free loan advanced by the Health Service Executive (HSE) to a person to help them meet the

cost of contributions from assets such as their home so that a person does not have to sell it during their lifetime.)

However, the principal residence will only be included in the Financial Assessment for the first 3 years of the time in care i.e. the residence cannot be charged with more than 15% of the cost of care, regardless of the time in care, if a person avails of the nursing home loan.

Of the 3,000 applications received under the Act up to 20 November 2009 approximately 10 per cent of the applicants applied for the nursing home loan. More detail on the operation of the scheme was covered in the 11 July 2009 legal page of this journal.

Charging order

In order to benefit from the nursing home loan a person must consent to a charging order being placed against the

asset in question. If a person is found to lack capacity they will not be able to consent to the creation of the charging order. They will therefore require a care representative appointed by the Circuit Court to act on their behalf.

In assessing whether a person has capacity, the starting point is to presume that the person has capacity until the contrary is established. It is important to note that assessment of capacity must be undertaken by two medical practitioners.

Assessing capacity

In order to assess whether a person has the capacity, the practitioner should try to establish the following:

- Does the person have a general understanding of what decision they need to make and why they need to make it?
- Does the person have a general understanding of the likely consequences of making, or not making, this decision?
- Is the person able to understand the information relevant to the decision?
- Is the person able to retain the information relevant to the decision, and use it and

weigh it as part of the process of making a decision?

- Is the person able to communicate their decision by any means?

A person is considered not to have the capacity to make a decision if they are unable to:

- understand the information relevant to the decision; or
- Retain that information; or
- Use the information as part of the process of making the decision; or
- Communicate their decision by any means (including by means of a third party).

The basis for a practitioner's decision must also be set out.

Guidance

The HSE has guidance for practitioners and capacity issues on its website and the Nursing Home Support Scheme (Assessment of Capacity Report) Regulations 2009 prescribes the format of mental capacity reports for submission by the Circuit Court for practitioners and are available at http://www.dohc.ie/legislation/statutory_instruments/pdf/si20090409.pdf?direct=1.

● **John Costello**, Consultant, Beauchamps Solicitors. E: j.costello@beauchamps.ie