

UK care home providers for older people – advice on consumer law

Helping care homes comply with their
consumer law obligations

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Care homes: advice on consumer law



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1. Key points you need to know

Introduction

- 1.1 This advice is intended to help you, as a care home, comply with your obligations under consumer law. Complying with consumer law is an essential part of running a home.
- 1.2 Consumer law gives important protections to care home residents and their representatives, who may include their family or an advocate who is supporting them. In any assessment of whether you are complying with your consumer law obligations, it is relevant that you are providing services to people who may be in a very vulnerable position – whether they are residents or representatives. They may be frail and in poor health, and under a lot of pressure and emotional stress.
- 1.3 The law requires that you consider the difficult circumstances in which people may be making decisions and the fact that they are unlikely to be familiar with the process of choosing a care home. This will be an important consideration for a court when assessing whether you are complying with the law.
- 1.4 This introductory section of the advice (section 1) provides a high-level summary of your obligations under consumer law, so that you are familiar with the key points you need to know. Where appropriate, we have cross-referred to sections of the advice which address each area in much more detail.
- 1.5 This advice covers:
 - Upfront information – what information you should provide to prospective residents and their representatives, and when and how you should do so.
 - Treating residents fairly – what you should do to ensure that your contract terms and the way you treat residents and their representatives are fair under consumer law.
 - Quality of service – how to comply with your obligation to perform your services to residents with reasonable care and skill.
 - Complaints handling – what you should do to ensure that your complaints handling procedure is easy to find, easy to use and fair.

Purpose and scope of this advice (section 2)

Is this advice for me?

1.6 This advice applies specifically to care homes for people over 65 and covers the whole of the UK. It is relevant for all care homes, irrespective of whether residents pay their own fees or are State-funded.¹

Key principles

Consumer law requires you to:

- Treat residents and their representatives fairly. You must not mislead them or behave aggressively or otherwise act unfairly towards them.
 - This obligation applies before as well as after the resident has moved in or signed a contract with you.
 - It means that you must do certain things, such as provide key information upfront, so they can make informed decisions.
- Ensure that your contracts with residents are fair.
 - You must not put residents at an unfair disadvantage, by tilting the rights and responsibilities under the contract too much in your favour.
- Perform your services with reasonable care and skill.
- Have an effective procedure for dealing with complaints, which is easy to find, easy to use and fair.

1.7 Consumer law sits alongside sector-specific obligations that apply to care homes, such as the regulations and standards enforced and expected by the sector regulators: the Care Quality Commission (England); the Care Inspectorate (Scotland); Care Inspectorate Wales; and the Regulation and Quality Improvement Authority (Northern Ireland).

¹ In this advice 'State-funded' residents means those residents funded by the NHS, their local authority or, in Northern Ireland, the Health and Social Care Trust.

What happens if I get it wrong?

- 1.8 If you fail to comply with consumer law, the CMA and other bodies, such as local authority Trading Standards Services, can bring court proceedings to stop infringements, seek compensation on behalf of residents and, in certain cases, bring criminal prosecutions.
- 1.9 Residents may also be able to seek damages in the courts and unfair terms in your contracts will be unenforceable against them.
- 1.10 A detailed overview of relevant consumer law is set out in Appendix A.

Providing upfront information (section 3)

- 1.11 Section 3 of this advice describes the information you need to provide to prospective residents and their representatives, up front. It also illustrates when and how it should be provided. You must provide the information which prospective residents and their representatives need to make informed choices, so providing them with clear, accurate and timely information is vital to complying with consumer law.
- 1.12 Upfront information should be provided to all prospective residents and their representatives, regardless of their funding. However, certain information (eg about your weekly fees and any upfront payments) may only be relevant to residents who pay their own fees (self-funders).²

² In Northern Ireland, a 'self-funder' is an individual who is assessed as able, or declares themselves able, to meet the full cost of his/her care, but whose care is arranged and managed by a Health and Social Care Trust. A 'private funder', on the other hand, is someone who arranges and pays for their place in a care home under a private contract with a care home without the involvement of the Health and Social Care Trust. In this advice, the term 'self-funder' covers both categories of people. The term 'self-funder' therefore refers to any care home resident who pays for their own care.

Key principles

In summary, prospective residents and their representatives must be provided with the information they need to make informed choices, including whether or not to shortlist, make further enquiries of or visit your home. This information must be provided:

- At a time that ensures that prospective residents and their relatives can understand and engage with it.

Remember: A prospective resident's and their representatives' commitment to their choice of care home will grow over the course of their enquiries and information-gathering, starting with the information provided at the beginning of their search, such as on a care home's website and the information provided during their first telephone enquiry.

- In a clear, accurate, accessible and unambiguous manner, with appropriate prominence.
- In all the places prospective residents and their representatives are likely to look for it (including on your website and during telephone or online enquires about your home).

Providing 'key information' on first contact

- 1.13 People look for information about care homes in different ways. You should prominently highlight all key information (see paragraph 1.15, below) on your website (if you have one), and in other written materials that you give to people or send to them when they get in touch for the first time (eg a 'key facts' sheet in an information pack, or as an insert in a brochure).
- 1.14 You should also draw key information to prospective residents' and their representatives' attention when they first contact you by phone or email and explain at this time, as a minimum, which residents you accept (eg State and self-funded), your pricing (including any upfront payments) and service and any surprising or important terms, and offer to provide further written material (eg by post, an attachment to an email or website address, which prominently highlights all the key information). You should explain all the key information to them at the beginning of their first visit to your home (ie before they are shown around) and ensure that they are provided with the key information in written form to take away. Your staff should be trained to provide this information and be able to answer questions about it (as well as the important, additional information, where people ask for it).

1.15 Paragraph 3.18 of this advice describes the key information that you should provide to prospective residents and their representatives on first contact (ie at the very start of your engagement with them, including on your website). By way of example, this includes:

Funding arrangements

- Whether you accept self-funded and State-funded residents.

Key features of your service

- The type of care needs you cater for.
- An overview of the rooms, facilities and services available to your residents.
- The size of the home (eg how many beds it has).
- A brief description of your staffing arrangements.

*Highlighting particularly surprising or important terms and conditions such as:*³

- Any requirement for self-funders to demonstrate that they can pay for their own care for a minimum period of time.
- How self-funded residents' fees may change during their stay.
- When the resident might require a 'guarantor' for their fee payments.

Fees and charges

- An accurate and representative indication of the total weekly fee rates that you typically charge for self-funders, for each type of care service offered.
- What services are included in your weekly fees and any optional, additional 'extras' which are not included and may need to be paid for separately.

³ By 'surprising', we mean a term that a prospective resident or their representative would not anticipate and know to look for, noting that such a person is unlikely to be used to dealing with care homes. A term may also be surprising if it is contrary to general industry practice.

- Any significant, additional costs that may be unavoidable for some residents because of their circumstances (eg where staff need to accompany them to medical appointments).
 - Details of any upfront payments required, such as the amount of any deposit, the risk it protects you against, how it will be protected and how it will be refunded.
- 1.16 You must also ensure that your marketing and advertising claims are truthful and accurate. You must not mislead prospective residents and their representatives by, for example, claiming that your home has an extensive range of daily activities on offer or has an activity coordinator, when this is not true.

Providing ‘important additional information’ in good time before you make an offer of a place

- 1.17 You must ensure that important, additional information is provided to prospective residents and their representatives when they want or need it, and in good time before you make them an offer of a place in your home. In our view, this means that it must be provided, at the latest, by the time they agree to have a care needs assessment. This is because, whilst a person’s commitment to a home will grow during the course of their dealings with the home, starting with their first contact, once they have agreed to a care needs assessment, they are likely (for all practical purposes) to be fully committed to securing a place in your particular home. This important additional information should be easily accessible to people from the start of their research. You should also take active steps to provide this information to prospective residents and their representatives and do so in sufficient time for them to be able to consider it before they agree to have a care needs assessment.
- 1.18 The important additional information should be provided to prospective residents and their representatives in a clear, accurate, accessible, unambiguous and timely manner. For example, important additional information should be clearly set out on your website, and highlighted in information packs that you send to enquirers. Where people contact you by phone or online to follow up on their initial interest, you should direct them to this information (eg on your website) or send it to them in writing if they prefer, and be able to pro-actively answer questions about it. Where people visit your home having already made initial enquiries (eg an initial visit), you should explain it to them at the beginning of their visit, answer any more questions they have, and give them written information to take away. Practical examples of how to provide this information are set out at paragraphs 3.24 - 3.27 of this advice.

- 1.19 Where prospective residents and their representatives contact you or visit your home for the first time and want to know more about your home at that point (instead of, for example, making further enquiries later), you should give the important additional information to them then and answer any questions they have about it.
- 1.20 Paragraph 3.28 of this advice describes the important additional information that should be provided. By way of example, this includes:
- Details of any trial period (including length).
 - Detailed information on your policies if a resident's funding arrangements change whilst in the home.
 - Your complaints handling procedure.
 - The reasons and conditions for ending the contract (including the notice period).
- 1.21 You must also ensure that a copy of your standard contract/terms and conditions for self-funded residents has been provided to prospective residents and their representatives, at the latest, by the time they agree to have a care needs assessment. Your standard terms should be easy to find from the start of people's research. For example, they should be clearly signposted on your website and included in information packs that you send to enquirers.
- 1.22 Once a care needs assessment has been undertaken and the prospective resident has selected the services they want to receive, you must confirm the final, total amount they will have to pay (including the total gross weekly fee rate and any permissible upfront payments) as part of your offer of a place and ensure that the terms of the final offer have been explained and fully understood. Where information has changed since it was first provided, the resident and their representatives must be informed and expressly agree to the changes.

Treating residents fairly (section 4)

- 1.23 Section 4 of this advice covers what you must do to ensure that your terms and the way you treat residents and their representatives are fair.
- 1.24 A 'term' covers any conditions, rules or notices which are intended to bind the resident or a third party (such as a person acting as a guarantor or paying a contribution towards the resident's fees). It can include statements in your

brochures, on your website and in your service user guides, as well as the terms in your contract or agreement with the resident.

Key principles

- Your terms must set out all the rights and obligations between you and the resident (and any other person who is also asked to sign the contract). You must ensure that they are simple, clear and easy to understand.
- Generally, your contract terms will be unfair if they put residents at an unfair disadvantage. If a term is unfair, it will not be enforceable. For example, a term may be unfair if it gives you greater rights than the resident.
- Terms must be designed, negotiated and entered into in a fair and open way.
- You must not mislead residents or their representatives, or exploit your position of power over them to apply pressure impairing their freedom of choice.

1.25 Section 4 sets out examples of terms that may be unfair in certain circumstances. By way of example, this includes terms that:

- Bind residents to 'hidden' terms that they have not had the chance to read and understand.
- Require residents to pay a deposit and, for example, give you a wide discretion to retain the deposit without justification, or where the purpose for which you require it is not clear.
- Require any other upfront payments, unless it is an advance payment of the resident's regular residential fees.
- Require someone to act as a guarantor, without providing the prospective resident and guarantor with clear and transparent details, upfront, of the extent of their potential liability if the resident defaults.
- Exclude or restrict your liability if you are at fault when things go wrong.
- Require residents to pay full fees for periods when they are temporarily absent, when you make specific cost savings.

- Require fees to be paid for extended periods after a resident's death.

Varying your terms, service or fees

- 1.26 Residents should receive the service they expect and on the agreed terms and not something that is, in any significant respect, different.
- 1.27 Where terms allow you to make changes to your service, the law requires that residents must be able to foresee and understand how changes might affect them, before entering the contract.

Key principles

- You must clearly set out the circumstances in which you may need to make changes, which should be limited to valid reasons, such as changes that are necessary because of new health and safety legislation.
- Terms should be transparent, so that residents and representatives can foresee and understand, in advance, how they might be affected.
- You must give sufficient notice of any change. Less than 28 days' notice is unlikely to be fair.
- You must give residents a pro-rata refund of any prepayments they have made if they decide to leave before the change takes effect.

- 1.28 In particular, your terms must set out clearly the circumstances in which a self-funded resident's fees may change during their stay and the method of calculating the change.⁴ If your contract simply says that any increase will be 'cost reflective', or 'reasonable' or limited to 'unexpected changes', this is unlikely to be fair, since residents will be unable to foresee the changes.
- 1.29 Whilst it is not the only way to comply with the law, you are more likely to comply where residents' fees are reviewed on an annual basis by reference to a relevant, objective and verifiable published price index, clearly specified and explained in the contract. Any index you use should be independently

⁴ See paragraph 1.12. The term 'self-funder' includes anyone paying their own fees in Northern Ireland.

verifiable and transparent, so that residents and representatives can genuinely understand the practical implications for them.

- 1.30 Exceptionally, major changes in legislation or regulations may directly result in a significant and demonstrable increase in your costs. In that case, we would be less likely to take action if any corresponding increase in your residents' fees was made at the time of the annual review, provided that it is not already covered by any price index you are using.
- 1.31 You may increase a resident's fees at other times where:
- They request and receive an enhanced service or better room, provided that this is clearly different from the service they are already paying for within the standard weekly fees and that they retain the choice as to whether they want to pay for it.
 - There is a significant and demonstrable change in their care needs. You should consult with residents and their representatives where you anticipate this and give them advance notice of any increase. Where there are disputes (or you anticipate one), you should liaise with independent professionals (eg a multidisciplinary team) to support your decision and residents should be able to leave without penalty before the increase takes effect. Where immediate care is required you should provide it, but the resident should have appropriate safeguards (ie you give them immediate notice of any fee increase and the opportunity to leave without penalty). See paragraphs 4.52-4.55 of this advice for more detail.

Asking a resident to leave

- 1.32 The circumstances in which you can terminate your contract with a resident must be clearly explained in the contract. They must be limited to valid reasons, for example, where you can no longer meet the resident's care needs even after making reasonable adjustments.
- 1.33 You should not ask a resident to leave the care home without first consulting with them and their representatives, and any other relevant independent professionals, and after efforts have been made to meet the resident's needs.
- 1.34 You should give the resident at least 28 days' written notice to leave, unless they are staying with you on a trial period, in which case you must still give them adequate notice to make alternative arrangements.
- 1.35 You must never ask a resident to leave or restrict a resident's right to have visitors or threaten to do so in retaliation to a complaint.

Terms specific to State-funded residents

- 1.36 The key principles of fairness set out above also apply to terms and practices that specifically apply to State-funded residents. You should ensure that the content of any agreement that you ask a State-funded resident or their representatives to sign (eg in a residency agreement) does not conflict with the terms of the placement contract you have with the relevant public funding body.
- 1.37 This is relevant, for example, in relation to any top-up fee arrangements for local authority funded residents and also where you accept Continuing Healthcare funded residents.
- 1.38 You should also ensure that you have alerted the resident and their representatives to the options available to them and their implications. For example, where there is a shortfall between your fees and the amount the local authority is willing to pay, you must make sure that the prospective resident and their representatives are aware of the option of making up the difference by arranging to make top-up payments through their local authority.

Providing a quality care home service (section 5)

- 1.39 Section 5 of this advice describes your obligation under consumer law to perform your service with reasonable care and skill.

Key principle

The law provides that if you do not provide your service to residents with reasonable care and skill, you will be acting in breach of contract and residents may be able to seek compensation from you.

- 1.40 The regulations and standards enforced and expected by the sector regulators establish the quality of care which you must provide. For example, you must ensure premises and equipment are suitable and safe and residents are treated with dignity and respect.
- 1.41 If you do not comply with the regulatory requirements enforced by the sector regulators or fail to have regard to their guidance, you may also infringe your obligations under consumer law.

1.42 However, compliance with these regulatory requirements is only an element of your obligation under consumer law to ensure that the services you provide to residents are performed with reasonable care and skill.

Complaints handling (section 6)

1.43 Section 6 of this advice describes how you should handle any complaints from residents or their representatives.

Key principles

To comply with your consumer law obligations:

- You must never pressure, intimidate or discourage someone from making a complaint.
- You should have a written complaints handling procedure which is:
 - Easy to find.
 - Easy to understand and use.
 - Written and followed so that complaints are dealt with fairly and effectively, minimising the upset and worry that they can cause.
 - Applied consistently across your care homes.

Discouraging someone from making a complaint

1.44 You must never, for example:

- Threaten to restrict or ban visitors or ask a resident to leave the home in retaliation to a complaint.
- Mislead a resident about how they can exercise their rights, for example, by failing to tell them that they can escalate their complaint to a more senior manager or head office, or to an external body such as an

Ombudsman, the Care Inspectorate in Scotland, or the appropriate local authority.⁵

Easy to find

1.45 Your complaints handling procedure must be easy to find, for example, highlighted on your website and highlighted in your service user or written guide, welcome pack and throughout the home.

Easy to understand and to use

1.46 You should make it possible for residents to make their complaints in a variety of ways. Information on how to make a complaint should be offered, in so far as possible, in different languages and formats. You should also encourage and offer residents the opportunity to be assisted by an advocate and highlight how they can obtain other third party advice and support they may need to bring a complaint.

Your complaints handling procedure should be effective and fair

1.47 You should have a quick, simple and streamlined process for resolving complaints. For example, you should:

- Set out clearly where and how complaints can be made.
- Set out the type of issues your complaints handling procedure covers as well as what it does not cover.
- Try to resolve any straightforward concerns at the earliest opportunity.
- Set out clear and reasonable timescales where a complaint requires further investigation and provide a full response within 28 calendar days.
- Ensure that any investigation is carried out by someone in your organisation who is independent of the concerns being raised, to avoid a conflict of interest.
- Protect the complainant's anonymity as far as reasonably possible.

⁵ Throughout this advice, unless indicated otherwise, references to local authorities should be taken to include their equivalents in each nation of the UK, including Health and Social Care Trusts (HSC Trusts) in Northern Ireland.

- Explain to residents and people acting on their behalf how to escalate their complaint to someone at a more senior level in your organisation if they do not think it has been dealt with properly.
- Explain to residents and people acting on their behalf where they can go (eg the Ombudsman, Care Inspectorate in Scotland) if they remain unhappy with how your care home has dealt with their complaint.

Applied consistently

1.48 You should ensure that your staff are trained in, and have a good understanding of, your complaints handling procedure and how it works. Staff should also understand their role and responsibilities in reporting and resolving complaints, and their role in supporting people if they want to make a complaint.

2. Purpose and scope

Aim of this advice

- 2.1 The purpose of this advice is to help you, as a care home provider, understand and comply with your obligations under consumer law.
- 2.2 Consumer law protects individuals' rights when they buy goods or services, ensuring they are treated fairly and can get help if things go wrong. It also helps them to get what they need to understand their rights and obligations and make informed choices.
- 2.3 Consumer law applies across the UK and therefore this advice covers England, Wales, Scotland and Northern Ireland. Understanding the consumer laws that affect you is an important part of running a care home. By considering and implementing this advice, you will be better placed to ensure that you are complying with the law and treating residents and their representatives fairly.⁶
- 2.4 If you do not comply with the law, the CMA and other enforcers may take enforcement action against you. This could include: stopping you from continuing to use unfair contract terms or practices; seeking redress for affected residents; and, in some circumstances, bringing criminal prosecutions.
- 2.5 This advice will also help to ensure that residents and their representatives can:
 - (a) Make informed choices about the resident's care.
 - (b) Be confident that they will be fairly treated.

⁶ 'Representatives' for the purposes of this advice may include the resident's or prospective resident's family and friends, or anyone making decisions, entering into contracts or making payments for the benefit of, or in respect of, the resident or prospective resident. This will include, but is not limited to, anyone with a power of attorney or who is a statutory advocate acting on the resident's behalf. There are certain circumstances in which older people have a statutory right to access to be supported by an advocate. For example, in England, under the Care Act 2014, the local authority must arrange an 'independent advocate' to assist the prospective resident's assessment and care and support plan, where the person has 'substantial difficulty' in being fully involved in the processes and there is no one appropriate to support and represent the person's wishes. Similar rights to an independent advocate apply in Wales under the Social Services and Well-being (Wales) Act 2014. In England and Wales, where there is concern about a person's capacity to make a specific decision, for example because of a mental impairment such as dementia, acquired brain injury or learning disabilities, then an assessment of capacity should be carried out under the Mental Capacity Act 2005. Those who may lack capacity will need extra support to identify and communicate their needs and make subsequent decisions and may need an Independent Mental Capacity Advocate. In Scotland, under the Mental Health (Care and Treatment) (Scotland) Act 2003, every person with a mental disorder has a right of access to independent advocacy.

- (c) Bring complaints if they have concerns and, where necessary, get appropriate redress.

Who is this advice for?

- 2.6 This advice is primarily intended for providers of residential care homes and nursing home services for people in the UK over 65 (referred to as ‘care homes’ in this advice).⁷
- 2.8 The advice will also be of relevance to local authorities (and other public funding bodies) who arrange and pay for care home placements (and who may enter into contracts with care homes for a resident’s care).⁸

What does this advice cover?

Scope

- 2.9 This advice sets out the CMA’s views on the application of consumer law to care homes. It does not provide advice on other laws or rules enforced by the sector regulators on registration of a care home, standards of care and safety⁹ or on sector-specific policy guidance (see paragraph 2.17, below). Similarly, it does not cover housing law. Appendix B provides links to other resources.

Types of care home provider

- 2.10 Consumer law will be relevant to all care homes. This includes independent homes - regardless of whether they are run on a voluntary or charitable ‘not-for-profit’ basis or a ‘for profit’ basis - and local authority operated homes.

Funding status of residents

- 2.11 In our view, consumer law will generally apply to a care home’s terms and practices, regardless of whether its residents are:

⁷ Consumer law applies widely. Therefore, the same general principles may apply to other types of care home (for example, homes that accept a mix of young and older residents). However, this advice has not been prepared for purposes other than advice for care homes for older people.

⁸ Where a resident is funded by the State, there will usually be a written contract between the care home and the public funding body. We would expect these contracts to be drawn up so that they meet the needs not only of the public funding body and care home, but also the resident. For example, contracts should be concise and written in plain English and avoid unnecessary technical language and jargon. Where third parties paying a ‘top-up’ enter into a contract with the local authority, these contracts will also be covered by consumer law.

⁹ The Care Quality Commission (England), the Care Inspectorate (Scotland), Care Inspectorate Wales and the Regulation and Quality Improvement Authority (Northern Ireland).

- (a) Self-funded ie they or their representative are responsible for paying their own fees.
- (b) Part-funded ie they or their representatives are responsible for paying some of their own fees with the local authority and, in Northern Ireland, the Health and Social Care Trust (HSC Trust), responsible for the rest.
- (c) State-funded through their local authority, health and social care partnership, HSC Trust or the NHS.

2.12 You should therefore observe the requirements of consumer law, even where you have residents who are State-funded.

The key areas

2.13 The advice focusses on the following key areas:

- (a) Upfront information: ensuring that you provide prospective residents and their representatives with the information they need to make informed choices (including when and how you should do so to ensure compliance with the law).
- (b) Treating residents fairly: ensuring that your contract terms (eg in your residency agreements) and the way you treat residents and their representatives are fair under consumer law.
- (c) Quality of service: ensuring that you comply with your obligation to perform your services with reasonable care and skill.
- (d) Complaints: ensuring that your complaints handling procedure is easy to find, easy to use, fair and effective.

2.14 This advice includes illustrative examples of contract terms and practices that, in our view, are likely to infringe the law, together with practical steps which may assist compliance. It is not intended to be exhaustive and is not intended to cover every situation in which an infringement may occur.

Relevant consumer law

2.15 This advice focusses on two key pieces of consumer law, namely:¹⁰

- (a) The Consumer Protection from Unfair Trading Regulations 2008 (CPRs). Generally, if you treat prospective and existing residents and their

¹⁰ See Appendix A of this advice for a more detailed overview of relevant consumer law.

representatives fairly, you are likely to be complying with the CPRs. However, if you mislead, behave aggressively, or otherwise act unfairly towards them (before or after the resident has moved in), then you are likely to infringe the law.

(b) The Consumer Rights Act 2015 (CRA). The CRA requires that:

- You ensure that terms in your contracts with residents (for example, in residency agreements) and wording used in your transactions with them (such as notices) are fair. Your terms will be unfair if they put residents at an **unfair disadvantage** by tilting the rights and responsibilities under the contract too much in your favour.
- You perform your service to residents with **reasonable care and skill**. Where you fail to meet this standard, you will be in breach of contract and residents may be able to claim compensation from you.

2.16 We have also considered how the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (CCRs) are likely to apply to you. Generally, the CCRs require you to provide certain information to prospective residents in a clear and comprehensible manner, before they are bound by a contract. You may also need to provide residents with cancellation rights in certain circumstances, depending on how you negotiate and enter into contracts.

Relationship with sector-specific rules

2.17 Consumer law sits alongside sector-specific obligations that apply to care homes, such as laws, regulations, standards and guidance.¹¹ Sometimes they overlap. Although this advice is concerned with the application of consumer law to care homes, failing to comply with sector-specific rules may be relevant to a finding that consumer law has been infringed, and vice versa.

What do you need to do?

2.18 As a care home, you should:

¹¹ Such as the regulations enforced and standards expected by the Care Quality Commission (England), the Care Inspectorate (Scotland), Care Inspectorate Wales and the Regulation and Quality Improvement Authority (Northern Ireland) and guidance such as, in England, the Department of Health and Social Care's National Framework for NHS Continuing Healthcare and NHS-funded Nursing Care and the NHS-funded Nursing Care Practice Guide.

- (a) Immediately read this advice.
- (b) Carefully consider whether you need to make changes to your contracts and business practices to make sure you are complying with the law (which may involve reviewing whether all your charges are fair).
- (c) To support your compliance with the law, consider a wider review of your internal procedures and processes. For example, to make sure that important information is clearly, accurately and prominently provided to prospective residents and kept up-to-date (including on your websites, in written materials such as information packs and user guides and in response to telephone enquiries), and that fair complaints handling procedures are being followed.
- (d) Make sure that all customer-facing staff understand these requirements and comply with them, since you will be responsible for their actions.

2.19 This advice sets out the CMA's current views on when contract terms and practices are more likely to comply with, or infringe, consumer law. It is not a substitute for the law itself, and does not replace the role of the courts, which is to provide the definitive interpretation of consumer law based on the facts of each case. Ultimately, you are responsible for ensuring that you are complying with the law. If in doubt, you should seek your own independent legal advice on the interpretation and application of the law. You may also be able to get advice from any representative body you are a member of or any local authority with which you have a Primary Authority relationship.¹²

What happens if you do not comply with consumer law?

2.20 If you fail to treat your residents and their representatives fairly and infringe consumer law, you may face action by:

- (a) The CMA or other bodies that enforce general consumer law (such as local authority Trading Standards Services). These bodies can act to stop you infringing the law by bringing civil proceedings for a court injunction¹³ (and, where appropriate, seek compensation for affected residents) or - in relation to certain breaches - criminal prosecutions.¹⁴

¹² Primary Authority is a means for businesses to form a legal partnership with a local authority, which then provides assured and tailored advice on complying with trading standards law (including consumer law). For more information, see <https://www.gov.uk/guidance/local-regulation-primary-authority#what-is-primary-authority>.

¹³ Or an interdict, in Scotland.




¹⁴ In Scotland, criminal proceedings are brought via the Crown Office and Procurator Fiscal Service (COPFS).

- (b) Residents themselves, who may have the right to seek damages in the courts for certain breaches of consumer law.
- (c) Sector regulators, where the conduct of concern falls below the acceptable standards, as set out in relevant regulations and guidance.
- (d) Other compliance partners such as the [Advertising Standards Authority](#), which can take action against misleading advertisements that contravene its Codes.
- (e) Ombudsmen, or the relevant complaints handling body, who may consider and refer to the CMA's advice when considering complaints.¹⁵
- (f) Public funding bodies (such as a local authority, HSC Trust or NHS commissioning body) who contracted with you for the service on behalf of a resident, where your conduct breaches the terms of their placement contract with you.

¹⁵ The Local Government and Social Care Ombudsman in England, The Public Services Ombudsman for Wales, The Scottish Public Services Ombudsman and The Northern Ireland Public Services Ombudsman.

3. Providing upfront information to prospective residents and their representatives

- 3.1 Choosing to move into a care home is one of the biggest and most emotionally charged decisions that individuals, their family or other representatives will make. Whilst some people may foresee a need for care, decisions are often faced for the first time following a sudden illness, injury or loss of a carer. This means that decisions are likely to be made with urgency and under extremely distressing and pressurised circumstances. People's capacity and time available to read and understand material may be limited. To comply with consumer law, the information that you provide to prospective residents and their representatives should be clear, simple and easy to find and given in a way and at a time that ensures that they can understand and engage with it.
- 3.2 The information provided on your website, in response to telephone and email enquiries, in your information packs and written materials, when people visit your care home and at open days, is critical in helping people to make informed decisions.
- 3.3 The clarity and comprehensiveness of upfront information is also important so that people can understand what terms will apply during their stay and evaluate the practical implications for them. However, you must also ensure that your terms and conditions are substantively fair (see section 4 of this advice).

<p>When</p> 	<p>On first contact</p>	<p>In good time before making offer of a place</p> <p>At the latest, by time people agree to have care needs assessment</p>	<p>Confirming the offer and final details</p>
<p>What</p> 	<p>'Key' information</p>	<p>Important additional information</p> <p>plus copy of standard contract for self-funders</p>	<p>Final amount resident needs to pay</p> <p>incl. total weekly fee rate and final contract</p>
<p>How</p> 	<p>Initial enquiry by telephone or online</p> <ul style="list-style-type: none"> • Drawn to people's attention and minimum key info explained • Offer to provide further material (eg 'key facts' sheet, web address) • Answer questions <p>First visit to home</p> <ul style="list-style-type: none"> • All key info drawn to people's attention and explained • Written material to take away (eg 'key facts' sheet) <p>Provide the important additional information where people want/ask for it</p>	<p>Follow-up enquiry by telephone or online</p> <ul style="list-style-type: none"> • Tell them where to find the info on your website, or offer to send it to them if they prefer (eg in an information pack) • Answer questions <p>Follow-up visit</p> <ul style="list-style-type: none"> • Explain the info, with written material to take away (eg in an information pack) <p>Take active steps to provide this information in sufficient time for people to be able to consider it</p>	<p>Confirm final offer</p> <ul style="list-style-type: none"> • Confirm offer (and in writing) • Ensure offer explained and understood • If any info has changed since first provided, get express consent
<p>Your Website</p>	<p>Key information prominently highlighted (no more than 1 click away)</p> <p>Important additional information clearly signposted (easy to find and access)</p>		

Ensuring that prospective residents and their representatives have the information they need to make informed decisions

- 3.4 You must provide prospective residents and their representatives with the information they need to make informed decisions, when they need it, and ensure that it is provided in a clear, accurate, accessible and unambiguous manner, with appropriate prominence.¹⁶

Stages of the customer journey

- 3.5 There are typically two main stages involved in finding a care home. The first stage involves prospective residents and their representatives researching and shortlisting available homes in a locality. Following this, they will usually visit homes to follow up on their initial interest before making a final decision about whether or not to commit to a particular home. A person's commitment to their choice of care home will grow over the course of their enquires and information-gathering, starting right from the beginning of their research, as they form a view based on the information given over the phone or on a care home's website, the look of the place and its atmosphere on a first visit, the impression given by the staff they meet and speak to, and their tour of the home. This will culminate in the agreement to have a care needs assessment – see paragraph 3.21, below – by which time the prospective resident will, for all practical purposes, have become fully committed to the particular home over the course of their enquiries.
- 3.6 To comply with your consumer law obligations, you must ensure that:
- (a) Key information about your home is provided to prospective residents and their representatives when they make first contact with you (including by visiting your website), so that they can make informed choices about whether or not to shortlist, make further enquiries or arrange a visit to your home, without being 'overloaded' with information at this stage (ie when researching their choices). A list of this information is set out at paragraph 3.18.
 - (b) Important, additional information is provided to prospective residents and their representatives when they want or need it, and in good time¹⁷ before

¹⁶ Generally speaking, the public funding body should provide information and advice relating to care, including the choice of types of care and support, and the choice of homes, available to those in the authority's area.

¹⁷ By 'good time', we mean that prospective residents and their representatives have a genuine and reasonable opportunity to consider information and evaluate any practical implications for them and are not pressured into making quick or uninformed decisions. In this context, we consider that for important, additional information to be provided in 'good time', it must be provided, at the latest, by the time the prospective resident and their representatives agree to have a care needs assessment – see paragraph 3.21 of this advice.

you make them an offer of a place in your home (eg by clearly signposting it on your website and in written materials). A list of this information is set out at paragraph 3.28.

- 3.7 Once the prospective resident has decided to go ahead with a home, they will have the care needs assessment and select the particular services they want to receive (eg whether they have an en-suite room or not). Following this, you must confirm the offer (including the final weekly fee rate plus any additional charges the resident will have to pay), before the resident accepts it.

Providing upfront information to all prospective residents

- 3.8 Upfront information should, in principle, be provided to all prospective residents and their representatives, regardless of the resident's funding arrangements. Ultimately, certain information (for example, information about the indicative weekly fees you charge and any upfront payments) may only be relevant for self-funders. However, where a prospective resident is wholly or partly State-funded, it is important that you give these residents and their representatives relevant information to help them make informed decisions (given, for example, that they may be offered a choice of potential homes to look at by the local authority or other public funding body that is placing them).¹⁸
- 3.9 Further, a resident's funding status may not be clear when they first arrive in your home, or, they may initially be funded by the State, but will pay their own fees later.¹⁹ People in these circumstances also need upfront information, so that they can make informed decisions about their long-term care.
- 3.10 You should also be aware that short stay/respite residents may transition into permanent placements. You must ensure that these residents and their representatives are provided with timely upfront information about permanent placements (eg your weekly fees, requirements for upfront payments and other key information relating to permanent residency), as well as about your short-stay or respite services. For example, providing this information after the

¹⁸ For example, they will need information about the key features of your service, any optional 'extras' they can purchase and how they can complain if care is not supplied as expected (as reflected by the contract between you and the public funding body).

¹⁹ For example, where a self-funder's placement is arranged by the local authority due to their personal circumstances; where a financial assessment has been delayed until after the resident is in the home; where the resident has been discharged from hospital for assessment; or where there is a 12-week property disregard or deferred payment agreement between the resident and local authority.

original admissions process for respite care has concluded or later is likely to infringe consumer law.

Providing key information on first contact with prospective residents

- 3.11 Prospective residents and their representatives are likely to be under considerable time pressure to find a suitable home. Whilst timings may vary depending on circumstances, they need to be able to quickly identify the most important, key information, such as what services you are offering, whether they are likely to be within their budget and how this compares with other homes, without being overloaded with information that may not be necessary or helpful to them at this initial stage of their enquiries.
- 3.12 Where key information is not provided on first contact (eg where you only provide it at the end of someone's initial visit to your home or only after they have expressed an interest in moving in, or reveal it only gradually during the course of the admissions process), that may cause prospective residents and their representatives to shortlist or view homes that are not affordable or not consider others that may be more suitable (infringing consumer law). It is particularly important that information about fees and charges is provided on first contact; people need to be able to calculate, upfront, how much staying in your care home is likely to cost them.

When



Key information to provide when people first contact you

What



Funding arrangements

- Whether you accept self-funded and State-funded residents

Key features of your service

- The **care needs** you cater for
- Overview of the rooms, facilities and services residents can expect
- Size of the home (eg number of beds)
- Brief description of staffing arrangements

Latest inspection rating/grades

Surprising or important terms and conditions. For example

- Any minimum period that a resident must self-fund for
- How self-funded residents' **fees may change** during their stay
- Any requirement for a guarantor

Fees and charges

- Indication of the **total weekly fee rates** you charge self-funded residents (full range) for each type of care service
- What **services** are **included** in the weekly fees
- **Additional services** which may need to be paid for separately, including any **significant, additional charges** that some residents might need to pay, such as for being taken to medical appointments
- Details of any **upfront payments required**, such as a deposit, including the amount, what it covers and how it is refunded, and any weekly fees payable in advance of moving in

How



Key information should be:

- Prominently highlighted on your website (no more than one click away)
- Drawn to people's attention and explained on first contact by phone or online – offer to send further written material as appropriate (eg 'key facts' sheet), or a website address if they prefer, with staff who are able to answer people's questions
- Explained upfront when people visit your home for the first time, with information to take away (eg 'key facts' sheet)
- Provided in **different formats** and, where necessary, different languages

How you should provide the key information

- 3.13 Prospective residents and their representatives may initially look for information about care homes in a number of places. For example, they may use a search engine (and be directed to your website or a third party website you are listed on),²⁰ or call you to request information and/or arrange a visit. Alternatively, they may decide to make an unarranged 'drop in' visit to make initial enquiries or take information away. You must therefore ensure that key information is clearly provided in all the places that people are likely to look for it, so that prospective residents and their representatives can make informed decisions about whether or not to shortlist, make further enquiries of or visit your home.
- 3.14 The information must be provided in a clear and simple way that prospective residents and their representatives, who may not have any experience or familiarity with care homes, can easily understand and process, without being overwhelmed with unnecessary information at this stage.
- 3.15 Given its critical importance, key information should be given particular prominence and actively brought to the attention of residents and their representatives at the earliest possible opportunity (even if they are not specifically looking for that information). Where you send people information packs, the key information should be prominently highlighted (for example, on a single 'key facts' sheet at the front of the pack). It will not be enough merely to include key information in your terms and conditions or provide it when the resident moves in. For example, you should ensure that it is provided as follows:

Websites

- (a) Prominently highlighted on your website.²¹ We consider that key information should be no more than one click away from the main home page (ie the first page) of your care home's website. You could do this by prominently displaying key information on the home page itself, or by using clearly labelled and prominently signposted icons/tabs on the navigation menu at the top of the home page, from which key information is directly accessible (eg tabs labelled 'key information about our service',

²⁰ Where you provide information about your home to a third party website, you should ensure that the information you provide is truthful and accurate and sufficiently comprehensive, that it is displayed in a manner that is not likely to mislead prospective residents and their representatives and that you take steps to correct inaccurate information when you become aware of it. Where you fail to do this, you may infringe consumer law.

²¹ The important additional information should also be provided on your website – see paragraph 3.24, below.

'our fees and charges').²² Where you have a corporate website that links to subsites or profiles for each of the individual care homes you operate, you should ensure that key information about the individual home is no more than one click away from the first page of that specific home's subsite/profile.

Telephone and email enquiries

(b) Specifically drawn to the attention of and explained to prospective residents and their representatives when they make initial enquiries by telephone or online (eg by email). You must not hide or conceal any of the key information, but actively make clear where it can be found. In any event, to ensure compliance with the law, you should at least as a minimum in all initial enquiries by telephone or email about your home:

- Give enquirers information about which residents you accept (eg State and/or self-funded), an indication of how much the resident will have to pay to stay (including any upfront payments payable on or shortly after entering the contract and the purpose of these), certain key features of your service (eg the care needs you cater for, an overview of the home's facilities) and any particularly surprising or important terms and conditions (eg a requirement for residents to be able to self-fund their care for a minimum period);²³
- Offer to provide further written material (eg a 'key facts' sheet or an insert at the front of a brochure which prominently highlights the key information) in the post or in an attachment to an email where appropriate, or, if the enquirer prefers, provide them with a website address where key information is set out; and
- Ensure that your customer services department/customer facing staff are trained to provide enquirers with key information and can answer any questions they have about it (as well as about the important additional information, where people ask for it).

²² Residents and their representatives may look for online information using other devices (eg tablets, mobile telephones). You must still ensure that key information is not obscured or hidden. For example, on a mobile device, people may need to tap on a 'menu' icon to access information. From there, we consider that the key information should be no more than one 'click' (or tap) away (eg using clearly labelled icons/tabs from which key information about, for example, 'our fees and charges', is directly accessible).

²³ You should endeavour to provide all this information by phone, for example, by ensuring your call handlers have an appropriate script. However, we recognise that there will be occasions when enquirers may ask for some very specific information only.

First visits to the home

- (c) Specifically drawn to the attention of and explained to prospective residents and their representatives at the beginning of their first visit to your home (whether it is an arranged visit or an unannounced 'drop-in') ie before you show them around the home. Moreover, where someone visits the home to make preliminary enquiries, you should ensure that - as well as explaining all the key information to them before the start of a tour of the home's facilities – staff provide them with key information to take away (for example, in a 'key facts' sheet which prominently highlights the key information). You should ensure that important or surprising terms are clearly explained to and understood by prospective residents and their representatives (for example, by staff going through and explaining these terms face-to-face at the start of the first visit to the home). You should also be able to answer any questions about the important additional information set out below at paragraph 3.28 (eg if you are asked whether you can meet certain religious requirements or whether pets are allowed) and offer to provide them with the additional information to take away (eg in an information pack).
- (d) Provided in different formats and media, accessible and appropriate to the needs of your prospective residents (for example, in large print for people who require this and with appropriate audio, computerised and visual aids).²⁴
- (e) Where your home is likely to cater for non-English speaking residents, provided in other languages.

²⁴ For example, in England, all care homes that provide care to State-funded residents must also comply with the [Accessible Information Standard](#), which sets out a specific, consistent approach to identifying, recording, flagging, sharing and meeting the information and communication support needs of residents with a disability, impairment or sensory loss.

In Wales, the [statutory guidance to the Regulated Services \(Service Providers and Responsible Individuals\) \(Wales\) Regulations 2017](#) states that a summary of a care homes admissions procedure should be included in their guide to the service. Regulation 19 requires that this guide must be in an appropriate language, style, presentation and format.

In Scotland, the Health and Social Care Standards set out the expectation that people receive and understand information and advice in a format or language that is right for them.

In Northern Ireland, the guide '[Making Communication Accessible for All – A Guide for Health and Social Care \(HSC\) Staff](#)' is intended to help those working in the health service to communicate more effectively with those who may have a disability or communication support need. It includes specific guidance on the provision of accessible information.

Ensuring what you tell people is truthful, accurate and up-to-date

- 3.16 You must also ensure that any claims or statements that you or your staff make (whether in writing, visually or orally) are truthful, accurate and up-to-date. Where you provide residents or their representatives with information that is untruthful or which, through its overall presentation, may deceive them, this is likely to infringe consumer law.²⁵ For example, you should not:
- (a) Claim that your care home has an extensive range of daily activities on offer (eg on-site entertainment), has an activity coordinator or hospitality team, when that is not true.
 - (b) Claim that your care home offers 'outstanding', 'superb', 'fantastic' or similarly high standards of care, when the latest inspection report from the sector regulator identifies your service as performing badly or requiring improvement or when the home is under an embargo for new admissions.
 - (c) Claim or give the impression that your care home has recently won an award when that is not true.
 - (d) Include customer reviews or testimonials on your website or in marketing materials, which are not from genuine residents or representatives, or where the reviewer has been incentivised in some way to write a positive review.
 - (e) Selectively highlight positive customer reviews, where they are inconsistent with an inspection report, or fail to display negative ones.
 - (f) Provide false or incomplete information about your services to a third party website (for example, a care homes listing site).
 - (g) Provide false information about the experience and qualifications of your staff or any awards they have won.
 - (h) Selectively quote from a sector regulator's inspection report to give a misleading overall impression about its findings.
 - (i) Mislead people about your inspection rating or grade by displaying a previous rating or grade that was more favourable than your most recent one.

²⁵ In addition to engaging in a misleading commercial practice under the CPRs, you may also infringe the Advertising Standards Authority's self-regulatory 'UK Code of Non-broadcast Advertising and Direct and Promotional Marketing' (CAP Code).

- (j) Provide false or partial information to help justify the level or purpose of any additional charge (particular care is needed for any fee which is not part of the headline price, given that whilst a prospective resident and their representatives are likely to expect a weekly residential fee, other charges are unlikely to be similarly expected).

3.17 In addition, where you do any of the following, this will be unfair in all circumstances:²⁶

- (a) Claiming to be a signatory to a trade association's code of conduct, when that is not true.
- (b) Displaying a trust mark, quality mark or equivalent without complying with the underlying terms of approval.
- (c) Claiming that your care home has been approved, endorsed or authorised by a public or private body, when this is not the case. For example, claiming to be registered to provide a specific type of care service, when that is not true.
- (d) Falsely stating that your service will only be available for a very limited time or that it will only be available on particular terms for a very limited time, in order to elicit an immediate decision. For example, pressuring someone to sign a contract by claiming that there is only one suitable room available in your home, or there is a long waiting list for it, or that someone else is interested in moving in straight away, when that is not true, or giving the impression that availability is restricted when your home has a reasonably rapid turnover of rooms.

More detail on the key information you should provide

3.18 The following sets out in more detail the non-exhaustive list of key information that should be provided to prospective residents and their representatives on first contact (ie at the very start of your engagement with them, including on your website):

Funding arrangements

- (a) Confirmation of whether you accept self-funded residents, local authority-funded residents and other State-funded residents (eg NHS-funded residents). Where you accept local authority residents, you should alert

²⁶ These are 'banned practices', as set out in Schedule 1, CPRs, and will always be unfair regardless of the circumstances.

prospective residents and their representatives, upfront, to whether a top-up fee may be required.

Key features of your service

(b) An overview of the main characteristics/key features²⁷ of your service, including a description of:

- The specific care needs your home is registered or able to cater for (eg nursing, residential, dementia, end of life, respite, palliative, continuing, frail, rehabilitation etc)
- The accommodation/rooms residents can expect in the home (eg whether they are en suite, single, shared, furnished or unfurnished, contain a television, telephone and internet connections)
- The facilities and services (including activities and entertainment) available to residents in the home (eg a cinema room)
- The size of the home (eg how many beds it has)
- A brief description of your home's staffing arrangements, and how they meet residents' needs and assure care quality. This is likely to include information about the number and qualifications of staff working in the home (eg qualified nurses and care assistants), the planned number of staff on a day to day basis (eg your typical duty rota during the day time, at night time and at weekends, where these differ) and how they will be deployed across the home (eg where the home has more than one floor/unit). This should be consistent with the information that you are already required to provide to the relevant sector regulator to demonstrate that your staffing arrangements are sufficient to meet residents' needs.²⁸ You should make clear that the specific level of care that each resident will receive in the home will depend on an assessment of their individual care needs (eg their level of dependency). Where you take steps to supplement your staffing to ensure residents' needs are met (for example, through the

²⁷ Under the CCRs, information about the main characteristics of your service will be binding on you as a term of the contract where the resident accepts an offer of a place in your home. If this information changes before the contract is agreed, you need to get the resident's express agreement to the change.

²⁸ For example, in Wales, Care Inspectorate guidance for compiling a Statement of Purpose under the Regulation and Inspection of Social Care (Wales) Act 2016 states that information about staffing arrangements should include the numbers and qualifications of specified staff (including registered nurses) and the planned number of staff on a day to day basis the service will deploy ie the typical rota. See <https://careinspectorate.wales/sites/default/files/2018-03/180115statementofpurposeguideen.pdf>.

use of technology such as automated monitoring), you should describe them.

✓ **Example of how to provide information about staffing arrangements**

Our residential floors have capacity for a maximum of 15 residents each, and usually our staffing levels consist of three experienced carers, who all have achieved an NVQ in health and social care, on each floor during the day and two experienced carers at night time.

Our dementia nursing floor caters to a total of 10 residents and is staffed solely by three registered nurses during the day and two registered nurses at night time.

All floors are managed by a registered nurse, who assesses when extra carers may be needed if your care needs change.

In addition, we have a 24-hour nurse call system installed in all our residents' rooms. We also make use of automated monitoring technology to check residents' breathing and movements while asleep, which alerts nursing staff at a central monitoring location to any possible issues or concerns which could require staff to intervene.

We have a dedicated activities co-ordinator who organises internal and external activities for all residents to enjoy.

Please note that the actual level of care that each resident will receive in our home will depend on their individual care needs.

- (c) Where applicable, your home's latest overall inspection rating²⁹ (or, in Scotland, grades) from the relevant sector regulator and a website address/weblink to your most recent performance assessment inspection report (for example, on the regulator's website).

²⁹ Note that, in England, there is a specific requirement under Regulation 20A of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 that all providers who have received a CQC performance assessment must ensure their rating(s) are displayed conspicuously and legibly on their website (if they have one) and at each care home location. Your inspection rating should therefore be on the main home page of your care home's website. See <https://www.cqc.org.uk/guidance-providers/ratings/display-ratings>.

*Highlighting particularly surprising or important terms and conditions*³⁰

(d) A clear summary of terms and conditions that prospective residents or their representatives may find particularly surprising or are otherwise important. For example:

- A requirement that prospective self-funding residents must certify that they are able to pay their fees for a minimum period or agree to a financial assessment as a condition of moving in. In particular, you should clearly explain:
 - What your policy is on accepting a resident who may be unable to satisfy your minimum funding criteria (including if they will be refused admission in all circumstances, will require a guarantor, or whether the decision is at the discretion of the local care home manager); and
 - The implications if they become eligible for State funding during the minimum period (for example, whether you can ask them to move to a less expensive room or terminate the contract and ask them to leave if the local authority fee rate is not sufficient or a top-up payment cannot be arranged through the local authority).
- An explanation of how a self-funded resident's fees may change after they have moved into the care home (see paragraphs 4.40 – 4.55).
- The requirement for a 'guarantor'.³¹ You should clearly explain the circumstances in which a guarantor will or may be required, the guarantor's role and responsibilities and when they may be liable, what fees/charges they may be liable for and the potential extent of their liability.

³⁰ By 'surprising' we mean any term that a prospective resident or representative would not anticipate and know to look for, noting that such a person is unlikely to be used to dealing with care homes. A term may also be surprising if it is contrary to general industry practice. Whilst we have given examples, these are not exhaustive. For example, a requirement for an upfront payment or fees payable after death may also be surprising. Note that your terms must be substantively fair under the CRA. Simply highlighting or drawing attention to surprising or important terms will not necessarily make them fair. See section 4 of this advice.

³¹ By 'guarantor', we mean a third party sponsor who agrees to be liable for a self-funding resident's fees should they stop paying. This is not the same as a third party (for example, a family member) who has agreed to pay a 'top-up' contribution so that the resident can accept a place in their preferred home. See section 4 of this advice for a discussion around the substantive fairness of terms requiring a guarantor.

Fees, charges and payments

(e) An accurate and up-to-date indication of the total weekly fee rates charged to self-funding residents, inclusive of all applicable taxes (for example, your standard gross weekly fee).³² In particular, you should ensure that:

- You make clear that the indicative fee information provided relates to self-funded residents (eg in a clear heading).
- You provide the full range of fees you typically charge rather than just a 'from' price, and that the range is accurately representative of what you typically charge new residents. For example, if the minimum weekly fee shown is for one exceptionally small single room in your care home, and thus much lower than the fees charged for the rest of the rooms, this is likely to be misleading.
- You provide indicative fees for each type of care service you offer – for example, residential care, nursing care, specialist dementia care and respite care,³³ making clear which type of service each indicative fee applies to.
- You provide indicative fees for each of the different types of room the fees apply to – for example, single, shared, en-suite.
- For nursing care, you make clear the relationship between the indicative fees quoted and the NHS Funded Nursing Care contribution (or HPSS payments for Nursing Care in Northern Ireland) some residents may be eligible for. This relationship may be determined by the relevant policy guidance in each country (see paragraphs 4.61 - 4.69). For example, in England you could say: *'Your nursing care may be funded in part by a contribution from the NHS (known as Funded Nursing Care and in 2018/19 was £156 a week). If you are eligible for this contribution, it will be paid directly to us by the NHS and will be deducted from the weekly fees quoted when paid'*.

³² The example provided is for illustrative purposes only in the context of this advice. We recognise that care homes may have different business models. For example, depending on your business model, it may be appropriate also to provide an average fee. To ensure compliance with consumer law, residents and their representatives must know, upfront, what they are likely to have to pay for your service, depending on their choices and circumstances.

³³ For respite care this may, for example, be a flat fee charged at a daily rate.

- Where appropriate and applicable, you make clear that indicative fees quoted are for guidance only and subject to an individual care needs assessment and the type of room and services chosen.

✓ **Illustrative example of how to provide indicative fee information**

Indicative prices/weekly fees guide for self-funded residents

Residential care:

Single room: The weekly fee charged for self-funding residents is currently from £800 ranging to £900 per week.

Single room with en-suite: The weekly fee charged for self-funding residents is currently from £900 ranging to £1,000 per week.

Shared room (per person): The weekly fee charged for self-funding residents is currently from £600 ranging to £700 per week.

Prices quoted are for guidance only. All prices are subject to an individual care needs assessment and the type of room and services chosen.

(f) Information about what services are included in your weekly fees and any optional additional services and extras that are not included and which may need to be paid for separately once the resident is in your home (for example, accompanied hospital visits, hairdressing, chiropody, medical supplies, toiletries and telephone charges). Any additional services/charges quoted should be optional, meaning the resident can genuinely choose to pay or not to pay. Charges that are mandatory for all residents (ie residents cannot reasonably avoid them) should be included in your headline fees: we would normally expect to see all mandatory charges recovered in your weekly fees. In particular, you should ensure that:

- You provide the actual cost (or where the cost cannot be calculated in advance, information about how it will be calculated) of any significant, additional costs that may be unavoidable for some residents, depending on their circumstances. For example, if you charge residents for being accompanied by a member of staff to medical appointments (where friends, relatives or other

representatives are unavailable),³⁴ the costs over a period of time can be substantial, so you should give the actual cost or an accurate indication. It is not sufficient to simply say that a charge will apply - for example, only saying 'we will ask for an additional fee to arrange for someone to accompany you on an external appointment' or 'If you need to get to hospital for an appointment you need to pay a member of staff to accompany you' is likely to be unfair.³⁵

- Where there are additional charges for everyday items or charges that vary in accordance with the resident's choices (eg hairdressing, toiletries, medical supplies), you should tell residents what those items/services are.³⁶
- You provide information about services that the resident may be able to receive for free from the NHS (if eligible). You should make clear what services may be charged for, depending on whether the resident is entitled to free NHS provision.
- Where you accept local authority or State-funded residents, you provide them and their representatives with an indication of any 'extras' they may personally be liable for.

✓ Illustrative example of how to provide information about what services are and are not included in your weekly fees

The following items and services are included in and covered by your weekly fees:

- The costs of your personal care
- Accommodation
- Electricity (eg heat and light)
- Food and drink, including snacks

³⁴ If a resident has to attend a planned hospital or GP appointment, you should notify the resident's representatives in advance, as they may be able to accompany the resident.

³⁵ Where the resident qualifies for NHS-provided transportation services to attend appointments, you should where practicable, ensure this is arranged. You should not charge the resident for the transportation.

³⁶ Where you have a current price list for additional charges/extras, you should tell prospective residents and their representatives where they can find it (for example, via a prominent link on your website and displaying it at the reception desk in the care home).

- Housekeeping and laundry undertaken on the premises (excepting articles requiring dry cleaning)
- Television licence, inclusive for personal use
- Occupational therapy

The following extra items and services are not covered by the weekly fees, but we can arrange for them to be provided to you at a cost. You shall be responsible for payment for extra items and services and we shall advise you of their cost beforehand. Our latest price guide is set out on our website, here [[weblink to prices](#)], in your service user guide and available at reception in your care home.

- Professional hairdressing
- Aromatherapy massage and reflexology
- Personal copies of newspapers or magazines
- Personal purchases such as stationery, confectionery, alcoholic beverages, particular snacks, soaps and toiletries
- Clothing, shoes and slippers
- Dry cleaning
- Installation of private telephone line, internet or cable TV connections

In the absence of free provision by the NHS, the following may also be provided, but shall be charged in addition to the weekly fees:

- Chiropody
- Opticians
- Dentistry
- Physiotherapy
- Other privately arranged healthcare

In the event that NHS staff, your representatives or relatives are unable to provide you with an escort to hospital appointments, we will apply a charge of £15 per hour for a member of staff to accompany you.

(g) Information about any other upfront payments required,³⁷ such as:

- Weekly fees payable in advance of moving in, including the amount (eg four weeks' residential fees), what they cover, and how fees are refunded should the resident decide not to move in.
- Where applicable, the amount³⁸ of any deposit that you require:
 - (a) Where you require a security deposit,³⁹ you should also provide: an explanation of the purpose of the deposit and the risk that it is intended to protect you against; details of how you protect it against the risk of insolvency (for example, whether it is 'ring-fenced' in a separate trust account or protected by insurance); details of where and by whom the deposit will be held; and how the deposit will be refunded when the resident leaves or dies.⁴⁰
 - (b) Where you require a reservation deposit,⁴¹ you should provide: an explanation of the purpose of the deposit and the risk that it is intended to protect you against (ie the risk of late cancellation by the resident); details about whether it gives that resident an exclusive option on the room until they move in; confirmation that it will be credited towards the resident's fees if they move in,⁴² and the circumstances in which the deposit (or any part of it) will or will not be refunded (eg if the resident decides not to move in).⁴³

³⁷ As we note above (paragraph 3.18(f)), we would expect all mandatory charges to be recovered through the regular residential fees. As we set out in section 4 of this advice, the charging of upfront mandatory fees, which are not deposits or pre-payments, is likely to be unlawful under consumer law.

³⁸ This should be the exact amount (where it is a fixed sum) or, where it is based on weekly fees, an illustration of what the typical amount is likely to be (this could be the **range** of deposits taken, or the **average** deposit taken).

³⁹ That is, a monetary sum which is intended to protect you against the risk of losses you might incur as a direct result of the resident's failure to pay fees and/or damage to property resulting from the resident's actions.

⁴⁰ For the avoidance of doubt, we consider that it is likely to infringe consumer law to require residents to pay any security deposit where this is not properly protected against the risk of your own insolvency. Such a term requiring payment is likely to be unfair and describing a sum as a security deposit when it is not kept separate from your operating funds is likely to be misleading.

⁴¹ That is, a monetary sum which is intended to protect you against the risk of losses you might incur as a direct result of the resident not moving into the home, following the conclusion of the contract with the resident.

⁴² We consider that failing to refund or credit a reservation deposit towards the resident's fees when they move in is likely to be unfair – see section 4 of this advice.

⁴³ Failing to give a refund may be unfair, where the amount retained by the home exceeds the loss caused by the resident's default – see section 4 of this advice.

Important additional information to be provided in good time before you make an offer of a place

- 3.19 Following the initial research stage, prospective residents and their representatives will have identified a shortlist of homes in which they are particularly interested and will need to decide which of these is best for them. This will usually mean visiting homes and further engaging with you and your staff, before making a final decision.
- 3.20 Important, additional information must be provided to prospective residents and their representatives when they want or need it, and in good time before you make them an offer of a place. You may also need to provide them with more tailored information at this stage (for example, information about any specific requirements following a discussion of their finances or any other specific conditions that the prospective resident must satisfy before being offered a place).
- 3.21 In our view, providing the important additional information in ‘good time’ means that it must be provided, at the latest, by the time the prospective resident and their representatives agree to have a care needs assessment. This is because, whilst a person’s commitment to a home will grow during the course of their dealings with the home, starting with their first contact, once they have agreed to a care needs assessment, they are likely (for all practical purposes) to be fully committed to securing a place in your particular home. This important additional information should be easily accessible to people from the start of their research (including on your website). You should also take active steps to provide the information to prospective residents and their representatives and do so in sufficient time for them to be able to consider it before they agree to have a care needs assessment. Practical examples of how to provide this information are set out below.
- 3.22 Where you fail to provide this information accurately, where you provide it late in the admissions process (for example, after the resident has already agreed to have a care needs assessment, just before they are asked to sign a contract, or after they have already moved in), or where you do not provide it clearly, the resident may end up choosing a home that is not suitable for their needs, when they would not have done so otherwise.⁴⁴

⁴⁴ In addition to engaging in a misleading commercial practice under Regulations 5 and/or 6 of the CPRs, you are also likely to be infringing specific sector regulations or failing to follow the guidance from the sector regulators. See, for example, in England, Regulation 19 of the Care Quality Commission (Registration) Regulations 2009. The intention of this Regulation is to make sure that care homes give timely and accurate information about the cost of their care and treatment to people who use their services.

When



Important additional information to provide in good time before you make an offer of a place (ie at the latest, by the time people agree to have a care needs assessment)

What



Includes:

- Details of any **trial period** (including length)
- Detailed information about what happens if residents' **funding arrangements change** while in the home
- **Complaints handling** procedure
- Reasons for **ending the contract** and any conditions (including notice)
- Trading name and contact details
- Information about how the home is **regulated** and **by which regulator**
- Details of who is registered as **running** the home and whether there is a **registered manager** in post (and, if not, the alternative arrangements in place)
- Latest **food hygiene** rating
- Information about **contents insurance**
- Whether residents can bring pets, choose male/female carers and whether you can meet dietary or religious requirements
- Where to find copy of your standard T&Cs for self-funders
- Information specifically required by sector regulations
- Any other information required under the **CCRs**

How



Take active steps to provide the important additional information and do so in sufficient time for people to be able to consider it before they agree to have a care needs assessment. It should be:

- Clearly signposted on your website (easy to find and access)
- Provided to people where they contact you by telephone or online to follow up on their initial interest, by telling them where they can find it on your website or offering to send it to them if they prefer (eg in an information pack), with staff who are able to answer people's questions about it
- Explained, upfront, when people visit your home again following preliminary enquiries, with further written material to take away (eg in an information pack)
- Provided where people contact you for the **first time** and want to know more about the home at **that point**

How you should provide the important additional information

- 3.23 This information must be provided to prospective residents and their representatives in a clear, accurate, accessible, unambiguous and timely manner, so that they can make an informed decision about whether or not to accept an offer of a place in your home.
- 3.24 Where you have a website, you should ensure that the important, additional information is clearly signposted and made available online, so that it is easy for prospective residents and their representatives to find and access. For example, important additional information could be provided using a clearly labelled icon/tab on the navigation menu bar of your home page (eg 'other important information you should know about our home') which takes people to a page where the information is clearly set out, or by providing prominent weblinks to the information. The information should not be placed on pages that can only be found using a search facility or which are otherwise hard to navigate or find.⁴⁵
- 3.25 Where, for example, people contact you by telephone or online to follow up on their initial interest, your staff should:
- Tell them where they can find the important additional information on your website.
 - Offer to send them the information if they would prefer (eg they may be unable to access or use the internet, or do not want to look online) - for example, as a separate sheet in an information pack which highlights the information.
 - Be ready and able to pro-actively answer questions about it.
- 3.26 Similarly, when people visit your home again having already made preliminary enquiries (eg in an initial visit), you should ensure that a trained member of staff explains the important additional information to them (and any information relevant to the particular resident's circumstances, such as the need for a third party contributor) at the beginning of the visit and is able to answer any further questions they may have. You should also provide them with this information in writing to take away (for example, set out on a

⁴⁵ Where information is on a website that is hard to navigate (for example, it is spread across several different webpages) so that it is difficult for residents and their representatives to find and access, this may infringe consumer law.

separate sheet in an information pack, highlighting the information in a clear and accessible manner) before they agree to have a care needs assessment.

- 3.27 In practice, some people may visit your home or contact you for the first time and decide that they want to know more about your home at that point (rather than, for example, taking information away and coming back for a further visit or making further enquiries later). This could be, for instance, because they need to find a suitable home quickly, your home is the only one in the area that has a current vacancy, or because they have already done a lot of research and expressed a clear interest in securing a place in your home. In this case, you should ensure that you provide them with the important additional information at that point (as outlined above). You could therefore provide the important additional information on first contact (eg where the enquirer asks for it), albeit the key information must be given particular prominence.⁴⁶

More detail on the important additional information that you should provide

- 3.28 The following is a non-exhaustive list of important additional information that should be provided to prospective residents and their representatives in good time before you make them an offer of a place (ie at the latest, by the time they agree to have a care needs assessment - see paragraph 3.21):

- (a) Where applicable, details of any trial period (including length, the circumstances in which the trial period can be ended prematurely by you or the resident, notice requirements, and arrangements for refunding pre-payments and any deposit).
- (b) Detailed information on your policies if a resident's funding arrangements change whilst in the home. For example, in relation to self-funded residents, you should explain what may happen if:
 - A self-funded resident becomes eligible for local authority funding during their stay in the home (for instance, whether you have the option of asking them to move to a less expensive room in the home or to terminate their contract and ask them to leave if the local authority rate is not sufficient or a third party top-up payment

⁴⁶ You could, for example, provide all the upfront information to residents and their representatives in a single document (eg an information pack), but the key information must be given particular prominence (eg on a 'key facts' sheet at the front of the pack).

cannot be arranged through the local authority – in which case the local authority will move them to another home).⁴⁷

- A self-funded resident becomes eligible for Continuing Healthcare⁴⁸ (CHC) funding during their stay at your home (for instance, whether you accept CHC funded residents in your home and if so whether you have the option of asking the resident to move to a less expensive room or to leave if the CHC funding is perceived not sufficient or the NHS funding body decides to move them to another less expensive home that can meet their assessed clinical needs).⁴⁹
- (c) Your complaints handling procedure,⁵⁰ including the name and contact details of any alternative dispute resolution (ADR) provider that you use (eg local mediation or conciliation services or a trade association mediation or arbitration scheme) and the circumstances when you will submit to an ADR procedure (for example, if a resident has exhausted your internal complaints handling procedure) and the contact details and role of the relevant Ombudsman service.⁵¹
- (d) The reasons for which you or the resident may terminate the contract and any conditions, including the notice period and the means by which the termination should be notified (eg by written notification and to whom).
- (e) Your trading name, the address at which you are established, your telephone number (unless already apparent from the context), and an email address at which you can be directly contacted.
- (f) Information about how your care home is regulated and by whom (for example, in England, by the Care Quality Commission (CQC)).

⁴⁷ In Scotland, under the National Care Home Contract, you are required to tell self-funded residents whether or not you will accept them on the basis that they may become eligible for further local authority funding and will come under the National Care Home Contract and how their charges will change (clause B.8.4).

⁴⁸ This is a package of care that is arranged and funded solely by the NHS for individuals who are not in hospital and who have complex ongoing healthcare needs. See also paragraphs 4.132 – 4.137 of the advice.

⁴⁹ To avoid misleading residents, you should make clear that the NHS funding body has a duty to consider the merits of paying a higher than usual cost - for example, where the need is for identified clinical reasons such as an individual with challenging behaviour who requires a larger room because their behaviour is linked to feeling confined, or where the frailty, mental health needs or other relevant needs of an individual who becomes eligible for CHC when they are already resident in a care home means that a move to other accommodation could involve significant risk to their health and wellbeing.

⁵⁰ Under the CCRs, this information will be binding on you as a term of the contract where the resident accepts an offer of a place in your home. If this information changes before the contract is agreed, you need to get the resident's express agreement to the change.

⁵¹ It is important you make clear that the use of ADR is voluntary and does not restrict in any way a resident's right to seek independent redress to the relevant Ombudsman service once the internal complaints handling procedure has been exhausted.

- (g) Details of who is registered as running the care home and whether there is a registered manager currently in post (and an explanation of what alternative management arrangements are in place, if not).
- (h) Your latest food hygiene rating.
- (i) Information about contents insurance - you should make clear whether the resident must arrange their own insurance cover for personal belongings. Where applicable, you should explain the value of the insurance cover that you provide for residents' belongings, details of what items are and are not included under your policy and the amount of any excess payable by the resident.⁵²

 **Example of how to provide information about contents insurance**

Our insurance policy provides cover for the resident's personal belongings up to a maximum value of £1,000 at any time, with the exception of cash. The policy carries a £50 excess payable by the resident for each claim made under the policy. If personal belongings, such as furniture and items eg cash, credit cards, deeds, documents or personal effects of greater value are kept in the home, they should be covered by the resident's own insurance. Further details of our insurance cover are included in the service user's guide.

- (j) Whether residents can bring pets to the home, choose a male or female carer and whether you can meet certain dietary or religious requirements.
- (k) Where to find a copy of your standard (proforma/sample) contract/terms and conditions for self-funded residents (see paragraph 3.29 below).
- (l) Any other information specifically required by sector-specific regulations, rules or guidance to help people make informed decisions.⁵³
- (m) Where you negotiate and enter into contracts at a distance without the physical presence of the resident (for example, by email or over the telephone) or away from your business premises (for example, in the resident's home or in a hospital), any other information required by the

⁵² However, as set out in section 4 of this advice, where you attempt to exclude or restrict your liability to residents where their belongings are lost, stolen or damaged and you are at fault, this is likely to be unfair.

⁵³ See, for example, the information set out in the Regulated Services (Registration) (Wales) Regulations 2017.

CCRs, including the resident's right to cancel the contract within the statutory cancellation period under the CCRs (typically 14 days after the day on which the contract was entered into).⁵⁴

- 3.29 It is vital that a copy of your standard (proforma/sample) contract/terms and conditions for self-funded residents has been provided to prospective residents and their representatives (and anyone else who will be party to the contract), at the latest, by the time they agree to have a care needs assessment, so that they can make an informed decision about whether or not your home is right for them. Your terms should therefore be easy for people to find. For example, a copy of your standard contract or resident's agreement for self-funders should be clearly signposted on your website and included in information packs you send to enquirers. Where residents and their representatives have not had a real opportunity to become familiar with or understand your terms and conditions before being asked to agree to them, they may not be incorporated into the contract (and may be unenforceable).⁵⁵ Where you try to enforce these terms against a resident, this may infringe consumer law.
- 3.30 Where you accept State-funded residents, there will be a placement contract between you and the public funding body, which will determine the terms of the resident's placement. However, these residents and their representatives will still need to understand the terms and conditions of their stay. For example, they should be provided with a pro-forma copy of any 'residency agreement' that they may be required to sign before agreeing to a care needs assessment.⁵⁶ This should include, among other things, clear information about who is responsible for payment of fees, the parties' rights and obligations and the terms and conditions of your service, so that they can make informed decisions about their care.

Confirming and finalising the offer of a place

- 3.31 You must also ensure that, once a care needs assessment has been undertaken and the resident has selected the services they want to receive

⁵⁴ General guidance on the CCRs can be found on the Business companion website. See <https://www.businesscompanion.info/en/quick-guides>.

⁵⁵ See paragraphs 4.7 – 4.8 of this advice on binding residents to 'hidden' terms. You may also be required to provide similar information under sector regulations. For example, in Wales, Regulation 19 of the Regulated Services (Service Providers and Responsible Individuals) (Wales) Regulations 2017 requires care homes to prepare a 'written guide' to the service, which must be given to all individuals receiving care and support and made available to others on request, and in an appropriate language, style, presentation and format.




⁵⁶ See, for example, in Scotland, the proforma residency agreement for permanent care placements at Appendix 7a to the National Care Home Contract.

(including the type of accommodation), you confirm the final, total amount that the resident will have to pay (including the total gross weekly fee rate inclusive of taxes, and any permissible upfront payments),⁵⁷ as part of your offer of a place (and for State-funded residents, confirmation of what has been agreed between you and the funding body, as it relates to the resident's care and any 'extras' they have agreed to pay for). You must also ensure that the terms of the final offer have been explained to the resident and their representatives by a trained member of staff and that they have actually understood it and, where any information has changed since it was first provided, the resident and their representatives have been informed of this and have expressly agreed to the changes, before accepting the offer (and signing a contract).⁵⁸

- 3.32 All residents should be provided with a copy of any contract or agreement that they have signed (as well as being provided with a copy in advance).

⁵⁷ Under the CCRs, information about the total price of your service will be binding on you as a term of the contract where the resident accepts an offer of a place in your home. If this information changes before the contract is agreed, for example because you want to increase the weekly fee that you quoted following the care needs assessment, you need to get the resident's express agreement to the change.

⁵⁸ You may also be required, under sector regulations, to give the resident a copy of any written agreement relating to their care and ensure that they receive such support as is necessary to enable them to understand the information contained in the agreement (such as information about the costs payable by the individual, other costs covered by the placing authority and the terms and conditions of the service), so that they can make decisions about their care. See, for example, the [statutory guidance from the Welsh Government relating to Regulation 20 of the Regulated Services \(Service Providers and Responsible Individuals\) \(Wales\) Regulations 2017](#). In any event, you must ensure that residents and their representatives are not pressured into making quick or uninformed decisions, infringing consumer law.

<p>When</p> 	<p>Confirming the offer and arranging the final details (after the care needs assessment has been completed and the resident has chosen the services they want)</p>
<p>What</p> 	<ul style="list-style-type: none"> • The final total amount the resident will have to pay (ie their total weekly fee rate including taxes and any permissible upfront payments) • Any information that has changed since you first provided it • Copy of the final signed contract
<p>How</p> 	<ul style="list-style-type: none"> • Confirm the offer in person or on the phone, and in writing (ie the final contract) • Ensure the offer has been explained and understood • Get express consent from the resident and their representatives if any information has changed since first provided

Emergency/rapid admissions

- 3.33 We recognise that not all admissions will be planned. In some cases, admissions may happen very quickly. For example, this may be the case where someone suffers a very sudden decline in health and requires immediate care or where a person is discharged from hospital at short notice.
- 3.34 Even in cases of rapid admission, you should ensure that prospective residents and their representatives are provided with all the information they need as soon as reasonably practicable, and at least by the time you make an offer of a place in your home. The fact that an admission may happen quickly is a further reason why sufficient information must be given to the resident and their representatives in a clear fashion, not an excuse to fail to provide them with the information they need to make informed decisions; it will not be enough to provide them with information once the resident has moved into the home.⁵⁹

⁵⁹ For example, we would not consider it acceptable for key information about your home to be provided to a resident only during a trial period. Residents are often reluctant to move homes, even when unhappy or dissatisfied, because of the stress and inconvenience involved, and the potential negative impact on their health.

3.35 In practice, you should ensure that you have systems in place to meet your information obligations in cases of emergency/rapid admissions, whilst also ensuring that residents get the care they need, when they need it.⁶⁰ For example, in cases of hospital discharge, you will normally need to visit the prospective resident to ensure that you can meet their needs, before accepting them. Before embarking on the assessment process, you should explain the key information to the prospective resident and their representatives (such as an indication of your weekly fees and any upfront payments), provide them with written material (eg an information pack) which clearly highlights the important, additional information and answer any specific questions they have. You should take extra care in these circumstances to ensure that information is provided in a manner that prospective residents and representatives can genuinely process and understand, before making decisions.

It is therefore critical that residents and their representatives have all the information they need to make informed decisions about your home, before you make them an offer of a place.

⁶⁰ This is likely to be particularly important where residents lack mental capacity and you need to engage with a statutory advocate who has been appointed to act on the resident's behalf.

4. Treating residents fairly: your contract terms and business practices

- 4.1 Where we refer to ‘terms’ in this section, this includes all contracts, agreements, conditions, rules, notices⁶¹ and regulations that your residents (or third parties, such as guarantors) are bound by, and which together form the contract between you.⁶²
- 4.2 You must not use terms or practices that are unfair. Residents and their representatives are in a weak position compared to you and are particularly susceptible to meeting onerous demands imposed on them to secure a place at a home. They may be unwilling or unable to leave the home if your service does not meet expectations or where they are unhappy with how you have interpreted or applied your terms. The vulnerable circumstances of the resident, at the time the contract is agreed, and when any term is being enforced subsequently, will be important considerations for a court when assessing the fairness of your terms.
- 4.3 In this section we set out specific types of terms and practices that are likely to be unfair and explain how you can ensure that you comply with your consumer law obligations.

Ensuring that your terms are user-friendly, clear and unambiguous

- 4.4 The wording used in your terms should be simple, clear and informative, so that residents and their representatives can genuinely understand their rights and obligations before agreeing to them.⁶³
- 4.5 As well as helping you to comply with your obligations under consumer law, spelling out your terms clearly will save you time in answering questions and

⁶¹ This could include statements made in writing or orally in your communications which relate to the rights and obligations between you and your residents – for example, in your brochures, service user guides, information packs, on your website, on a poster in your home, or even word of mouth such as what a salesperson or staff member might say to a prospective resident and their representatives before they agree to move into your home. It is important to note that a term in a notice need not technically have contractual effect for it to be challenged as unfair.

⁶² Or wording which otherwise relates to the rights and obligations between you.

⁶³ The Court of Justice of the European Union has explained that terms should not only make grammatical sense but must put the consumer into the position of being able ‘to evaluate, on the basis of clear, intelligible criteria, the economic consequences for him which derive from it [the term]’ (see Case C-26/13 *Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt.*, at paragraph 75).

reduce the likelihood of disputes. In particular, you should ensure that your terms:

- (a) Set out all the rights and obligations arising under the contract. Where you fail to do this, terms may not be incorporated into the contract and may be unenforceable against the resident.
- (b) Include upfront 'key facts' sections or executive summaries, highlighting particularly surprising or important terms at the beginning.
- (c) Are written in plain and simple language that an ordinary person would understand, avoiding legal jargon such as 'implied terms', 'indemnify', or 'joint and severally liable'.
- (d) Explain any care terminology used, such as what is meant by a 'top-up fee', 'guarantor' or 'Funded Nursing Care'.
- (e) Are clear about their meaning, to avoid any ambiguity or confusion.⁶⁴
- (f) Use meaningful headings to make your terms easy to navigate.
- (g) Are legible for older people. For example, this may mean having contracts in larger font for the visually impaired.

4.6 Complying with the upfront information requirements in section 3 of this advice and ensuring that your terms are user-friendly and transparent will help them to be fair. However, your terms also need to be substantively fair.

Before the resident moves in

Binding residents to 'hidden' terms

4.7 As set out in section 3 of this advice, you must ensure that your standard terms and conditions for self-funders are brought to the attention of prospective residents and their representatives in good time before you make them an offer of a place. This is so that they have a real opportunity to read and understand their rights and obligations under the contract, before being bound.

⁶⁴ Where there is more than one possible interpretation of a term, in the event of a dispute between you and the resident, consumer law will require that it should be given the meaning that is most favourable to the resident.

4.8 Where you use a provision which has the effect of binding residents to terms that they have not had the chance to become familiar with or understand, this is likely to be unfair under consumer law. For example:

- (a) Where terms in other documents are deemed to be accepted by a resident signing a contract/resident's agreement, but the linked terms are found in several documents located in various places (making them difficult to find and review).
- (b) Where a prospective resident is required to make a payment to you before the care needs assessment is completed or before a clear offer of a place is made and accepted by them. In these circumstances, they will not be aware of key terms of the contract, including the amount of their monthly residential fees, and will not have had an opportunity to consider these other terms.⁶⁵ We discuss upfront payments further at paragraph 4.16, below.
- (c) Where terms are said to be binding on the resident even if the contract has not been signed.

✘ Examples of terms that are likely to be unfair⁶⁶

'These terms and conditions, together with the attached admission agreement and the policies provided in your welcome pack upon admission, form the agreement governing our relationship for the duration of your stay at our home'

'This contract consists of this document together with all preceding and following correspondence, provider information and informal promises, including the contents of any brochure, booking details, service users handbook and service user plan'⁶⁷

⁶⁵ We would consider such a requirement unfair even if the money is refundable, because it is likely to restrict the prospective resident's ability to shop around and creates a disproportionate sense of obligation on the resident to proceed with the transaction. We also fail to see the business need for taking such sums at this stage in any case.

⁶⁶ Note that we provide these example terms for illustrative purposes only in the context of this advice. Where we give examples of terms that are more likely to be fair, the CMA is not presenting these terms as fair (or likely to be fair) and immune from challenge in all circumstances. The CMA is unable to "approve" terms or recommend terms for use on the basis that they are fair and therefore will not be open to challenge by itself or other enforcers. The assessment of fairness for the purposes of the CRA requires consideration of all the circumstances of each case and of the effect of the other terms in the contract.

⁶⁷ While we have concerns about the fairness of care homes relying on terms purportedly contained in brochures, it is important to bear in mind that in certain circumstances residents and their representatives can rely on such statements, for example in the event of a dispute.

Terms requiring deposits

- 4.9 Some care homes ask for a security deposit from self-funding residents after they have entered into a contract, but before they move into the home. This is refundable when the resident leaves or dies, provided that no outstanding fees or charges are owed. Other care homes, in similar circumstances, ask for a reservation deposit to hold a room for a prospective resident, which might be retained (in full or part) if they do not move in.
- 4.10 As set out in section 3 of this advice, you must ensure that you give prospective residents and their representatives clear, accurate and prominent upfront information about any requirement for a deposit. Where you fail to do this at the earliest opportunity (or where you provide information only gradually or late in the admissions process) this is likely to infringe consumer law.

Security deposits

- 4.11 Terms which allow you to take a security deposit must be fair. A security deposit remains the resident's money and you must take care of it. For example, terms that require a very substantial deposit or which give you a wide discretion to retain it without clear justification when the contract ends, are likely to be unfair, as this may operate as a financial sanction for ending the contract, or even deter residents from complaining or challenging invoices where they are dissatisfied with your service, for fear of losing their deposit.⁶⁸ You must also ensure that your arrangements for returning security deposits are fair and transparent.

⁶⁸ For example, where you require a deposit in circumstances where you already require residents to pay fees monthly in advance, it may be an unfair term under the CRA to extract a large deposit from the resident and then expose them to the risk of their money being lost. It may also be an 'aggressive' commercial practice under the CPRs where you exploit your position of power over the resident to require payment of a large deposit as a condition of offering them a place in your home.

✘ Example of a term that is likely to be unfair

'We shall be entitled to apply the deposit, at our absolute discretion, at any time during or after the resident's stay, towards satisfying any outstanding balance or any outstanding breach of these terms and conditions'

4.12 To help you to comply with your consumer law obligations, you should ensure that:

- (a) Prospective residents and their representatives are provided with key information about the requirement for a security deposit on first contact with you (see paragraph 3.18(g) of this advice).
- (b) The purposes for which you may require a security deposit are limited to valid reasons, namely protecting you against the risk of non-payment of fees or damage to property caused by the resident's actions.
- (c) The amount of any deposit is set low enough so that it merely reflects and protects those legitimate interests. For example, if you require residents to pay fees a month in advance, a large deposit may be unfair, since you will already be substantially protected against the risk of non-payment of fees.
- (d) A security deposit is not used as part of your working capital or to meet your running costs and is held in a separate resident/client bank account, separated from your working capital. You are more likely to comply with consumer law where you protect the resident's deposit against the risk of loss (for example, by 'ring-fencing' in a separate trust account or insuring it against the risk of insolvency).
- (e) Your terms clearly and accurately explain the purpose for which you take the security deposit and what it is intended to protect, the circumstances in which it will and will not be refunded and the arrangements for refunding it (including how you handle disputes and the availability of any independent ADR), so that residents and their representatives can easily understand and foresee how they might be affected.
- (f) Any deductions you propose to make from the deposit are clearly set out in an invoice or final statement of account and supported by evidence. Your terms should not give you sole discretion to assess the amount you will retain when the contract ends or allow you to have the final say on

whether to return the deposit at all. In particular, you should not withhold all or part of a resident's security deposit:

- For reasons unconnected with non-payment of fees or damage to property caused by the resident (for example, because the resident has frequently complained about your service).
- In response to the resident withholding payment where there is a genuine dispute about the quality of your service.
- For vague or poorly defined reasons, whether set out in your contract or not.

(g) Deposits are returned as quickly as possible once the resident has left the home (or has died) and the final account has been issued and agreed by the resident or their estate. This should normally be no more than 28 days after the resident has left or died, other than in exceptional circumstances, such as where there is a need to obtain probate or identify the executor of an estate.

(h) Where there is a dispute over the return of a deposit, you have in place a fair and transparent process for resolving the dispute. Where you cannot resolve disputes, you should consider referring the matter to an independent party to resolve (for example, an ADR provider).

Reservation deposits

4.13 A reservation deposit should only legitimately be used to protect you against losses you might incur as a direct result of the resident not moving into the home after a contract has been agreed. A requirement for a large reservation deposit which does not accurately reflect those potential losses is likely to be unfair under consumer law, as it may act as an unfair financial sanction should the resident decide not to move in.

4.14 Similarly, where your terms make a reservation deposit non-refundable in all circumstances where a prospective resident does not move in, this is also likely to be unfair. Such a term allows you to retain payment even when you were at fault or your actions prevent the resident moving in, as agreed, and ignores the fact that there are likely to be at least some circumstances in which you can minimise any loss and so refund these sums. Moreover, before requiring payment of a reservation deposit, you should think carefully whether there is a legitimate need for it. For example, a reservation deposit is likely to be open to objection if it is sought when residents routinely agree to move into the home shortly after signing a contract, or where you have a waiting list.

4.15 To help you to comply with your consumer law obligations, you should ensure that:

- (a) Prospective residents and their representatives are provided with key information about any requirement for a reservation deposit on first contact with you (see paragraph 3.18(g) of this advice).
- (b) The reasons for which you may require a reservation deposit are limited to protecting you against the risk of late cancellation, and this is clearly explained. The amount of the reservation deposit should therefore be modest, so that it represents no more than the limited loss that you are likely to incur if the resident decides not to move in (taking into account any reasonable steps you can take to reduce your loss, such as admitting a new resident). Where, as is commonly the case, someone else can quickly move in, you should refund the deposit in full.
- (c) Your terms clearly and accurately explain the circumstances in which the reservation deposit will and will not be refunded and the arrangements for refunding it (including how you handle disputes and the availability of any independent ADR), so that residents and their representatives can easily understand and foresee how they might be affected.
- (d) Your terms do not allow you to benefit where you are at fault. For example, your terms should not allow you to withhold a refund of a reservation deposit:
 - Where the resident's room is not ready on the date that you had told them it would be and they want to cancel as a result.
 - Where the room does not conform to its sales, marketing or pre-contract description when the resident is due to move in.
 - Where you withdraw an offer (for example, because the resident's care needs change before they move into the home and you are no longer able to meet their needs).
- (e) Where the resident moves in, the reservation deposit is returned in full as quickly as possible (normally within seven days) or credited against the first fees to be paid.

Terms requiring other upfront payments

- 4.16 A term requiring a resident to pay a wholly or partially non-refundable fee on signing a contract is likely to be unfair under consumer law.⁶⁹ It can, for example, have the practical effect of taking away the resident's right to terminate the contract, particularly within any trial period, and can operate as a financial sanction on the resident and a windfall for the care home, given that contracts can normally be terminated by either party on one month's notice.
- 4.17 We are also concerned that payments that are sometimes required on the signing of a contract (or anytime thereafter) are likely unfairly to require residents to pay for services which are not supplied to them, or which they otherwise do not benefit from, or which they are in fact, or will already be paying for through the regular residential fees.⁷⁰ Examples of the types of payments which we consider are likely to infringe consumer law include charges for:
- (a) Maintenance or improvement of common parts of the care home. Residents will reasonably expect, and usually have, the right to enjoy these areas through payment of their regular residential fees.
 - (b) Activities related to admissions (eg care needs assessments and installing in the resident's room appropriate care needs equipment before they move in). These types of activities are necessary to ensure that you can meet your obligations of providing person-centred care. We consider that it is wholly artificial to attempt to treat such activities as not being part of the primary residential care services, which are paid for by the residential fees.
 - (c) Other pre-contract activities (eg promoting the home and answering telephone enquiries from prospective residents and their representatives). These types of activities can be simply described as the cost of doing business, as underlined by the fact that they are carried out before care home staff have even met the prospective resident.
 - (d) Joining or moving into a care home. It is unlikely that charging a resident for joining or moving into a home can be properly regarded as a distinct

⁶⁹ It is also likely to be unfair under consumer law to require the prospective resident to make a payment **before** they have concluded a contract with you.

⁷⁰ The same objections would not apply to advance payment of regular residential fees, as long as there are appropriate provisions in place for refunds where the resident does not move in, or pro-rata refunds if the resident leaves early.

service, given that welcoming and settling a new resident into a care home is part of the primary residential care services, which are paid for by the resident through the regular residential fees.

- 4.18 Regardless of whether they are required to be paid upfront or during performance of the contract, these types of fees are also likely to be challenging to describe accurately without misleading prospective residents and their representatives. We would also have concerns about a care home failing to disclose important information about the fee upfront, and instead gradually revealing its existence and amount during the course of the admissions process. Imposing a requirement to pay an upfront fee as a condition for being able to move into a care home is also likely to exploit the resident's need to be admitted to the home, and so cause them to pay a fee which they would not pay if their negotiating power was equal to that of the care home.
- 4.19 You are likely to mislead prospective residents and their representatives and infringe consumer law where, at any time, you represent or give the impression that a payment:
- (a) Funds the upkeep of communal areas of a particular home (eg gardens and lounges), when in fact the money is put into your general funds, or used over a number of homes charging upfront fees which they claim are to cover the costs or expenditure they incur on the communal areas when these are in fact not tracked adequately, or at all. In any event, as indicated above, upfront charges for the maintenance or improvement of common parts of a home are likely to infringe consumer law, irrespective of how they are represented to prospective residents and their representatives. Describing the fee in a way that is misleading compounds the error by creating the impression of the fee's legitimacy, making it more likely that residents will pay it without challenge.
 - (b) Funds specific services provided to the resident as part of the admissions or moving in process, when no specific service is in fact provided at all in return for the payment but rather the admissions related activities are simply a necessary part of ensuring that the care you provide meets the needs of the individual resident; or where the fee is calculated by reference to estimated costs that apply more generally across all residents or homes. In these circumstances, representing the payments as being to fund specific services associated with the admissions or moving in process are likely to be misleading, as prospective residents and their representatives are likely to understand that the fee is specifically to cover the costs of their own admission. In any event, as indicated above, charges for admissions related activities are likely to

infringe consumer law, irrespective of how they are represented to prospective residents and their representatives. Describing the fee in a way that is misleading compounds the error by creating the impression of the fee's legitimacy, making it more likely that residents will pay it without challenge.

- (c) Covers or is related in any way to costs, expenditure or disbursements incurred (or to be incurred) by you, where there are no clearly identifiable costs or services which are provided to residents, at their request, specifically in return for the payment. Similarly, if the fee is not calculated in line with such costs (for example, if the costs are not adequately tracked by you, or if the payment is determined by the amount you consider residents will pay or have paid in the past), or if, in practice the fee has been frequently waived or reduced, then it is not credible to suggest that this is a charge to cover these costs. In any event, charging fees in circumstances where they are not associated with a clearly identifiable cost or requested service is likely to infringe consumer law, irrespective of how the charge is represented to residents and their representatives. Describing the fee in a way that is misleading compounds the error by creating the impression of the fee's legitimacy, leading them to pay it without challenge.

4.20 We would also have concerns where you do not make the amount of the fee clear to prospective residents or their representatives, or where you do not give them clear, accurate, unambiguous and prominent upfront information to confidently work out how much the fee will be. For example, if an upfront fee is described to prospective residents as an amount equal to two weeks' residential fees, this is not likely to be sufficiently transparent for them to understand the practical implications, given that prospective residents will not know the amount of their regular residential fees until late in the admissions process.

4.21 To help you to comply with your consumer law obligations, you should:

- (a) Avoid making mandatory charges beyond the regular residential fee, whether those charges are applicable to all residents or any subset of residents.
- (b) Keep careful records of any money you pay out on a resident's behalf, and evidence in support, where you reasonably wish to pass the cost of a specific expense onto a resident (for example where you have purchased an additional item for them which is not covered by the residential fees, such as an item of clothing).

- (c) Only seek to charge a resident for specific goods or services⁷¹ where you have obtained their express consent to make that specific purchase in advance.

Terms requiring someone to act as a 'guarantor'

- 4.22 Some care homes may require someone to co-sign a self-funding resident's contract as a 'guarantor', or to sign a separate contract, where they agree to be liable for the resident's fees if they stop paying.⁷²
- 4.23 Where a guarantor is required, they and the resident must be able to understand and assess the potential extent of their liability and evaluate the practical implications for them both, before they accept responsibility.⁷³ This is especially important given the effect it may have on the guarantor's own finances. Where you pressurise someone into acting as a guarantor as a condition of accepting a resident, or where you only mention the requirement late in the admissions process (when the prospective resident is likely to already be committed to taking up a place), this is likely to infringe consumer law.⁷⁴
- 4.24 Generally, we would be unlikely to object to a term requiring a guarantor to make up missed residential fee payments, in the event of the resident's default, provided that:
 - (a) You have provided the resident and guarantor with clear and prominent upfront information about the guarantor requirement at the earliest possible opportunity.
 - (b) You have taken appropriate steps to ensure that they have genuinely understood and agreed to this obligation.
 - (c) The guarantor is given reasonable notice of the amount of any overdue payment(s) as they arise, together with your intention to take the payment from them. You should also send them a clear invoice for payment as soon as practicable. It would never be acceptable to allow arrears to build

⁷¹ Ie something that is demonstrably different from and in addition to the service already covered within the standard weekly residential fees.

⁷² Note that this is not the same as a third party (for example, a family member) who has agreed to pay a 'third party top-up contribution' towards the resident's fees.

⁷³ See paragraph 3.18(d) of section 3 of this advice for key upfront information about the requirement for a guarantor.

⁷⁴ For example, it may be an 'aggressive' commercial practice under the CPRs where you pressurise or intimidate a resident's representatives into agreeing to a financial commitment, or otherwise exploit their vulnerability to apply pressure, limiting their ability to make free or informed decisions.

up without notifying the guarantor that this is happening and involving them in early discussions as to how to manage or resolve the resident's financial difficulties.

- 4.25 However, terms that require a third party to guarantee the resident's performance of all their obligations under the contract, without limitation or further explanation, are unlikely to be fair under consumer law. This is because, where the circumstances in which the third party may be liable are vague or unclear, they are unlikely to be able to foresee and understand, before they agree to be bound, when they may be liable under the contract and the potential extent of that liability.

✘ Examples of terms that are likely to be unfair

'By signing this document, you will assume full responsibility for the performance of the resident's obligations under the terms and conditions of this agreement'

'You are fully liable with the resident for each and all of the obligations of the resident'

- 4.26 Similarly, terms that make the guarantor liable for 'all fees and additional costs', without providing an explanation of exactly what those fees are, when the guarantor will be liable, what their liability will be or, where this cannot be calculated in advance, how it will be calculated, are unlikely to be fair. The guarantor will not be in any position to foresee, on the basis of clear, intelligible criteria, what they may be liable for and what the potential extent of that liability may be.

- 4.27 To help you to comply with your consumer law obligations, you should ensure that:

- (a) Prospective residents, their representatives and any prospective guarantor are provided with upfront information about the requirement (including the circumstances in which a guarantor may be required and what this is likely to require) on first contact with you (see paragraph 3.18(d) of this advice).
- (b) Your terms are transparent, enabling guarantors to understand easily and foresee how they might be affected and evaluate the practical implications for them. You should avoid technical or legal jargon (such as 'indemnify' or 'joint and severally liable') that people are unlikely to understand

without further explanation. For example, your terms should clearly, accurately and unambiguously explain:

- The guarantor's role and responsibilities under the contract.
 - The specific circumstances in which they will be liable.
 - What fees/charges they will be liable for.
 - The potential extent of their liability and, where this cannot reasonably be calculated in advance, the manner in which it will be calculated.
 - The consequences for the guarantor if they are unable to pay (for example, if they may have court proceedings initiated against them to recover monies) and what may happen to the resident's place in the home.
- (c) You should explain the effect of the contract to the guarantor (including by speaking to them over the phone if they do not physically accompany the resident).
- (d) The circumstances in which the guarantor may be liable are limited to situations where the resident is genuinely at fault and you have suffered loss as a result (for example, we would be unlikely to object where a guarantor is liable for missed residential fee payments). Your terms should not make a guarantor liable for costs that could arise when you are at fault, or you have recourse to some other third party. For example, where a resident becomes eligible for State funding, this should reduce the guarantor's liability for the full fees.
- (e) Your terms do not require someone who has a power of attorney over the resident's affairs to be personally liable for guaranteeing payment of the fees, where they have not expressly agreed to this. This is because an attorney uses only the resident's money over which they have authority and does not become personally liable for contracts signed for a person lacking capacity.
- (f) Your terms do not impose unreasonable notification requirements on the resident and/or guarantor to tell you about changes to their situation, such as requiring the resident and/or guarantor to notify you of any and all changes to the resident's personal or financial circumstances, without spelling out what these are.
- (g) You give reasonable and early notice to a guarantor if you become aware that a resident is having difficulties paying their fees (for example, where

they have fallen into arrears on a payment), so that they can take appropriate action to remedy the default if possible, and you involve the guarantor in discussions about how to resolve the resident's financial problem.

Terms requiring prospective residents to confirm that they can pay their fees for a minimum period

- 4.28 Some care homes require self-funding residents, as a condition of acceptance, to confirm that they can continue to pay the agreed fees for a minimum period (eg two years). This may involve assessing the prospective resident's finances during the pre-admission process to check that they have sufficient funds for the stated minimum period, or requiring them to self-certify that they have sufficient assets to self-fund for this period.
- 4.29 As set out in section 3 of this advice, you must provide prospective residents and their representatives with clear and prominent upfront information about any funding conditions when they make first contact with you, as this may affect their decision about whether or not to shortlist, make further enquiries of or visit your home. This may be particularly relevant if they are just above the eligibility threshold for State funding.
- 4.30 We do not object to minimum funding period terms in principle,⁷⁵ provided that any increases to your fees during this period are clearly foreseeable to the resident before entering the contract. If your fees are liable to be changed at your discretion, it is difficult to see how the resident can offer any assurance that they will be able to pay what is a unknown future amount (see paragraphs 4.40 – 4.55 below on fee increases).
- 4.31 However, you must ensure that such terms are substantively fair. You must not prevent or deter a resident from seeking assistance from their local authority (or other public funding body such as the NHS) if they become eligible for State funding during the minimum period. A resident may become eligible if, for example, they run down their assets more quickly than expected because their care needs (and associated costs) increase, or because their declining health means they are assessed as being eligible for Continuing Healthcare. A term with this effect is likely to be unfair (and unenforceable). Moreover, the local authority will need to be aware of the situation so it can

⁷⁵ For example, such a minimum funding period may allow prospective residents and their representatives to plan better for their care needs. It may help them to assess, upfront and ahead of making any commitment, whether they may in fact be entitled to State funding or whether they are likely to be able to afford your fees for the duration of their stay.

meet its obligations to the resident and, if necessary, make suitable alternative arrangements for them.

4.32 To help you to comply with your consumer law obligations, you should ensure that you do not:

- (a) Prohibit, or otherwise deter, self-funding residents from seeking State funding if they become eligible during the minimum period (for example, by telling the resident that they may be in breach of contract), even if, in practice, you assist residents in these circumstances.
- (b) Impose unreasonable notification requirements on the resident. For example, if you require them to notify you within a specified timeframe where they anticipate becoming eligible for State funding, that period should not be excessively far in advance, as it will be very difficult for a resident to anticipate and comply with such an obligation.
- (c) Oblige self-funding residents or their representatives to agree, at the time of entering the contract, to be liable for any future funding 'shortfall' (between the self-funder fee rate and local authority rate) that may arise in the event the resident seeks State funding during the minimum period. This is because the resident (or third party) will not be able to foresee and understand, at the time they enter the contract, what their future liability might be (see also paragraph 4.112 on 'top-up' payments).
- (d) Impose any penalty on the resident if they leave your home during the minimum period, for example, as a result of no longer being able to afford the full fees required.

4.33 You must also ensure that your terms are transparent, so that residents and their representatives can make informed choices about whether or not to enter into the contract. In particular, your terms should clearly, accurately and unambiguously explain:

- (a) Where applicable, details of what the assessment of the prospective resident's finances will entail.
- (b) Whether, and in what circumstances, you may still accept a resident who is unable to satisfy your minimum funding criteria - for example, if the decision is at the discretion of the local care home manager, or if a guarantor may be required.
- (c) What steps residents must take after moving in to notify you in advance of a potential change in their funding situation.

- (d) Any support or assistance you may offer residents, for example in discussing the change in their funding situation with the local authority.
- (e) The implications if a resident becomes eligible for State funding during the minimum time period. For example, whether they could be asked to move to a less expensive room or to leave the home if the local authority fee rate is not sufficient or a top-up payment cannot be arranged through the local authority.

After the resident moves in

Varying your terms or your service (including changes to fees)

- 4.34 For your contracts to be considered fairly balanced, residents should be entitled to receive the service they expect, on the agreed terms, and not something that is, in any significant respect, different.
- 4.35 We recognise that sometimes it may be necessary for you to make adjustments to your terms or service (for example, to improve it). But terms that give you a wide discretion to make a range of changes, or allow you to do so on short notice, especially if the resident has no say, are likely to be unfair under consumer law, since they could be used to force residents to accept unanticipated costs, new requirements or reduced benefits.

✘ Examples of terms that are likely to be unfair

'We reserve the right to make changes to our terms or service at any time by serving 7 days' notice on you. Changes will take effect from the date of the notice'

'We shall have the right to vary these terms and conditions and/or any of our services or policies from time to time if, in our opinion, it is necessary or appropriate to do so'

- 4.36 In this sector, notice of a change and a right for the resident to end the contract without penalty before it takes effect is unlikely ever to be enough to offer sufficient protection. Residents are often reluctant to move homes, even when unhappy or dissatisfied, because of the stress and inconvenience involved, and the potential negative impact on their health.
- 4.37 Consumer law requires that you specify, at the outset, the circumstances in which you may need to make changes without the resident's consent, so that the resident can foresee, when deciding whether to accept a place in your

home, the circumstances in which changes may occur and understand how they may be affected.⁷⁶ These circumstances should be clear, and narrow in scope and effect.

4.38 To help you to comply with your consumer law obligations, you should ensure that any term that may allow you to change your terms or service after the resident has agreed to move into your home:

- (a) Clearly, accurately and unambiguously specifies the circumstances in which you can make changes, which should be limited to valid reasons.⁷⁷ For example, terms are more likely to be fair where they allow only very minor changes, non-fee related changes that are necessary to give effect to new health and safety laws or sector regulations, changes that benefit residents, or an annual increase of fees in line with inflation (see paragraph 4.40, below).
- (b) Is transparent, so that residents and their representatives can foresee and understand how the changes might affect them, before they accept an offer of a place. Simply saying that any change will be 'reasonable' is not enough, as the resident will not be in a position to understand and evaluate what sort of changes you may make and in what circumstances.
- (c) Requires you to give advance written notice of the change to residents and their representatives before it takes effect, so that residents who do not wish to accept it can, in theory, end the contract and avoid it. This period should be sufficient for the resident realistically to be able to escape the effects of the change, and be no less than the period of notice that the resident must give to end the contract. Further, when the resident has given notice within this period, the changes should not apply to the resident during their notice period. Periods of less than 28 days are unlikely to be fair.
- (d) Allows the resident to obtain a pro-rata refund of prepayments for use of their room or services not yet provided (including full refund of any deposit), if they decide to move out before the variation takes effect.

4.39 If a major, unexpected change becomes necessary which was not provided for in the contract (in particular, a change that may reduce the resident's

⁷⁶ See, for example, paragraph 3.18(d) of section 3 of this advice (highlighting surprising or important terms).

⁷⁷ The Court of Justice of the European Union has strongly emphasised the need for this kind of full transparency in the use of variation terms, so that consumers are able to foresee the changes that can be made and understand the implications for them, before entering into a contract. See case C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen e.V.*, paragraphs 43, 44 and 55.

benefits or be disadvantageous to them), you must provide extensive notice and engage in meaningful consultation with residents and their representatives since you will, in effect, be seeking to make a fundamental change to the agreement, which could put you in breach of contract. Such a change should not take effect without the resident's consent and should be limited to exceptional circumstances that are out of your control and where you may be unable to continue providing your service without making changes. Where you make such changes unilaterally (ie without the resident's consent) you may be liable for damages for breach of contract, as well as infringing consumer law.⁷⁸

✓ **Example of a term that is more likely to be fair**

'You must observe the resident rules and regulations, which shall be made available for you to inspect in the home.

We shall be entitled to make modifications to the resident rules and regulations to reflect new health and safety laws or sector regulations, or to improve the service that we provide to you. In all cases, we will consult with you and your representatives about proposed changes and provide you with six weeks' notice before any modification takes effect. If you object to any modifications you have the right to terminate this agreement without penalty'

Changes to residents' fees during their stay: annual reviews

- 4.40 Balanced contracts require that residents receive what they have been promised, in exchange for paying an agreed price. Terms which give you, in effect, an unlimited right to increase the price of your service after it has been agreed are likely to be unfair under consumer law, especially where the resident has no choice but to pay the higher price or leave. As with general variation terms, transparency is critical, so that prospective residents and their representatives can foresee changes and understand the practical implications for them.
- 4.41 Fee increase terms need to be treated with great care, in particular so that they do not allow you to increase your fees arbitrarily. To ensure compliance

⁷⁸ To be clear, you are expected to comply with all current relevant legislation and sector rules and regulations. Where your terms allow you to vary your terms or service because of your non-compliance with existing legislation, rules and regulations, this is unlikely to be fair under consumer law.

with consumer law, your fee variation terms must set out clearly the circumstances in which the resident's fees may change and the method of calculating the change. This should enable residents and their representatives to foresee, on the basis of clear, objective and intelligible criteria, the changes that may be made and evaluate the practical implications for them, before entering the contract.⁷⁹ In addition, we consider that general fee reviews should be limited to once a year (eg 1 January).

✘ Examples of terms that are likely to be unfair

'Your fees will be subject to review in future and any increase will be notified to you in writing'

'Fees will be increased from time to time. We will give you advance notice of any change before it takes effect'

4.42 Simply stating that your fees may go up as a result of 'increased costs', 'local market conditions' or 'the wider national economic picture', will not make your terms fair. This type of general wording is both unclear as to what residents can expect and open to misuse, since residents can have no reasonable certainty over what the increases will be. Such terms also fail to recognise that, generally speaking, you are likely to be much better able to anticipate changes in your costs than residents are.

4.43 Similarly, a term which merely states that any increases will be 'cost reflective' or 'reasonable' or limited to 'unexpected changes' is unlikely to be fair, as the resident will be unable to foresee what sort of changes such wording allows, and in what circumstances. Such vague wording also provides significant scope to make unexpected changes, to the detriment of residents.

⁷⁹ We consider that information about how the resident's fee may increase during their stay should be actively and prominently drawn to the attention of residents and their representatives as early as possible (for example, on your website, in written materials you provide to prospective residents such as a 'key facts' sheet or in information packs and when they arrive for initial visits) alongside other key information – see paragraph 3.18(d) of this advice.

✘ Example of a term that is likely to be unfair

'Fees are normally reviewed annually (upward only). Any general review of your fees, including the annual review, will take account of local market conditions, the wider national economic picture and any unforeseen or unexpected costs that have arisen since the time of the previous review'

- 4.44 Terms which seek to 'cap' an annual fee increase but which still give you a very broad discretion to increase your fees, or without setting out clearly the circumstances in which a change may occur, are also likely to be unfair. This is because the resident will still be unable to foresee, in any meaningful way, the increases that they may be subject to in future and they can have no reasonable certainty that increases are actually cost reflective. In general, we would have concerns about terms which impose a 'cap' or 'floor' on fee increases, on the basis that any cap or floor is likely to be arbitrary and therefore not reflective of your genuine costs increases.

✘ Examples of terms that are likely to be unfair

'We will review your fees annually. As a result of the review, your fees will not increase by more than 15%, other than in exceptional circumstances'

'Your fees will be reviewed annually and will be increased by 10% or the Consumer Prices Index, whichever is higher'

- 4.45 Whilst it is not the only way to comply with the law, we consider that care homes are more likely to ensure compliance where they review existing residents' fees on an annual basis by reference to a relevant, objective and verifiable published price index, clearly specified and explained in the contract.⁸⁰ Critically, this approach is likely to give prospective residents a

⁸⁰ That is not to say that linking increases to a price index is the only way to ensure compliance with consumer law. For example, in theory, a care home could fix a resident's fees for the duration of their stay. Alternatively, a contract could specify the precise level and timing of any future increases in price so that they effectively form part of the agreed price, provided that the details are clearly and prominently drawn to the resident's attention before entering into the contract, in a way which allows them to foresee and evaluate the practical implications for them.

degree of foreseeability in relation to future fee increases, whilst ensuring that increases will not be calculated on an arbitrary basis.

4.46 For example, you may consider linking fee increases for existing residents to:

- The percentage increase in the Consumer Prices Index including housing costs (CPIH) over the previous year.⁸¹
- The average of (i) the percentage increase in the CPIH over the previous year and (ii) the percentage increase in the National Living Wage (NLW) rate compared to the previous year.⁸²
- A weighted averaging, presented and explained in a way that prospective residents and their representatives are likely to understand. For example, where 65% of the cost of a resident's care is attributable to staff costs and 35% is attributable to non-staff costs, 65% of the resident's overall fees could be increased by reference to NLW and the remaining 35% by reference to CPIH.⁸³
- An index developed or required by legislation or sector regulations for the purpose of reflecting the costs of care provision.

4.47 The examples set out above are suggestions for indices that you may consider using to ensure compliance with the law. This list is not exhaustive and we are not mandating any of these examples as being the only method of ensuring legal compliance. For instance, there may be index-based approaches that take into account additional cost drivers that are relevant to care homes, or which separate out the care staff, nursing and other cost elements of the total weekly fee and specify in residents' contracts which index will be used to update each. However, the more complex an index is, the harder it will be to explain to residents and their representatives, meaning that it may be unfair for lack of transparency. The key is that any index you use should be capable of independent verification, and be described with sufficient clarity in the contract, so that people can genuinely understand and

⁸¹ CPIH is likely to be more appropriate than CPI, which excludes housing costs. This is because care home fees contain an element of housing provision. The CPIH index (showing the increase in prices over the previous 12 months) is published monthly at <https://www.ons.gov.uk/economy/inflationandpriceindices/timeseries/l55o/mm23>.

⁸² For example, in this case, if CPIH increased by 2% over the previous year and NLW by 4%, an average of 3% could potentially be applied. This approach is designed to reflect the fact that staff costs represent a major component of the cost of a care home place, whilst keeping the calculation as simple and transparent as possible for residents. For example, in 2016-2018 NLW has grown faster than CPIH, so using NLW on its own is likely to have exaggerated increases in care home costs. An average of CPIH and NLW should more closely represent care home cost inflation.

⁸³ Weightings may vary depending on, for example, whether the home is nursing or residential.

predict the likely impact of the fee variation term on them over the course of their stay.

- 4.48 To present a price variation term fairly and transparently in your contract, it is likely to be necessary to illustrate the impact of the term with a worked example of how fees could change in the future, and a description of how they have changed in the past.
- 4.49 Exceptionally, major changes in legislation or sector regulations might significantly increase your costs of providing your service (for example, where the sector regulator imposes new minimum staffing requirements for the provision of specific types of care). Where such a change directly results in a significant and demonstrable increase in your costs,⁸⁴ we would be less likely to prioritise enforcement action where the resident's fees are increased at the time of the annual review to reflect the increase in your costs, to the extent that it is not already covered in the price indexation used.⁸⁵ In such circumstances you should ensure that:
- Any price index that you use does not already take into account these cost increases. Where the price index already takes account of these costs, no further increase should be made.
 - Your terms clearly set out and explain the limited circumstances in which you may increase fees for this reason.
- 4.50 As with variation terms generally, you must also ensure that you provide residents and their representatives with advance written notice of the change in their fees,⁸⁶ before it takes effect, so that they are, in theory, genuinely free to avoid it by leaving before the change takes effect and receive a pro-rata refund of any prepaid residential fees.

⁸⁴ If you wish to explicitly incorporate increases in the NLW into your annual fee reviews, we would expect such increases to already be taken into account through the index method you have chosen.

⁸⁵ We would expect such situations to be truly exceptional and as covering only costs which are directly imposed on care homes by a major change to legislation or regulations that is outside of your control, not those which are the result of poor planning or the unavoidable risks of running a business (such as a local shortage of staff). However, whether your term or practice is fair will ultimately be determined by reference to the law, including all the circumstances existing when the term was agreed and to all the other terms of the contract.

⁸⁶ For example, in Northern Ireland the [Residential Care Homes Regulations \(Northern Ireland\) 2005](#) and the [Nursing Homes Regulations \(Northern Ireland\) 2005](#) require a registered care home to notify the resident at least 28 days in advance of any increase in residential fees.

Changes to residents' fees during their stay: more frequent changes

4.51 We would not object to more frequent changes in a resident's fees (ie not linked to an index) where:

- The resident requests and receives an enhanced service or a better room, provided that:
 - what makes it an enhanced service is clearly defined
 - the enhanced service is demonstrably different from the service already covered within the standard weekly residential fees
 - the resident retains the choice as to whether they want to pay – for example, if someone no longer wishes (or cannot afford) to pay for a better room they should be able to move back to a standard room, when one becomes available
- The resident's care needs change (for example, where they will require increased levels of care which mean you incur additional costs in meeting their needs), but residents should also receive a reduction in fees where their care needs reduce. There must be a significant and demonstrable change in the resident's care needs to justify a increase in price for this reason; where you assess changes by reference to care 'bands', these should be limited, and clearly defined according to significant steps in increasing care needs.

Changes to care needs

4.52 To ensure compliance with the law, you should be able to evidence and justify a decision to increase fees due to a change in care needs (for example, through the use of recognised accredited dependency tools)⁸⁷ and any increase must be reasonable and proportionate to the resident's needs.⁸⁸ Where you anticipate or assess that a resident's needs have changed (eg through informal or responsive monitoring), you should engage in meaningful

⁸⁷ For example, in England, CQC guidance on Regulation 9 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014, says that care homes should use nationally recognised evidence-based guidance when designing, delivering and reviewing care.

⁸⁸ Under section 51, CRA, where a consumer has not paid a price (or other consideration) for a service and the contract does not expressly fix a price, the contract is to be treated as including a term that the consumer must pay a reasonable price for the service, and no more. What is a 'reasonable price' is a question of fact.

and transparent consultation⁸⁹ with them and their representatives and give them advance written notice (eg 28 days) before implementing a change in fees (including the reasons), so they can challenge your decision or avoid the increase if they wish.

- 4.53 Where there are disputes, or you anticipate a dispute, you should liaise with relevant independent professionals (eg a multidisciplinary team) to support your decision. Any change in the resident's fees should not take effect until the consultation process and notice period has ended (ie the new fee rate should not be backdated). To achieve fairness, we consider that you should pause the notice period if a resident or their representative has raised a dispute, and start time running again only when the relevant independent professional has given their view of the appropriate level of care and fees. This will ensure that residents and representatives still have time to make alternative arrangements for their care, if the revised price you are proposing is too high for them.
- 4.54 There may also be instances where a resident suffers an unforeseeable decline in health that requires significant extra care to be given at short notice. You are more likely to comply with your consumer law obligations in these circumstances where you provide reasonable notice of the price increase (eg seven days), so residents and their representatives have sufficient time to consider their position and you provide and signpost the opportunity for your assessment to be reviewed by relevant independent professionals. Further, because the increase in cost could be substantial, you should offer the resident the opportunity to leave the home without penalty before it takes effect, if they or their representative feel the increased level of care is unaffordable.
- 4.55 We accept that there may be circumstances where not providing additional care immediately would be harmful to the resident, and it is clearly in their interests for it to be provided straight away. As where additional care is being introduced at short notice, you should ensure that residents and their representatives have appropriate safeguards, namely, that you give immediate notice of any fee increase the additional care will entail (and where they do not agree with your decision, you liaise with relevant independent professionals (for example, a multidisciplinary team) to support it), and the resident has the opportunity to leave without penalty when the fee increase

⁸⁹ For example, by having a conversation with the resident and their representatives (which may include a statutory advocate appointed to act on the resident's behalf) about their changing needs, how this will affect the type of care they are likely to require in future (by reference to an accredited dependency tool) and how this is likely to affect their fees.

takes effect. You should not apply the fee increase until any dispute is resolved, but where your decision is supported by independent assessment and the resident does not decide to leave the home, we would be unlikely to prioritise enforcement action where the increased fees were backdated to the date on which you began providing the extra care.

✓ **Example of a term that is more likely to be fair**

'Your fees will be reviewed on an annual basis (on 1 January each year) in line with changes in the Consumer Prices Index including housing costs (CPIH). We will consult with you and your representatives before implementing a change in your fees for this reason and provide you with at least 28 days' notice in writing (including the amount of any increase). The increase will take effect on the date notified unless, before that date, you give us 28 days' notice to end this agreement. For example, where your weekly fee rate is £1,000 and the CPIH 12-month inflation rate for January is 2%, your new fee rate will be £1,020 a week. In order of most recent, our annual fee increases for the last three years have been 2.6%, 1.0% and 0.4%, respectively.

Your fees may increase or decrease at other times where there has been a significant change in your care needs, as assessed by qualified staff. We will consult with you and your representatives and involve you in any decision to provide additional care. Following this consultation, we will give you 28 days' notice in writing before implementing a change in your fees for this reason, unless your care needs have increased significantly and unexpectedly. Where your care needs increase significantly and unexpectedly, meaning that we need to provide you with additional care or facilities at short notice, we will consult with you and provide you with at least 7 days' notice in writing of any increase.

Where we give you notice to increase your fees for this reason you may either:

- Do nothing, in which case the fee increase will take effect on the date notified; or
- Give us notice that you wish to leave. In this case you will have 28 days (or 7 days where we have given you 7 days' notice of a fee increase) from the date you notify us, to move out before the fee increase applies; or
- Ask for an independent review of our assessment of your care needs, revised fee level, or both. In this case, we will suspend our notice period until the independent review is completed. If you are unhappy with the outcome of the review, you can still tell us you wish to leave, as above.

You will be entitled to see the details of the assessments we have relied upon as part of the consultation and decision process.

Your fees may also change if, at your request, you move to a different room for which different fees are payable. Details of our current room rates can be found on our website at [weblink] and are also available at the reception desk in the home'

Changes in care home ownership

- 4.56 When a resident's rights under a contract are transferred to a new owner, this is called an 'assignment' (or, in Scotland, an 'assignation'). Where ownership of a care home changes hands, the rights and obligations under residents' contracts are likely to transfer with it.⁹⁰ To ensure compliance with consumer law, residents' legal position should be unaffected by the transfer.
- 4.57 On the sale of your business (for example, a sale of assets), the purchase agreement will typically specify that the buyer agrees with the seller to assume the latter's obligations and liabilities under contracts, from the date of sale.
- 4.58 As a general rule, contracts may not be unilaterally varied in these circumstances and may only be terminated in accordance with their terms. Therefore, once the new owner is in place, we would expect them to abide by the terms of the resident's contract, including the provisions on variation. If, as is typical, the seller requires a promise from the buyer in respect of any failure on the buyer's part to continue to perform ongoing business contracts, this too will be a restriction on the buyer's ability to renegotiate contracts.
- 4.59 Where terms give a care home the right to 'assign' or 'transfer' its rights and obligations to a new owner and where this may prejudice the resident's rights, this is likely to infringe consumer law. For example, a term is likely to be unfair if it could result in existing residents having to deal with someone who offers

⁹⁰ Generally, only the rights under a contract can be legally 'assigned' and not the obligations under that contract (for example, the provision of the services by a care home to the resident). In practice, parties often behave as though the burden of the contract can also be assigned. It is our view that such a course of dealing may be classified in legal terms as a 'novation' (that is, the old contract is replaced with a new contract between the resident and the new owner of the care home), or as an assignment of the benefit of the contract coupled with the subcontracting of the obligations to the new owner. What is said in this section is considered to apply whether assignment or novation is involved.

an inferior service or who seeks to reduce their rights under their residency agreements.

- 4.60 To help you to comply with your consumer law obligations, you should ensure that you consult with residents and their representatives before ‘transferring’ rights and obligations so that they understand the implications. You must obtain their consent to any transfer or change that may adversely affect them, and do so before it takes place. Where residents have a penalty-free right of exit if they object to a change or new owner, this is unlikely to offer them sufficient protection, for the reasons set out in paragraph 4.36. Alternatively, an ‘assignment’ term is less likely to be considered unfair if it operates only in circumstances which ensure that the resident’s rights under the contract will not be prejudiced in any way.

Relationship between self-funder fees and NHS Funded Nursing Care payments

- 4.61 Funded Nursing Care is the contribution provided by the NHS to care homes with nursing in England and Wales to support the provision of registered nursing care to eligible residents. These payments are made directly to care homes, and the resident does not receive any money directly. In Northern Ireland, there are similar payments called ‘HPSS Payments for Nursing Care’ that cover the cost of providing nursing care in nursing homes on behalf of those residents who pay privately for their own care. For the purposes of this advice these payments for nursing care in England, Wales and Northern Ireland are collectively referred to below as ‘FNC’ payments to ‘self-funders’.⁹¹
- 4.62 The policy intention of FNC is that where an individual in a care home has been identified and assessed by the NHS to require registered nursing care, the NHS will be responsible for funding a defined contribution towards the costs of nursing care.⁹² The resident should not be required to pay for this portion of their care already covered by the NHS. FNC does not cover the wider non-nursing care or accommodation provided to the resident.

⁹¹ In Scotland, local authorities contract with care homes to make flat rate payments (Free Personal & Nursing Care Payments) for the personal and/or nursing care of those residents assessed as being eligible who currently meet their own care costs (self-funders). The rates payable by local authorities to care homes are set out in the Community Care (Personal Care and Nursing Care) (Scotland) Amendment Regulations. Self-funders continue to pay the remainder of their own costs (related to the hotel, living or accommodation arrangements) either under a separate private contract with the care home or under the local authority’s own contractual arrangements with the care home. See the Scottish Government’s ‘Free Personal and Nursing Care – Consolidated Guidance’, July 2003.

⁹² Where it has been first established that the individual is not eligible for NHS Continuing Healthcare.

- 4.63 In England, the *National Framework for NHS Continuing Healthcare and NHS-funded Nursing Care* from the Department of Health and Social Care makes clear that contracts between residents and care homes should include transparent and fair terms governing how FNC payments are treated, explaining what will happen if a resident is admitted to hospital or what happens if a resident dies.⁹³ There is also policy guidance in Wales and in Northern Ireland on payments for nursing care.⁹⁴
- 4.64 Each country has their own policy arrangements around FNC and the relationships with residents, including self-funders. You should have regard to these arrangements when providing information to residents about your fees and in drafting relevant terms. Your terms, together with the upfront information you provide to residents about your fees, should clearly explain what FNC is, the resident's potential entitlement to it, and how you treat FNC payments when the eligible resident is self-funded. In particular, you should clearly set out:
- (a) The relationship, if any, between FNC payments and a self-funded resident's own contribution to their overall residential fees (ie very clearly defining the services that are paid for by the FNC payments and those paid for by the resident).⁹⁵
 - (b) What will happen to a resident's own contribution to their fees if there is a change in the amount of the FNC payment (ie where it increases, decreases or ceases).

⁹³ The 2018 version of the [national framework](#) document took effect in England on 1 October 2018 (see paragraph 257).

⁹⁴ The current guidance for Wales is the [NHS Funded Nursing Care in care homes Guidance 2004](#). In Northern Ireland the relevant guidance is the [Department of Health Circular on HPSS Payments for Nursing Care](#).

⁹⁵ This may be determined by the relevant FNC policy guidance. For example, in Northern Ireland the guidance states that HSC Trusts' contracts with nursing homes should stipulate that the nursing home will discount the full financial benefit of any HPSS payment for nursing care from the fee payable by or on behalf of the resident. In England, the guidance states that the care home provider should set an overall fee level for the provision of care and accommodation, which should include any registered nursing care provided by them. Where a Clinical Commissioning Group assesses that the resident's needs require the input of a registered nurse, they will pay the NHS-funded Nursing Care payment (at the nationally agreed rate) direct to the care home and the balance of the fee will then be paid by the individual or their representative, unless other contracting arrangements have been agreed (for example, where the care home's contract states that the provision of registered nursing care covered by the FNC payment is completely separate to the fees paid by the resident, meaning a change in the FNC is a separate matter that will not impact on the fees the resident is paying). In Wales the NHS (through Local Health Boards) is responsible for paying for the nursing care in a care home by a registered nurse for all eligible residents, including self-funders who are encouraged to be included as part of wider contract arrangements. The contract should clarify responsibilities for the provision of, and payment for, services, and identify the standards of provision required.

- 4.65 Making your terms transparent in the manner described above will help to ensure that:
- (a) The resident understands the key services which they are required to pay for, as distinct from the nursing care costs which are covered by the FNC payment.
 - (b) The resident's contribution to fees will be fairly calculated in a way which fully recognises the element of their care package which is funded by the FNC payment.
 - (c) Disputes are less likely to arise between you and the resident, for example, if there is an increase in the level of FNC payments.
- 4.66 If your terms do not clearly define the services that are paid for by the eligible resident and those paid for by the NHS, you are at risk of unfairly reserving the right to charge an eligible resident for nursing services which are covered by the FNC payments.
- 4.67 If a self-funder contract, for example, defines the overall/gross weekly fee as payment for accommodation and care to include nursing care, and your terms oblige you to deduct FNC payments from the overall fee, the resident is reasonably likely to conclude that their own contribution to the residential fees will decrease when the amount of the FNC payments increases. Particularly, in these circumstances, we are likely to object to a fee variation term which could be (or has been) relied upon to arbitrarily increase the overall/gross fee in a way that ensures that you receive the benefit of any increase in FNC payments, contrary to the resident's reasonable expectations. Moreover, in these circumstances, we see no merit in the potential argument that the resident has suffered no detriment as their actual contribution remains the same.

Making self-funded residents liable for 'shortfalls' in FNC payments

- 4.68 It is the intention that the FNC payment for specified nursing care by a registered nurse is the NHS's liability rather than the resident's. You should not require the resident to pay any sums that apply because either:

(a) FNC payments have reduced or ceased when the resident has been temporarily admitted to hospital.⁹⁶

(b) FNC payments have ceased after the death of the resident.

4.69 Terms which have the effect of transferring this liability onto the resident are likely to be unfair.

Surcharges

4.70 We would consider it unfair for a care home to make a charge to a resident where the home does not provide an additional, identifiable service in return. For example, it is likely to be unfair where you charge a fee simply for processing a resident's payment to a third party service provider (eg for hairdressing).

4.71 To help you to comply with your consumer law obligations, you should ensure that:

(a) You only seek to charge a resident for specific goods or services⁹⁷ where you have obtained their express consent to make that specific purchase in advance.

(b) If you provide residents with optional services for which there may be a charge (in addition to their residential fees), residents and their representatives are told about this upfront. Any charge you make must be reasonable.⁹⁸

⁹⁶ In England, the [NHS-funded Nursing Care Practice Guide](#) makes clear that in order to guarantee the place in the care home on return from hospital and to avoid individuals being asked to pay any shortfall for the time they are in hospital, Clinical Commissioning Groups should consider the payment of an equivalent sum to the FNC as a retainer. Similarly, in Wales the [NHS Funded Nursing Care in care homes Guidance 2004](#) states that Local Health Boards (LHBs) will need to make payments to retain a resident's place during periods of temporary hospital admission (a payment equivalent to the NHS Funded Nursing Care rate in effect will be made by the LHB to the care home for a period - normally up to six weeks - but this may be varied to co-ordinate with local authority contractual arrangements where appropriate during periods of hospital admission). In Northern Ireland there are similar provisions in the [Department of Health Circular on HPSS Payments for Nursing Care](#) for the payment by HSC Trusts of a retainer fee if a resident is temporarily absent for more than seven consecutive days eg because of a hospital admission or for another reason.

⁹⁷ Ie something that is demonstrably different from and in addition to the service already covered within the standard weekly residential fees.

⁹⁸ Under section 51, CRA. What is 'reasonable' will be a question of fact.

- (c) Charges that are mandatory for residents (ie residents cannot reasonably avoid them) are included in your headline fees (see paragraph 3.18(f) of this advice).

When things go wrong

Excluding or restricting your liability to your residents

- 4.72 Terms which allow you to exclude or restrict your liability to residents when you are at fault are likely to be unfair under consumer law. This includes terms that prevent or hinder residents from seeking compensation. Terms that take away or reduce residents' statutory rights (in particular, the right to have services provided to them with reasonable care and skill) are also 'blacklisted' under consumer law (meaning that they are automatically unfair and unenforceable against residents).⁹⁹
- 4.73 To help you to comply with your consumer law obligations, you should ensure that you do not:
- (a) Attempt to exclude or restrict your liability to residents where they suffer personal injury or die because of your negligence (for example, where you fail to administer medicines safely).¹⁰⁰
 - (b) Say that 'residents use facilities at their own risk', as this could be relied on to exclude or limit your liability for death or personal injury or where you lose or damage residents' property.
 - (c) Include vague or uncertain wording (for example, 'we may exclude or limit our liability so far as the law permits'), since the practical effect is unclear, and it is unlikely that residents will know what this actually means.
 - (d) Include complex legal jargon (for example, 'implied warranties', 'mutatis mutandis') which residents are unlikely to understand and so hinder them from exercising their legal rights.
 - (e) Attempt to exclude or restrict your liability to residents where their belongings are lost, damaged or stolen because of your failure to keep them safe or take reasonable security precautions at the home.

⁹⁹ See section 5 of this advice for more detail on providing a quality care home service.

¹⁰⁰ Such a term is also 'blacklisted' and unfair in all circumstances under the CRA.

- (f) Attempt to exclude or restrict a resident's right to withhold or deduct the amount of any arguable claim they have against you from anything they must pay.¹⁰¹ Where this right to 'set-off' is excluded, residents may have no choice but to pay in full where your service fails to meet expectations, and then sue for compensation (resulting in unnecessary legal proceedings).
- (g) Deny residents the right to a refund or compensation in all circumstances, even where you have breached the terms of the contact.¹⁰²

4.74 Your terms are more likely to be fair where your liability for loss or harm is excluded or restricted only where you are not at fault and where you do not prevent or hinder residents from seeking redress.

 **Example of a term that is more likely to be fair**

'We will ensure that we provide our service to you with reasonable care and skill and maintain a standard of care as required by law. We will not exclude or limit our liability to you where we fail to meet these standards (including where our negligence results in death or personal injury or loss or damage to your belongings)'

Financial penalties where a resident is in breach of contact

- 4.75 As a business, you may have a legitimate interest in charging residents where they breach the terms of the contract. However, residents and their representatives may be in a position of vulnerability. In some cases, residents may lack full mental capacity.
- 4.76 Terms that allow you to impose disproportionately high charges for breach of contract are likely to be unfair under consumer law (for example, where they require the resident to pay more in compensation than any loss you are likely to suffer as a result of the resident's actions).¹⁰³ We have particular concerns that these types of term may: mislead residents into thinking that you are entitled to more compensation than you lawfully are; or, in this particular

¹⁰¹ An arguable claim may arise where, for example, you fail to perform your service with reasonable care and skill (see section 5 of this advice). Failing to settle a legitimate claim against you, and instead requiring consumers to litigate, may in some circumstances be an aggressive commercial practice under the CPRs, where it has the effect of dissuading consumers from exercising their legitimate rights.

¹⁰² Such a term may also be 'blacklisted' under the CRA.

¹⁰³ Such a requirement may also be automatically void under English contract law (as an unenforceable 'penalty').

context, restrict their ability to make free or informed choices through intimidation or exploitation.

4.77 For example, your terms are likely to be unfair where they:

- (a) Require residents to compensate you for losses that are not a direct result of their default.
- (b) Require residents to pay interest on outstanding fees at a rate above your clearing bank's base rate, since it makes the resident pay much more than the cost of making up their default.
- (c) Allow you excessive discretion to decide how much is charged when the resident breaches the contract.
- (d) Impose a fixed, arbitrary fee for any breach of contract, which is out of all proportion to your expected losses.
- (e) Allow you to claim 'all costs and expenses' resulting from the resident's breach, instead of just your net costs directly resulting from it.
- (f) Allow you to claim your costs on an 'indemnity' basis (that is, all costs, not just costs reasonably incurred), since it would require the resident to pay more in compensation than your reasonable losses. Such a term is also objectionable because of its use of legal jargon, which the resident is unlikely to be able to understand.

✘ Example of a term that is likely to be unfair

'If you fail to pay your fees on the first day of every month, we reserve the right to charge interest at 10% per year above our bank's current base rate for each day that payment is outstanding'

4.78 Your terms are more likely to comply with consumer law where you clearly and unambiguously explain, in plain language, that you will require the resident to pay a stated sum which represents a genuine pre-estimate of the limited administrative costs that you are likely to incur as a result of the resident's default. You should be able to identify these costs with reasonable precision and the amount you recover must not represent a profit for you.

4.79 Alternatively, your terms could state that the resident can be expected to pay reasonable compensation, or compensation according to the law. In this case,

the law will require you to take active steps to ‘mitigate’ (ie reduce) your loss (for example, by promptly informing residents of missed payments and consulting with them and their representatives to find out the reasons for the arrears).

Visiting rights in care homes

- 4.80 Residents must be allowed to see their family and friends if they want to and you must ensure that there are suitable opportunities to see visitors. The right to have visitors is underpinned by legislation¹⁰⁴ and if you impose an unreasonable restriction on a resident’s right to have visits from family or friends, you are also likely to infringe consumer law.¹⁰⁵
- 4.81 In particular, you must never impose, or threaten to impose, a visitor ban in retaliation to a complaint from a resident or their representative. Where you exploit your position of power over a resident to apply pressure through the imposition or threat of visitor bans, impairing their freedom of choice, this is likely to infringe consumer law.¹⁰⁶
- 4.82 Where your terms give you a wide discretion to ban visitors, this is also likely to be an unfair term under consumer law, as it may dissuade residents from seeking redress or complaining where your service does not meet expected standards, for fear of being denied visits.
- 4.83 To help you to comply with your consumer law obligations, you should ensure that:
- (a) The circumstances in which visitors’ access to the home can be restricted are very narrow and do not go beyond what is reasonably required to protect your legitimate interests or those of your residents. For example, we would be unlikely to object to bans in rare and extreme cases, such as where visitors have abused or physically assaulted or threatened to

¹⁰⁴ Where you stop or prevent a resident who is fully or partly funded by the NHS or a local authority from receiving visitors, this may infringe the resident’s rights under Article 8 of the European Convention on Human Rights, incorporated into UK law by the Human Rights Act 1998 (that is, a person’s right to respect for their private and family life, home and correspondence).

¹⁰⁵ Where you do not allow visitors, you may also infringe sector specific legislation. For example, the [CQC's Guidance](#) on Regulation 10 ‘Dignity and Respect’ of The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014, states that ‘*People’s relationships with their visitors, carer, friends, family or relevant other persons should be respected and privacy maintained as far as reasonably practicable during visits*’ and ‘*People must be supported to maintain relationships that are important to them while they are receiving care and treatment*’. The Health and Social Care Standards in Scotland set out the expectation that people experiencing care are supported to manage the relationships with family, friends or partner in a way that suits their wellbeing.

¹⁰⁶ In particular, the prohibition on ‘aggressive’ commercial practices in the CPRs.

assault your staff or residents, or where they otherwise pose a real and significant danger to your residents, staff or other visitors.

- (b) The circumstances in which a resident's visitors may be banned are transparent ie they are clearly and unambiguously set out and explained in the contract.
- (c) The decision to ban the visitor is made only after a thorough risk assessment and appropriate consultation with the individuals concerned (including the resident and the visitor whose access may be restricted) and is subject to an internal appeal mechanism whereby the affected parties can dispute your decision.¹⁰⁷ In extreme cases (for example, where there is a significant risk of very serious harm to staff or residents) we recognise that you may need to take immediate action to safeguard your residents and staff. In these circumstances you should refer the matter to the local authority to provide oversight and advice and, where necessary, contact the Police.
- (d) Where the resident lacks mental capacity to make decisions, visits should be allowed, unless there are compelling reasons to say they are not in the resident's best interests. You must follow national legal requirements.¹⁰⁸ Where someone has a lasting power of attorney for the resident, they must be consulted first.
- (e) Any restriction or ban is kept under regular review and removed as soon as practicably possible.¹⁰⁹

¹⁰⁷ This may, for example, be covered by your complaints handling procedure, which should be fair and transparent.

¹⁰⁸ For example, in England and Wales, these reasons should be agreed through a Mental Capacity Act 2005 decision-making process and you must observe the Deprivation of Liberty Safeguards where residents lack capacity. See www.cqc.org.uk/mca and also the [Mental Capacity Act Code of Practice for England and Wales](#). Note that, in July 2018, the Government published a Mental Capacity (Amendment) Bill, which if passed will replace the Deprivation of Liberty Safeguards with Liberty Protection Safeguards. In Scotland, you should consider contacting the Mental Welfare Commission, which has supervisory and advisory duties in relation to welfare guardianship and welfare powers of attorney under the Adults with Incapacity (Scotland) Act 2000.

¹⁰⁹ See, for example, the Local Government and Social Care Ombudsman's report on its investigation into complaint number 16 009 251 against Nottinghamshire County Council. <https://www.lgo.org.uk/assets/attach/4169/16009251%20-%20Notts%20CC%20-%20ASC.pdf>. In England, the CQC has produced further information on visiting rights in care homes. See http://www.cqc.org.uk/sites/default/files/20161025_Visiting-rights-information-detailed.pdf.

Treatment of temporary absences from the home

- 4.84 There may be periods where a resident is temporarily away from your home. This may be pre-arranged (for example, a holiday) or unplanned (for example, where the resident needs to spend time in hospital after a fall).
- 4.85 Generally, a term that requires a resident always to pay full fees, regardless of whether allowance could be made by you for savings or gains available because of the resident's absence, may be unfair under consumer law. This type of term ignores the fact that, during periods of absence, the resident is receiving very little benefit from the service for which they have agreed to pay. You may also be making specific costs savings because of no longer having to provide the full service (for example, on food or medicines or personal care). This is likely to create an imbalance in the rights and obligations under the contract, to the detriment of the resident, who is paying for a service that, to a significant extent, you are no longer having to provide.
- 4.86 We recognise that the costs you save during the resident's absence may be limited (particularly where you reserve the resident's room for them). In these circumstances, an assessment of fairness will consider the period for which the resident is required to pay full fees.¹¹⁰ Fairness is more likely to be achieved where you limit the period for which full fees are payable, after which a discount will be applied, and ensure the discount represents a reasonable estimate of your likely savings.
- 4.87 To help you to comply with your consumer law obligations, you should ensure that:
- (a) You reserve the resident's room for them whilst they are temporarily absent from the home (and you do not terminate the contract). Where you require the resident to pay full fees during any part of their absence, this should be dependent on the resident retaining the exclusive right to use their room. If you allow the resident's room to be re-allocated on a short-term basis, you should first seek the resident's permission for this and give them a pro-rata refund of their fees for that period.
 - (b) You review the resident's position after a set period of absence (for example, 6-8 weeks) to ascertain whether they are likely to be able to return to the home, and discuss and agree with them and their

¹¹⁰ Where a self-funded resident is eligible for FNC, you should not require the resident to pay any sums that apply because FNC payments have reduced or ceased when they have been temporarily admitted to hospital. See paragraph 4.68 above.

representatives what should happen with regards to the further retention of the room (see paragraphs 4.93 – 4.104, below, on termination of contracts).¹¹¹

- (c) Where you make specific cost savings during the resident's absence (for example, on food or medicines), you give the resident a discount in their fees after a set period, to reflect the fact that the resident is no longer benefitting from this aspect of the service. Where you only provide a discount after a significant period of absence (for example, 6 weeks), or your terms provide that fees may be reduced only at the sole discretion of the home manager, this may be unfair under consumer law.

✓ **Example of a term that is more likely to be fair**

'If you are away from the care home (for example, because you are on a pre-arranged holiday or because you are in hospital) your room will be reserved for you. During the first full week of absence your fees will continue to be payable in full. After that, your fees will be reduced by 20%.

If you are absent from the home for a continuous period of 6 weeks, we will consult with you and your nominated representative to seek agreement regarding the further retention of your room'

When the resident is asked to leave your home, or asks to leave

- 4.88 You may want to include terms in your contract that give both you and the resident legitimate reasons for ending it (for example, because you can no longer meet the resident's care needs even after making reasonable adjustments).¹¹² However, it is important that you recognise the practical and

¹¹¹ A resident may need to be absent from the home for an extended period (for example, due to hospitalisation), during which time the resident may still be paying fees. It may become unlikely that the resident will be able to return to the home (for example, because the home is not able to meet the resident's current care needs). In these circumstances, the resident or their representatives may not want to continue to pay for a service that, in effect, they will no longer be able to benefit from. It may therefore be beneficial to all parties to review the resident's placement after a set period and terminate the contract by consent, if appropriate.

¹¹² For example, Regulation 21(4) of the Regulated Services (Service Providers and Responsible Individuals) (Wales) Regulations 2017 provides that '*if, as a result of a change in the individual's assessed needs, the service provider is no longer able to meet those needs, even after making any reasonable adjustments, the provider must immediately give written notification of this to the individual, any representative, the service commissioner and the placing authority*'.

emotional difficulties residents might face in the event you ask them to leave - residents are unlikely to want to move once settled in your home, and may face significant stress and inconvenience if they have to find somewhere else to live. Simply ensuring that you both have equal rights to end the agreement is unlikely to make your terms fair, given the position of vulnerability that your residents may be in.¹¹³

Trial periods and short stays

- 4.89 Some care homes specify that an initial period of residency will be a trial (for example, to ensure that the home can meet the resident's needs and that the resident is happy in the home), following which the residency may be made permanent. Either party may end the trial early.
- 4.90 Even during trial periods, a sudden and unexpected termination can leave residents and their representatives facing significant inconvenience and distress. Where your terms allow you to terminate the contract during the trial period without providing residents and their representatives with adequate notice, or where they allow you to always keep prepayments for services not yet supplied, they are likely to be unfair under consumer law.

✘ Example of a term that is likely to be unfair

'For the first four weeks following admission to the home, either party may terminate this agreement by giving 48 hours' notice. Fees payable in advance will not be refundable in the event that you leave the home during this period'

- 4.91 To help you to comply with your consumer law obligations, you should ensure that:
- (a) Prospective residents and their representatives are provided with upfront information about any trial period in good time before you make them an offer of a place in your home (see paragraph 3.28(a) of this advice).
 - (b) Your terms clearly, accurately and unambiguously explain the circumstances in which the trial period may be ended prematurely (for example, because you cannot meet the resident's care needs or because

¹¹³ See, for example, *Overy v Paypal (Europe) Ltd* [2012] EWHC 2659 (QB).

the resident is seriously disruptive), so residents and their representatives can have a degree of foreseeability as to when this may happen.

- (c) The resident and their representatives are given adequate notice of termination, so that they have sufficient opportunity to make alternative arrangements (for example, seven days). You should keep the resident's placement under review during the trial period and give adequate notice if you are likely to terminate at the end of the period.
- (d) Where the trial is ended prematurely by either party, the resident receives a pro-rata refund of any prepayments they have made for continued use of the room beyond the notice period or services not yet supplied (including the return of any deposit). Where the resident leaves during the notice period and you are able to re-allocate the resident's room, you should always return any residential fee payments to the outgoing resident which relate to the same period, to avoid double recovery.¹¹⁴

4.92 Where you offer respite care for individuals on a short-term basis (for example, because they need extra support following an illness or hospital stay), we consider that the same principles apply.

 **Example of a term that is more likely to be fair**

'The first four weeks following admission to the home are treated as a trial period. During this period, either of us may terminate the agreement by giving the other seven days' notice in writing. We may terminate the agreement during this period if it becomes clear that we cannot provide you with the level of care that your needs require. Any fees that you have paid for any period beyond the expiry of the notice period (or the date of your departure, if later) will be refunded to you. Where you leave the home before the end of the notice period and we are able to re-allocate your room to someone else before that period expires, we will refund any payments that you have made for the period following re-allocation'

¹¹⁴ If the contract was entered into away from your business premises (for example, over the phone, via email or whilst the resident was in hospital), then you must ensure that the resident (and their representatives) are aware of their right to cancel the contract within 14 days of the date on which they entered it, under the CCRs. Where you need to start providing your service immediately because the resident expressly requests this, you should set out how much they will have to pay, but they will still have the right to cancel within 14 days, meaning you cannot ask them to pay for services they have not received, because they have cancelled. In these circumstances, the resident should only be charged for the period of time up to when they informed you of their decision to cancel.

Termination terms

Acceptable reasons for terminating a resident's contract

4.93 Where your terms give you a wide discretion to terminate the contract (for example, for any reason at all or for vaguely defined reasons), this is likely to infringe consumer law, as such wording is open to misinterpretation and misuse. This is likely to be the case even where you provide residents with advance notice and a refund of prepayments, because of the significant inconvenience and potentially adverse effect on their health and wellbeing.

✘ Examples of terms that are likely to be unfair

'We may end our agreement with you on four weeks' written notice at any time where you breach any of the terms of this agreement'

'Where it is felt by our home manager that the resident would be better suited to an alternative environment, or where circumstances arise where the home manager feels there is no reasonable alternative eg acrimonious disputes, then we will give you 28 days' notice to leave'

4.94 However, you are not obliged to provide services unconditionally. In this context, fairness is more likely to be achieved where your terms allow you to end the contract only if the resident is in serious breach of their obligations under the contract or where it is genuinely impossible for you to continue providing care for reasons beyond your control (ie exceptional reasons).

4.95 We consider that legitimate reasons for terminating a resident's contract would be:

- (a) A voluntary decision by the resident to leave the home (provided that this decision is genuine and the resident has sufficient capacity to make it or there is someone lawfully authorised to take this decision on their behalf).
- (b) The need for the resident to move to accommodation that can better meet their care needs, even though you have made reasonable adjustments to

try to meet those needs (eg where you are not registered to provide the type of care that the resident now requires).¹¹⁵

- (c) The need for the resident to move to extra care or supported accommodation, and you do not provide this.
- (d) Where you are closing all or part of your business, including the resident's home.¹¹⁶
- (e) The need for the resident to go into hospital (provided that the resident is unable to return to the home in the foreseeable future, the absence is not temporary, and you have consulted with the resident and their representatives before a final decision is made. See also paragraphs 4.84 - 4.87 of this advice.
- (f) Where the resident has repeatedly failed to pay their fees and significant fees remain outstanding.¹¹⁷
- (g) Where the resident is violent towards your staff or other residents and there is a significant risk of serious harm to staff, other residents or the resident themselves if they remain in the home.

Providing written notice of termination

4.96 Where your terms allow you to terminate the contract on short notice or without any notice at all, this is likely to infringe consumer law, as the resident (who may be vulnerable) may not have sufficient time and opportunity to make arrangements for suitable alternative accommodation.

4.97 Furthermore, most care home residents in England and Wales are legally entitled to a minimum of 28 days' written notice to vacate a care home under the Protection from Eviction Act 1977 (or the period set out in your contract, if

¹¹⁵ You should always consult with the resident and their representatives and be able to evidence and justify your decision (for example, through the use of recognised accredited dependency tools).

¹¹⁶ Most care home closures will have been planned and residents and their representatives should therefore be consulted and informed well in advance. In cases of unplanned closures at short notice, the local authority will have a temporary duty to meet the needs of residents and you should contact them as soon as possible. However, you will retain primary responsibility for the immediate welfare of the affected residents, wherever possible. In any event, you should do all you can to safeguard residents and act in their best interests. The NHS and care sector partners have produced guidance on managing care home closures in England. See https://www.nhs.uk/NHSEngland/keogh-review/Documents/quick-guides/1577_QuickGuide-CareHomes_9.pdf.

¹¹⁷ By way of example, in *Office of Fair Trading v Ashbourne Management Services Ltd & Ors* [2011] EWHC 1237 (Ch), the court held that a delay of three months in paying fees was undue and justified the service of notice (in the form of a final warning) requiring payment to be made within one month, failing which the contract could be terminated. In any event, the law requires you to take active steps to 'mitigate' (ie reduce) your loss.

longer).¹¹⁸ Where the resident is unwilling to leave the home once notice has expired, you must apply to court for an order to evict. Similar provisions may apply for residents in Scotland.¹¹⁹

- 4.98 Therefore, even in cases of very serious breaches of contract or harmful behaviour, unless the resident (or those who are lawfully authorised to act on their behalf) genuinely agrees to leave on shorter notice, you should always provide them with at least 28 days' written notice of termination. In England and Wales, if they are unwilling to leave upon the expiration of the notice, you must also apply to court for an order to evict.¹²⁰
- 4.99 We recognise that, in extreme cases (for example, where a violent resident poses a significant risk of serious physical harm to staff or other residents or where their health rapidly deteriorates) you may need to take immediate action to safeguard residents and staff. In these circumstances, you should contact your local authority for advice and assistance in making appropriate arrangements.

Ensuring that you follow due process when asking a resident to leave

- 4.100 Even where a resident might be in serious breach of contract, you should ensure that they and their representatives are given sufficient opportunity to address the conduct (for example, address detrimental behaviour or catch up with missed payments) and, where necessary, appeal a decision to end the contract. You should not ask a resident to leave the care home without first consulting with them and their representatives, and any other relevant independent professionals, and after efforts have been made to meet the resident's care needs. The reasons for the consultation should be fully discussed, together with possible solutions, before any final decision is made on the resident's continued stay in the care home.¹²¹

¹¹⁸ A notice will usually need to include specific wording required by legislation and you must observe statutory rules relating to service. For example, in England, see the Notices to Quit etc. (Prescribed Information) Regulations 1988 for form and content requirements and the Law of Property Act 1925 for rules about service.

¹¹⁹ The Rent (Scotland) Act 1984.

¹²⁰ Note that, where responsibility for a resident's care is being transferred to other persons, your responsibility may continue until care and treatment is assumed by that person (for example, the local authority). See, for example, in England, Regulation 12(2)(i) of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014.

¹²¹ This is also reflected, for example, in the National Care Home Contract in Scotland.

- 4.101 You are likely to infringe consumer law if you fail to have a fair and transparent process for deciding whether to ask residents to leave or interfere with any statutory protections they may have under relevant legislation.
- 4.102 Where you intimidate, exploit or pressurise residents or their representatives into leaving the home, this will be unfair under consumer law.¹²² Examples of infringements of consumer law in this context include:
- (a) Threatening or asking a resident to leave in reprisal for them making a complaint (for example, by falsely claiming that you can no longer meet their care needs).
 - (b) Using emotional pressure or discriminating against a resident, to pressurise them into agreeing to leave the home.
 - (c) Falsely claiming that the resident has orally 'agreed' to leave the home.
 - (d) Not giving the resident at least 28 days' written notice of termination.
 - (e) Back-dating a written notice of termination so that the notice period is reduced - for example serving a notice on 5 June but dating the notice 1 June.

✓ **Example of a term that is more likely to be fair**

'We may end this agreement if you persistently behave in a way that seriously affects the wellbeing of other residents and staff in the home.

Before asking you to leave the home, we will make all reasonable efforts to address and manage detrimental behaviour and consult with you and your representatives, to ensure you understand that a problem has arisen and are supported to behave in a different way. Where we ask you to leave, we will provide you and your representatives with 28 days' written notice, but we will work with you to help you find suitable alternative accommodation'

¹²² For example, the prohibition on 'aggressive' commercial practices in Regulation 7, CPRs.

Summary: ensuring that you comply with your consumer law obligations when terminating the resident's contract

4.103 To help you to comply with your consumer law obligations, you should ensure that:

- (a) Your termination policies and procedures (including the circumstances in which the contract can be ended, the evidential basis upon which any decision will be made, notice requirements and the arrangements for refunds of deposits and prepayments) are clearly explained in your contract (for example, by using an executive summary or 'key facts' document), which should be clearly signposted on your website and in the materials you provide to prospective residents and their representatives (eg resident information packs or service user guides), so that residents and their representatives can easily understand why their stay may be terminated.
- (b) The reasons for which you may terminate the contract are limited to valid reasons, namely where the resident is in serious breach of their obligations under the contract or where it is genuinely impossible for you to continue providing care for reasons beyond your control.
- (c) Residents and their representatives are given adequate written notice of your intention to terminate the agreement in compliance with relevant legislation (which should be at least 28 days), to enable them to take steps to correct the conduct of concern or, where that is not possible, find suitable alternative accommodation.
- (d) Before asking the resident to leave the home, you help them to understand that a problem has arisen, put in place ways of meeting their needs and consult with them, their representatives and any other relevant independent professionals (for example, on how to manage periods of stress and distress to prevent similar incidents reoccurring). This is especially relevant for dementia patients, who may not be in full control of their actions.¹²³ In extreme cases (for example, where a violent resident poses an immediate and significant risk of serious physical harm to themselves, staff or other residents), you should contact your local authority for advice and assistance and, where necessary, the Police.

¹²³ For example, CQC has produced guidance on positive behaviour support for people with behaviours that challenge. See https://www.cqc.org.uk/sites/default/files/20170322_briefguide-positive_behaviour_support_for_people_with_behaviours_that_challenge.pdf.

- (e) Where you think a contract may need to be terminated because of the resident's changing care needs, you must ensure that you consult with the resident and other relevant independent parties at an early stage, in good time before a final decision is made, and ensure that they are properly involved in the decision-making process. This should include:
- The resident's representatives (including any statutory advocate acting for or assisting the resident).¹²⁴
 - Relevant independent professionals (eg a multidisciplinary team, which may include the resident's own doctor and Consultant Specialist).
 - Where applicable, the placing authority (local authority, NHS) and the resident's social care worker or occupational therapist.
- (f) Where it becomes impossible for the resident to stay in the home and immediate action is necessary (for example, because of a rapid deterioration in the resident's health which means you can no longer meet their needs), you should provide the resident and their representatives with support and assistance to help them find suitable alternative accommodation. You should also contact the local authority, which should be able to assist in finding suitable accommodation (either temporary or permanent) to meet the resident's eligible needs.
- (g) Residents and their representatives are given disclosure, so far as is reasonably practicable, of the reasons for being asked to leave (for example, advice in doctor's or serious incident reports).
- (h) Where the resident has missed a payment, you must notify the resident and their representatives promptly, investigate why the payment has been missed and give them sufficient opportunity to clear arrears (for example by agreeing a repayment plan) before seeking to terminate the contract. You should not terminate unless there are significant arrears.
- (i) Residents and their representatives are given a real opportunity to challenge and appeal your decisions. For example, given the serious consequences for the resident of being asked to leave, you should ensure that someone at a senior level has input and oversight of any proposed

¹²⁴ For example, this may be an advocate provided by the local authority to support and represent the resident where they have substantial difficulty in engaging with the care process and require assistance, or, where the resident lacks mental capacity to make decisions, an advocate appointed to act on their behalf under relevant mental health legislation.

decision by the local home manager (such as reviewing the proposed decision) or that there is a timely appeal mechanism against the decision of a local home manager, rather than giving them sole discretion to terminate the contract. You should also consider using ADR services (such as mediation or conciliation) to help resolve concerns where the resident or their representatives disagree with or complain about the decision.

- (j) Where the contract ends through no fault of the resident (for example, because you are no longer able to meet their care needs), the resident receives a pro-rata refund of any prepayments (including deposits and fees paid in advance), to ensure that they are not having to pay for services not yet supplied.
- (k) Where you terminate in response to a serious breach of contract by the resident, you retain only an amount that is necessary to compensate you for any loss directly caused by the resident's conduct. Terms that make prepayments non-refundable in all circumstances are likely to be unfair.

Where the resident decides to terminate the contract

4.104 To help you to comply with your consumer law obligations, you should ensure that that:

- (a) Your terms clearly set out how much notice is required from the resident, how it must be given and to whom (eg in writing to the home manager).
- (b) The notice period for ending the agreement is no longer than what you are required to give the resident in the event of you terminating.
- (c) You do not impose unreasonable barriers to termination (eg requiring that notice must always be given by registered post).
- (d) You do not require the resident to pay fees for any period beyond the agreed notice period. If the resident leaves the home before the end of the notice period and you are able to re-allocate their room to a new resident during that period, you should provide them with a pro-rata refund of the fees (as you will have already reduced your loss arising from the resident's departure). Where the resident terminates with justification (for example, where you are at serious fault) the resident may be entitled to a full refund of prepayments and to compensation.

✓ **Example of a term that is more likely to be fair**

'Where you vacate the room during the notice period and we can use the room to accommodate another resident, the fees due for the remainder of the notice period will be reduced to take into account any sums received from the new resident for that period'

Fees charged after death (and treatment of residents' possessions)

- 4.105 The CMA published separate compliance advice on the charging of fees after the death of a resident on 31 May 2018. The full advice (which also covers the treatment of resident's possessions) is set out at Appendix C of this advice.
- 4.106 In summary, terms which have the effect of requiring residents or their representatives to continue to pay fees beyond the point at which possessions are cleared from the room are in principle likely to be unfair. This is because, once residents' representatives have cleared residents' rooms, the contract is likely to be of no benefit at all to them.
- 4.107 At the time the contract is entered into, it is likely that residents would have a reasonable expectation that their representatives will continue to have access to their room for a short period following their death. This will enable their representatives to pack up and remove the resident's possessions. We can see that, in principle, it is reasonable for care homes to continue to charge fees during this brief period. It is also in care homes' legitimate interests to use contract terms which ensure a degree of certainty as to when they will be able to recover the room, so that it can be re-occupied by a new resident as soon as possible.
- 4.108 As explained in the full advice, we are unlikely to object to terms which permit a care home to charge fees:
- (a) For no more than a reasonable short and fixed period of up to three days, from the day following the resident's death, provided that provision is made for fees to stop being charged if a new resident occupies the room within this period; or
 - (b) Until possessions are cleared from the resident's room by their representatives, provided that a reasonable backstop period of no more than ten days is included in the contract term for fees to cease from that point.

4.109 Care homes could also include terms which permit a representative, after the death of a resident, to request in writing an extension of the fixed period or backstop period, respectively.

4.110 See Appendix C for more detail on the CMA's position (including treatment of residents' possessions).

Terms specific to State-funded residents

4.111 Where you accept State-funded residents, there will be a contract between you and the public funding body (such as the local authority, NHS funding body, or HSC Trust) setting out the terms of the resident's placement. We consider that the content of any agreement that you ask the resident or their representatives to sign (eg a residency agreement) should not conflict with the terms of the placement contract.¹²⁵

Top-up fee arrangements for local authority funded residents

4.112 In England, Wales¹²⁶ and Northern Ireland, where a person is eligible for State funding but would like their care and support provided in a care home that costs more than the amount the local authority will pay, or would like to secure a better room in the same care home, a third party (who may not necessarily be the same person who is the resident's normal representative), may be able to pay a 'top-up fee' to make up the difference.¹²⁷ In some cases, the resident themselves may be able to pay the top-up.¹²⁸

4.113 Top-up fees may also arise where someone who was a self-funding resident becomes eligible for State funding at some point after they have moved into a care home.

4.114 Where a local authority is under a duty to meet a person's needs by placing them in a care home, they must also be involved in any top-up

¹²⁵ See, for example, clause A.6.4 of the National Care Home Contract in Scotland.

¹²⁶ The term 'top-up' does not feature in the relevant legislation for Wales (The Care and Support (Choice of Accommodation) (Wales) Regulations 2015 and the supporting Part 4 and Part 5 Code of Practice (Charging and Financial Assessment) Annex C). The official terminology is 'additional cost'.

¹²⁷ Top-up fees arise when the resident's preferred care home costs more than the amount specified in the residents' budget set by the local authority. Top-up payments must be distinguished from charges that you make for additional items not covered by your core residential fees, such as hairdressing, which you can charge to the resident.

¹²⁸ This is not permitted in Northern Ireland unless the resident is a 'private funder' and arranges and pays for their place in a care home under a private contract and without the involvement of the HSC Trust.

arrangement.¹²⁹ Moreover, top-up payments should generally be paid to you by the local authority under the terms of their placement contract with you. The local authority must have a separate agreement with the payer of the top-up, who will be responsible for reimbursing the local authority for the agreed amount.¹³⁰ The local authority also remains responsible for ensuring that all fees (including the top-up) are paid to the care home.¹³¹

Arranging a top-up payment through the local authority

- 4.115 Arrangements for top-up payments to a care home should always be agreed between the local authority and the party who is paying the top-up. In England, there must be a written agreement between the person paying the top-up and the local authority.¹³²
- 4.116 The involvement of the local authority ensures that it remains responsible for making sure that all fees (including the top-up) are paid to the care home. This means that if, for whatever reason, the payer cannot continue paying a top-up, then the arrangement is managed in a stable way, with the local authority deciding whether to move the person into standard accommodation that does not require a top-up or to fund the top-up itself.
- 4.117 In order to comply with your consumer law obligations, you should ensure that prospective residents (or existing residents who have become eligible for local authority funding) and their representatives are fully aware that top-ups should be arranged through the local authority. In England, arranging top-ups in this way ensures the legislation is being complied with and also provides benefits for residents. In particular, it means that the local authority can ensure that robust contractual arrangements are in place that clearly set out where responsibilities for costs lie and ensure that the person paying the top-up understands those arrangements. It also means that the local authority can ensure the sustainability of the arrangements for the resident if there are any changes in the financial circumstances of the resident or the person paying the top-up.

¹²⁹ In Scotland, when a resident is placed in a care home under the National Care Home Contract, any additional charges for care must be approved by the funding body and other additional extras must be agreed with the resident or their representatives.

¹³⁰ The local authority must ensure the payer has access to sufficient information and advice to enable the payer to understand the terms of the proposed written agreement before entering into it. It must be clear to the payer that the level of their contribution may change.

¹³¹ In Northern Ireland, see [Circular HSC \(ECCU\) 1/2010](#), paragraphs 77-93.

¹³² The Care and Support and After-Care (Choice of Accommodation) Regulations 2014.

- 4.118 Therefore, if your charges exceed the amount which the local authority is willing to pay, to comply with consumer law you should:
- (a) Liaise with the appropriate local authority at an early stage, so that any top-up arrangement that may be agreed will involve them.
 - (b) Make sure that the (prospective or current) resident and their representatives are aware of the option of making up the difference by arranging through their local authority to make top-up payments (as it is likely that they may be unfamiliar with the way top-ups are intended to operate).
- 4.119 If you do not tell the resident and their representatives (and the third party, if this is someone else) about the option of covering the shortfall through an arrangement with the local authority, but simply ask them to cover the extra costs themselves in a private arrangement with you, then this is likely to infringe consumer law, as it exploits their unfamiliarity with the legislation and statutory guidance relating to top-ups.¹³³
- 4.120 Similarly, if you tell the local authority that you are willing to accept the resident at the rate it has offered to pay you, but then privately ask the resident, their representative or the third party to make additional top-up payments to cover a 'shortfall' as a condition of moving into the home (or in order to remain in the home), then this is likely to infringe consumer law and be inconsistent with the legislation in England, Wales and the guidance in Northern Ireland.
- 4.121 Once the resident is in the home, any increase in the top-up payments should always be made in line with your placement contract with the appropriate local authority - for example, following an annual review where any proposed increases to the top-up fee are agreed with and through the local authority, which should consider whether it will meet the extra costs.
- 4.122 You are likely to infringe consumer law where you ask the payer for, or charge them, further top-up payments without the knowledge and agreement of the local authority, for example by claiming that it is needed to cover increases in

¹³³ For England, see the [Care and support statutory guidance](#). In Northern Ireland, paragraph 89 of [Circular HSC \(ECCU\) 1/2010](#) states 'If a home requests an increase to a third party payment, it must do so through the HSC Trust as the contracting party. Third parties can seek the agreement of both the HSC Trust and the home to pay their contribution directly to the home. Where this is the case, HSC Trusts should ensure that this agreement is documented.'

the NLW or the extra costs of agency staff.¹³⁴ Such an action would also be inconsistent with the legislation in England, Wales and Northern Ireland.

4.123 As well as being transparent (and consistent with the local authority placement contract), you must ensure that any terms on top-up payments that you rely on in your residency agreement with residents (and with the third party if you also ask them to sign the same agreement or a separate contract) are **fair** - for example, in relation to how your future fee increases will be calculated given that this will potentially impact on the level of the top-up payment.

Arrangements where it has been agreed between all the parties that the top-up payment will be made directly to you

4.124 Where it has been agreed with the local authority and the party who is paying the top-up that the top-up payment can be made directly to you by the person paying it (rather than it being collected by the local authority and then passed on to you in accordance with the normal recommended practice),¹³⁵ the obligations and rights in any agreement you ask the payer to sign must be consistent with the corresponding terms in the placement contract between you and the local authority.

4.125 If you seek to impose more onerous terms on the person paying the top-up in these circumstances (for example, if you ask the payer to continue paying the top-up fee for a longer period after the residents' death than would be the case under your agreement with the local authority), then the effect is to penalise the payer for making payments direct to the home rather than via the local authority. This is likely to be unfair under consumer law, as you are taking advantage of the payer's weaker bargaining position, and potentially their goodwill to assist the resident.

4.126 Moreover, you should not simply ask the payer to sign a standard self-funder contract as this is likely to create confusion or mislead them about their rights and obligations, infringing consumer law, even if you do not seek to enforce those terms in practice.

4.127 Any agreement you ask the person who is making the top-up payment to sign must contain clear, accurate, and unambiguous information about the

¹³⁴ This may also be an 'aggressive' commercial practice under the CPRs, where you exploit your position of power over the resident and their representatives so as to apply pressure to make further payments, limiting their ability to make free or informed decisions.

¹³⁵ For England, see the Care and support statutory guidance, paragraph 8.33.

arrangement (which is consistent with the local authority placement contract), including for example:

- (a) How much the top-up payment will be.
- (b) The arrangements for collecting the payments eg frequency, how it will be paid and on what date.
- (c) How often it will be reviewed.
- (d) In what circumstances the top-up payment might change, how any increases in the top-up payment will be calculated, and the notice period given for any such increases.
- (e) How the costs will be shared (for example, with the local authority) if you increase the resident's fees in the future.
- (f) The consequences of ceasing to make the top-up payments.
- (g) What may happen to a resident's placement if the person paying the top-up payment can no longer pay or afford the top-up, for example whether your contract allows you (in consultation with the local authority and resident) to move the resident to another less expensive room or, ultimately, to terminate the contract and ask them to leave (in which case the local authority will need to move them to another home).

4.128 In the event that the person making the top-up payment directly to you falls into arrears, you should inform the relevant local authority immediately, as it should remain contractually liable to you for payment of the full costs of the accommodation, including any top-up. You may infringe consumer law if you seek to take action against the payer to recover any outstanding debt, or threaten to evict the resident if the arrears are not paid, without first alerting and discussing with the local authority.

Top-up fee arrangements where a self-funded resident becomes eligible for local authority funding after moving in

4.129 You should set out clearly, upfront, what may happen if a self-funded resident becomes eligible for local authority funding when in the care home – for example:

- (a) When and how they need to notify you if they think they may reach the eligibility threshold.
- (b) Whether your contract allows you to move the resident to another room or, ultimately, terminate the agreement if the local authority is unwilling to

pay the required amount or a top-up for the shortfall cannot be arranged (see paragraphs 4.93 - 4.104 on termination of contracts).

- 4.130 Where a self-funded resident becomes eligible for local authority funding during their stay, you should discuss future funding with them, their representatives and the local authority. In some circumstances this might include agreeing a top-up fee arrangement.
- 4.131 However, a term in a self-funder contract that obliges someone to commit at the outset (as a condition of the resident being accepted into the home) to cover any future funding shortfall (eg for a set period of time) in the event the resident becomes local authority funded during their stay, is likely to be unfair. In particular:
- (a) At the time of entering the agreement with the home, the representative will not be able to foresee and understand what their future liability might be for any shortfall between the local authority rate and the care home's fees (and what the practical implications may be for them, such as whether they will be able to afford it).
 - (b) The representative may be unable to escape from, or mitigate against, their new financial liability at the time it may arise as, in principle, they may be obliged under the contract to meet the shortfall for the whole of the set period (and even if the resident were to move to another care home during this period).
 - (c) Entering a top-up arrangement should be subject to the agreement of the local authority at the time the self-funding resident becomes eligible for State funding. The local authority will need to be satisfied that the representative has the means to pay the top-up and can afford it and that they understand its implications.

✘ Example of a term that is likely to be unfair

'Should you become eligible for local authority funding during your stay, a nominated third party will be required to pay the difference between the amount paid by the local authority and the amount of the self-funder fees charged at that time for a period of 6 months from the day you become local authority funded'

Continuing Healthcare funded residents and top-up payments

- 4.132 Some of your residents may be in receipt of NHS Continuing Healthcare (in England), Continuing NHS Healthcare (in Wales), or continuing healthcare (in

Northern Ireland), collectively referred to in this advice as 'CHC'. This is a package of care that is arranged and funded solely by the NHS for individuals who are not in hospital and who have complex ongoing healthcare needs.¹³⁶ You should ensure that the terms and business practices you use with CHC residents are consistent with NHS rules,¹³⁷ relevant policy guidance¹³⁸ and your contract with the NHS funding body commissioning the placement.

4.133 You are not allowed under NHS rules¹³⁹ to ask residents in receipt of CHC or their families to make top-up payments towards the cost of the care package that has been agreed between you and the appropriate NHS funding body (such as the local Clinical Commissioning Group in England, Local Health Board in Wales, or HSC Trust in Northern Ireland).

4.134 Where you seek to make such charges, this is likely to infringe consumer law,¹⁴⁰ for example, by:

- (a) Asking a resident or their relative for a one-off payment to cover some of your business or care costs.
- (b) Demanding a regular top-up to the weekly fee to cover a claimed 'shortfall' in the CHC funding (either as a condition of moving into the home or as a condition of staying in the home).
- (c) Asking a resident to sign an agreement (or to be invoiced) for the provision of additional private services, when these are not in fact provided and the true purpose of the payment is to cover a claimed 'shortfall' in the CHC funding.

¹³⁶ In Scotland the arrangements are different. Under Hospital Based Complex Clinical Care (previously known as NHS Continuing Healthcare) if someone has a health need then the NHS is responsible for meeting that need free of charge. However, people in care homes are asked to contribute (subject to their financial circumstances) towards their social care and accommodation costs.

¹³⁷ The relevant Government Departments in each nation are responsible for these NHS rules.

¹³⁸ In England, see [The National Framework for NHS Continuing Healthcare and NHS-funded Nursing Care](#) which took effect on 1 October 2018; in Wales, see [Continuing NHS Healthcare - The National Framework for Implementation in Wales](#), in Northern Ireland see [Circular HSC \(ECCU\) 1/2010 - Care Management, Provision of Services and Charging Guidance](#).

¹³⁹ Access to NHS services is based on clinical need and not on an individual's ability to pay. The NHS should never subsidise private care with public money (which would breach core NHS principles) and patients should never be charged for their NHS care, or be allowed to pay towards NHS care (except where specific legislation is in place to allow this) as this would contravene the founding principles and legislation of the NHS.

¹⁴⁰ For example, this may be a misleading commercial practice under the CPRs. It may also be an 'aggressive' commercial practice under the CPRs, where you exploit your position of power over the resident and their representatives so as to apply pressure to them to make payments towards the cost of the agreed care package.

Offering additional private care services

- 4.135 Under NHS rules, where you offer additional private care services¹⁴¹ (so-called 'lifestyle choices' such as aromatherapy, beauty treatments or extra sessions of physiotherapy, which the NHS would not normally fund as they are not clinically indicated or defined within the individual's care plan) to CHC residents, the decision to purchase any of these services should always be a purely voluntary one for the resident borne out of personal choice.
- 4.136 You should not, for example, require or otherwise pressurise a CHC resident to purchase additional services as a condition of moving into the home or continuing to allow them to remain in the home as an NHS-funded resident. Where you require this, or use terms that give you a discretion to require this, this is likely to infringe consumer law. For example, a term in your contract that requires a CHC resident to agree to pay for extra 'lifestyle choices' or to upgrade to a better room and pay extra is likely to be unfair.
- 4.137 Where a CHC resident voluntarily expresses a preference for, or requests higher-cost accommodation (for example, a room in a home that is more expensive than the NHS would normally pay in that locality) and/or additional services, in line with the relevant policy guidance in England and Wales,¹⁴² you should first refer the matter to the appropriate NHS funding body which has placed the resident to consider:
- (a) Whether the resident's indicated preference is necessary to meet their assessed needs (and so should be funded by the NHS as part of the basic care package).¹⁴³
 - (b) If it is not an assessed need, whether the type of private service is permitted under NHS rules (unless it is possible to separately identify and deliver the NHS-funded elements of the service, it will not usually be

¹⁴¹ Additional services are those which are over and above those detailed in the care plan developed to address assessed need. See, for example, in England the Guidance on NHS patients who wish to pay for additional private care (2009).

¹⁴² [The National Framework for NHS Continuing Healthcare and NHS-funded Nursing Care](#) which took effect in England on 1 October 2018. For Wales, see [Continuing NHS Healthcare - The National Framework for Implementation in Wales](#) (page 61).

¹⁴³ There may be circumstances, to be considered on a case by case basis, where an NHS body should consider the merits of paying a higher than usual cost - for example, where the need is for identified clinical reasons such as an individual with challenging behaviour who requires a larger room because their behaviour is linked to feeling confined, or where the frailty, mental health needs or other relevant needs of an individual who becomes eligible for CHC when they are already resident in a care home means that a move to other accommodation could involve significant risk to their health and well being.

permissible for CHC residents or their families to pay for higher cost services and/or accommodation).¹⁴⁴

Failing to do this exposes you to engaging in the type of conduct which may infringe consumer law.

¹⁴⁴ See, for example, in England, [The National Framework for NHS Continuing Healthcare and NHS-funded Nursing Care](#) (paragraphs 270 - 290).

5. Providing a quality care home service

The requirement to perform your service with reasonable care and skill

- 5.1 You have an obligation under consumer law to ensure that the services you provide to residents are performed with reasonable care and skill. The law makes this a term of your contracts with residents.¹⁴⁵
- 5.2 This statutory test focuses on how you take care of your residents. It applies not just to the main tasks you have agreed to perform, but to everything that is done, or should be done, as part of your service. We consider that running a care home with reasonable care and skill will require you to ensure that residents' needs are met in a caring environment. There must not be carelessness or a lack of thoroughness on your part.
- 5.3 If you fail to provide your services with reasonable care and skill, you will be acting in breach of contract and the resident may be entitled to seek compensation from you. As discussed in paragraphs 4.72 – 4.74 of this advice, contract terms that have the effect of excluding or restricting your liability to residents where you fail to meet this standard are likely to be unfair.

Relevance of sector-specific requirements

- 5.4 The sector regulators are responsible for enforcing specific regulatory requirements relating to quality and safety in care homes.¹⁴⁶ They publish guidance for care homes on how to meet their obligations and for residents on the standards they have a right to expect from you.
- 5.5 For example, in England, sector regulations set out 'Fundamental Standards' which establish a baseline below which care must not fall. These prevent people from receiving unsafe care and treatment.¹⁴⁷ They also include requirements to ensure that residents are treated with dignity and respect, receive suitable nutrition, are safeguarded from abuse and receive care in an environment which is clean and safe. You must make sure that your premises and any equipment used are suitable and safe and, where applicable,

¹⁴⁵ Under section 49(1), CRA.

¹⁴⁶ The CQC in England, Care Inspectorate Wales, the Care Inspectorate in Scotland and the Regulation and Quality Improvement Authority in Northern Ireland.

¹⁴⁷ Health and Social Care Act 2008 (Regulated Activities) Regulations 2014, Regulations 9-20.

available in sufficient quantities. Similar regulatory requirements apply in Scotland, Wales and Northern Ireland.¹⁴⁸

- 5.6 You must ensure that you are familiar with the guidance from the sector regulators and comply with the registration requirements and regulatory requirements which they enforce through, for example, their inspections. How you meet your obligations under these regulatory requirements will affect the ratings or grades which the sector regulators award and the findings in their inspection reports. These may ultimately affect your registration.
- 5.7 Moreover, breaches of the requirements of some of the sector regulations can amount to a criminal offence. For example, the CQC has power to bring criminal proceedings if you fail to provide care and treatment in a safe way.
- 5.8 The regulatory requirements enforced by the sector regulators and their guidance are likely to be relevant when considering whether you are meeting your obligations under consumer law, since they indicate the level of care and skill that is considered reasonable for everyone operating a care home to exercise.
- 5.9 Therefore, if you breach any of these regulatory requirements or ignore their guidance, you could face enforcement action from the sector regulators, in addition to infringing consumer law. However, compliance with these regulatory requirements is only an element of your obligation under consumer law to ensure that the services you provide to residents are performed with reasonable care and skill. It is not the only measure of whether you are meeting this consumer law obligation. Accordingly, some but not all of the examples identified below reflect specific provisions covered in the national sector regulations.

Conduct likely to fall below the required standard

- 5.10 There is no exhaustive list of what you must do to meet the standard of reasonable care and skill. However, in our view, the following are examples of behaviour which would be likely to breach the required standard:

¹⁴⁸ In Scotland, the relevant standards are the Health and Social Care Standards 2017 and the Social Care and Social Work Improvement Scotland (Requirements for Care Services) Regulations 2011. In Wales, the Regulated Services (Service Providers and Responsible Individuals) (Wales) Regulations 2017 and accompanying [Statutory Guidance](#) covers the standard of care and support to be provided. In Northern Ireland, the DHSSPS Residential Care Homes Minimum Standards (August 2011) and the DHSSPS Care Standards for Nursing Homes (April 2015) specify the arrangements, facilities, and procedures that need to be in place and implemented to ensure the delivery of a quality service.

Examples reflecting specific provisions covered in national sector regulations and guidance

- (a) Failing to treat residents with respect and dignity, which includes making sure that they have privacy when they need and want it and are treated as equals.
- (b) Failing to involve a resident or someone acting on their behalf in discussions about their care, treatment and support.
- (c) Not taking into account a resident's personal preferences for things they like to do for fun or information about specific needs relating to their religion.
- (d) Not providing the necessary levels of support and monitoring at mealtimes, such as not providing the food and drink which a resident may need, or not taking into account the fact that they are a vegetarian.
- (e) Not monitoring the levels of prescribed medicine that you have in stock for a resident or failing to re-order them in time.
- (f) Failing to ensure that staff who are taking care of residents with dementia have the necessary training and skills.

Other general examples

- (g) Where a resident is not regularly washed or supported so that they can wash themselves, or their bed linen is not regularly changed or if they are left alone when clearly distressed.
- (h) Failing to refer a resident whose condition has deteriorated for a specialist risk assessment.
- (i) Failing to provide appropriate care and support when someone may be in the last days of life.

6. Ensuring that your complaints handling procedure is easy to find, easy to use and fair

- 6.1 Even though you may make every effort to provide high-quality care and support, residents and their representatives may still be dissatisfied or have problems. It is important that you encourage and respond to feedback and demonstrate that you are committed to resolving any complaints quickly, fairly and effectively. This will help you to address the needs and expectations of residents and maintain a high standard of care.
- 6.2 In this advice we use the term 'complaint' to mean any expression of dissatisfaction that a care home or member of staff has not met the standard people would expect or about the care home's action or lack of action. It also covers a 'concern' that people may have which never becomes a formal complaint.
- 6.3 Given the potential vulnerability of the people concerned and the distress and worry they may feel in raising a concern about their care and treatment, it is especially important that your complaints handling procedures are accessible and fair. This will ensure that residents and representatives are able to raise a complaint with confidence that it will not cause problems for them and will know that they can expect to be listened to and that their concerns will be taken seriously and acted upon.
- 6.4 To help you to comply with your consumer law obligations, you should ensure that you have a written complaints handling procedure which is:
- (a) Easy to find.
 - (b) Easy to understand and use.
 - (c) Written and followed in such a way that complaints are dealt with fairly and effectively, with due regard to the upset and worry that they can cause to residents (as well as care staff).
 - (d) Applied consistently across your care homes.
- 6.5 You risk infringing consumer law if your policies, practices or terms have the effect of discouraging someone from making a complaint or from escalating it if they are unhappy with how it has been dealt with.

✘ Examples of policies, practices and terms that are likely to be unfair


If you or your staff:

- (a) Fail to publicise your complaints handling procedure eg where you simply tell people that ‘the home has a complaints handling procedure which can be seen upon request’.
- (b) Create any barriers to raising or pursuing a complaint eg by specifying that complaints can only be submitted in writing or within a very short timeframe after the incident or conduct has occurred.
- (c) Pressurise, intimidate or discourage someone from making a complaint eg by threatening residents with (or giving the impression that there may be a risk of) reprisals that will affect their care.
- (d) Discriminate against or victimise complainants eg by allowing staff to comment unfavourably to the resident about their complaint, threatening to restrict or ban the resident’s relative(s) or friend(s) from visiting them, threatening to ask the resident to leave the home, or evicting them by way of retaliation to a complaint.
- (e) Fail to respond adequately to complaints eg by ignoring or failing to investigate the complaint, or failing to log or keep records of written and oral complaints.
- (f) Mislead residents about how they can exercise their rights eg by telling them your initial decision regarding their complaint is final when, in fact, if they are dissatisfied, it can be escalated to a more senior manager or your head office; or failing to tell them that they can escalate their complaint to an external body such as an Ombudsman, the Care Inspectorate in Scotland, or the appropriate local authority.

6.6 Alongside your consumer law obligations, there are statutory sector-specific regulations and guidance on handling complaints that you must also follow and the requirements often overlap. The sector rules and guidance are relevant to assessing the standards you should follow to comply with your obligations under consumer law.¹⁴⁹ Further details are provided in Appendix B.

¹⁴⁹ For example, in assessing whether you have breached the general prohibition on unfairness in Regulation 3(3) of the CPRs. There are also other guidelines on complaint handling published by bodies such as the Older People's Commissioner for Wales, the Complaints Standards Authority in Scotland, the Northern Ireland Public Services Ombudsman, the Patient and Client Council in Northern Ireland and Healthwatch England. In Scotland, you must take account of Regulation 18 of the Social Care and Social Work Improvement Scotland (Requirements for Care Services) Regulations 2011. For Northern Ireland, see the [Guidance on complaints handling in regulated establishments and agencies](#) of 1 April 2009 published by DHSSPS.

Ensuring that you comply with your consumer law obligations

<p>Easy to find</p> 	<p>Make sure information about how and where to complain is easy to find</p> <p>For example:</p> <ul style="list-style-type: none">• On your website• In your written/service user guide and welcome pack• On display in the home (posters in reception and shared areas)
<p>Easy to understand and use</p> 	<p>Take into account the needs of your different residents</p> <p>For example:</p> <ul style="list-style-type: none">• Give them information and make help available in appropriate languages and formats (such as large print, Braille and audio)• Allow residents to complain in a variety of ways (freephone, text, online, letter, residents meetings)• Encourage residents to get extra support (eg an advocate) and advice• Give the option to report something anonymously (such as by using a complaints box)
<p>Effective and fair</p> 	<p>Deal with complaints fairly and effectively</p> <p>For example:</p> <ul style="list-style-type: none">• Make it clear who is in charge of handling complaints• Make sure investigations are carried out by someone in your organisation who is independent of the concerns raised• Give clear and reasonable timelines for investigating any complaints• Make sure a complaint can be taken to a more senior member of staff if the resident is unhappy with how it has been dealt with• Clearly explain how a complaint can be escalated to an external body if someone is still unhappy (eg the Ombudsman, local authority, sector regulator)
<p>Consistent</p> 	<p>Train your staff so that they clearly understand</p> <ul style="list-style-type: none">• How to deal with complaints• Their role and responsibility in reporting/resolving complaints• Their role in supporting people if they want to make a complaint

Ensuring your complaints handling procedure is easy to find

- 6.7 You must give or make available a copy of your complaints handling procedure to prospective residents, before they become bound by any contract with you.¹⁵⁰

- 6.8 Information about how and where to complain should be well publicised and brought to the attention of residents and people acting on their behalf. The absence of this information could influence someone's decision whether to pursue a complaint and is therefore likely to infringe consumer law.
- 6.9 Your complaints handling procedure must be easily located and visible. For example, it should be:
- Clearly signposted (ie easy to find and access) on your website.
 - Highlighted in your written/service user guide, welcome or information packs for residents.
 - Set out in your contracts with residents.
 - Prominently on display at your main reception or lobby area and in common sitting areas, such as through notice boards, posters, leaflets and brochures.
 - In residents' bedrooms (for example, highlighted in a resident's booklet kept in all bedrooms).
- 6.10 You should also clearly explain your complaints handling procedure to residents and their representatives at the appropriate time that they need this information. This means that you should give relevant and timely information, in writing and orally, to complainants to support them in making and progressing their complaint at each stage of your complaints process. For example, you should explain how a resident can access independent advocacy or advice services, and how they can escalate their complaint to an external body such as the Ombudsman, local authority or sector regulator as appropriate.

Ensuring your complaints handling procedure is easy to understand and use

- 6.11 It is important that your complaints handling procedure is easy to understand and use. This means you should take into account the different needs of your residents. For example, some residents may be frail or in poor health or have special needs and may not be able to make a complaint in writing or may find it very difficult to do so.

¹⁵⁰ As required by Regulation 9(1) and Schedule 1, CCRs.

- 6.12 You should make it possible for residents to make their complaints either orally or in writing in a variety of ways, such as by:
- Freephone.
 - Text.
 - Online (for example, through computer tablets around the home that anyone can freely use to report their concerns via email).
 - Letter or post.
 - At residents' and relatives' meetings.
- 6.13 Information on and assistance in making a complaint should also be made available and offered, in so far as possible, in languages other than English (appropriate to your residents' needs, which may include interpreter services) and suitable alternative formats - such as large print, Braille and audio for residents with visual impairment, or by using British Sign Language for deaf residents – so that no complainants are disadvantaged.
- 6.14 You should provide the appropriate level of support needed to help a resident make a complaint. This includes:
- (a) Encouraging and offering complainants the opportunity to be assisted in the complaints process by an advocate¹⁵¹ or representative (such as a friend or relative) as well as an interpreter if necessary.
 - (b) Highlighting potential sources of local advocacy, interpreter and advice and support services that the resident may contact. You should make it clear how a complainant can access advocacy, advice and support services (where available), and give the contact details (including in your written complaints handling procedure) for organisations that provide support in making a complaint - for example, the local Citizens Advice Bureau and Age UK, and free national Advice helplines.
- 6.15 You should make every effort to welcome feedback from residents and their relatives, to ensure that you do not create psychological barriers to complaining, which may amount to an unfair aggressive practice under

¹⁵¹ In this context we are referring to the advocacy services which *may* be available to help people bring a complaint, rather than the statutory advocacy services which *must* be provided where, for example, the person has an Independent Mental Capacity Advocate because there is concern about their capacity to make a specific decision. This could arise as a result of a mental impairment such as dementia, acquired brain injury or learning disabilities (see paragraph 4.103(e)).

consumer law. For example, to avoid deterring possible complaints from residents or their relatives who might be afraid or anxious that giving their details could lead to reprisals from staff, you should give people the option to report general concerns and complaints anonymously if they so wish, such as through a Complaints or Comments Box or residents and relatives meetings.

Your complaints handling procedures should be effective and fair

6.16 Your complaints handling procedures should be written and followed in such a way that complaints are dealt with fairly and effectively. You are more likely to comply with your consumer law obligations where you cover the steps and information set out below.

Information about the operation of your complaints handling procedure

6.17 You should set out clearly where and how complaints can be made, including:

- (a) Who to approach to discuss a complaint.
- (b) Who is responsible for handling the complaint eg registered home manager, complaints manager.
- (c) How to complain if the subject of the complaint would otherwise be handling it.
- (d) The different ways in which complaints can be submitted (see paragraph 6.12).
- (e) How complaints can be reported anonymously (see paragraphs 6.15 and 6.24(d)).

6.18 You should set out clearly the type of issues your complaints procedure covers and what is not covered by the procedure.¹⁵² You should make clear the range of concerns that residents can complain about, for example, through a non-exhaustive list illustrating the different categories of complaint. You should also set out clearly the routes open to someone if they wish to make a complaint and where these differ depending on the nature of the concern raised. For example, where a concern raises safeguarding issues, the local authority's safeguarding procedures would take precedence and the

¹⁵² For example, issues that are not covered by the complaints handling procedure might include a request for a service or asking for an explanation of a policy.

complaint will be on hold until those procedures have been concluded (and the complaint could also be raised with the sector regulator).¹⁵³

- 6.19 You should explain how individuals can be supported to make a complaint by a representative, interpreter, advocate and/or friend (including highlighting potential sources of local independent advocacy, advice and support services) and encourage and offer them such support (see paragraph 6.14).

Stages of the complaints handling procedure

- 6.20 You should aim to have a quick, simple and streamlined procedure for resolving complaints early and with as few steps as necessary. In this context, where a resident's health may decline rapidly or they could even pass away, it is particularly important that there is no delay in resolving complaints.
- 6.21 You should acknowledge complaints quickly. You should also ensure that complainants are kept informed at all times of the next steps in the complaints handling procedure.

Frontline resolution stage

- 6.22 You should have a frontline resolution stage, which aims to resolve straightforward concerns quickly at the earliest opportunity. This is suitable for complaints that are easily resolved and require little or no investigation.¹⁵⁴
- 6.23 You should explain how concerns raised at the frontline resolution stage can be escalated to the investigation stage if the matter is not satisfactorily resolved, or if the resident does not want to take part in the frontline resolution process.

Investigation stage

- 6.24 If a complaint cannot be resolved at the frontline resolution stage, you should open an investigation.
- (a) You should set out clear and reasonable timescales within which residents can expect to hear back about their complaint, at each stage of the procedure. For example:

¹⁵³ It is important to ensure that everyone, including residents and their representatives and your own staff, know when a concern or complaint is a safeguarding or criminal issue and what must happen.

¹⁵⁴ It should not be used for concerns that relate to complex, serious, or high risk issues.

- Investigations into complaints should be launched immediately upon receipt and within a maximum of 28 calendar days a response - giving a full explanation of the investigative process, outcome and action (if any) that is to be taken - should be provided, either in writing or by arranging a meeting with the individuals concerned.¹⁵⁵
 - Where the complaint relates to a time-sensitive issue, such as a decision to ask a resident to leave the home, the investigation should be concluded as quickly as possible.
 - If the issues are too complex to complete the investigation within 28 calendar days, the complainant should be informed of any delays and the timetable for completing the investigation.
- (b) You should ensure that any investigation of a complaint is carried out by someone who is independent of (and not the direct subject of) the concerns raised, so as to avoid conflicts of interest where managers or staff investigate complaints about themselves. For example, people should be able to complain directly to your head office or area manager if their complaint is about the registered manager at the care home.
- (c) Where you identify complaints that are considered to be significant, serious or present issues of a sensitive nature (including, for example, in relation to a resident being asked to leave the home or the imposition of a visitor ban), you should ensure that there is a process for rapid and effective notification to senior management and that someone at a senior level has direct input and oversight of the investigation. Overall responsibility and accountability for the management of complaints lies with senior staff.
- (d) You should protect the complainant's anonymity as far as reasonably possible. Any personally identifiable information concerning the resident should only be used for the purposes of addressing their complaint and should be actively protected from disclosure unless they have expressly consented to it being disclosed or there are statutory obligations that make this necessary, such as safeguarding.

¹⁵⁵ This is the period specified in Regulation 24 of the [Residential Care Homes Regulations \(Northern Ireland\) 2005/161](#) and Regulation 24 of the [Nursing Homes Regulations \(Northern Ireland\) 2005/160](#) and is, therefore, a reasonable benchmark. In Scotland, Regulation 18(4) of the [Social Care and Social Work Improvement Scotland \(Requirements for Care Services\) Regulations 2011/210](#) stipulates that providers must respond within 20 working days after the date on which the complaint was made.

- (e) You should fully investigate all complaints and (where relevant) work with other organisations where the complaint is of a joint nature to address the issues raised, (telling the complainant who will take the lead in dealing with their complaint) or refer it to the appropriate authorities for investigation (this may include sector regulators or the local authority safeguarding teams).
- (f) You should ensure that residents are kept regularly updated on the progress of the investigation and provided with any meeting dates well in advance (rather than having to request a meeting themselves).
- (g) You should clearly explain your decision in writing (so there is a record), giving details of the outcome of the complaint and any action taken. If a resident has special needs, or where the subject matter to be communicated is sensitive, the use of telephone or face-to-face contact may be appropriate.

Escalating a complaint within your organisation if the complainant is unhappy with the outcome

- 6.25 If the complainant is not satisfied with how you have handled their complaint, you should tell them about the further forms of action that are available to them under your internal complaints handling procedure (as well as explaining how they can escalate the complaint to relevant independent external bodies).
- 6.26 You should ensure that residents and people acting on their behalf can, and know how to escalate their complaint to someone at a more senior level in your organisation to review if the matter has not been satisfactorily resolved.¹⁵⁶ In such circumstances you should inform the complainant of the next steps in the process and the timescale within which it is likely to be completed.
- 6.27 Where appropriate, you should also consider the use of external ADR where complaints cannot be easily resolved, such as where the matter is particularly acrimonious and those involved have become entrenched in their positions. Where the resident and you agree, services such as mediation or conciliation can be used (using suitably trained and qualified mediators) to try to resolve resident dissatisfaction or defuse problems before they escalate further by helping to get to the real issues and underlying concerns driving the complaint. This can help provide an efficient and fair process.

¹⁵⁶ If the relevant regulatory framework for complaints handling allows it.

6.28 You should make clear that engaging in ADR is voluntary and there is no need for residents to take part in ADR before they are able to seek independent redress through the relevant Ombudsman service. Even if you use ADR, you should inform residents that the option to seek independent redress by going to the relevant Ombudsman service is open to them once the internal complaints handling procedure has been exhausted.

Escalating a complaint to an independent external body

6.29 You should make clear in your written complaints handling procedure and decision letter that if a resident remains dissatisfied with how you have dealt with their complaint or your decision, they have the right to escalate the complaint externally, and make them aware of how and to whom they can escalate their complaint with the relevant contact details.

6.30 You should clearly explain how and when the complaint can be escalated to the local authority, NHS or other public funding body, the Care Inspectorate in Scotland, the relevant Ombudsman, and any ADR scheme you may be signed up to (for example, through a trade body arbitration scheme you belong to). You should make clear any differences in how and to whom a complaint can be escalated depending on the nature of the concern. In relation to:

- The local authority or HSC Trust, or NHS funding body: you should make clear in what circumstances the resident can escalate their complaint to the local authority or HSC Trust or NHS body (such as the appropriate Clinical Commissioning Group in England), for example where it is paying for or has arranged the placement.
- The relevant national Ombudsman:¹⁵⁷ you should explain the Ombudsman's role and remit. It is important that you also make clear whether the Ombudsman can consider complaints from self-funded residents. The Ombudsman is the ultimate and final stage in the complaints resolution process for both state and self-funded resident in England and Wales. In Northern Ireland, the Northern Ireland Public Services Ombudsman is also the final stage in the complaints resolution process unless the resident is entirely privately-funded. However, in

¹⁵⁷ In England, the CQC encourages care homes to signpost residents to the Local Government and Social Care Ombudsman (LGSCO). In Northern Ireland, Scotland and Wales, there is a specific sector regulation requiring care homes to do so. See section 25 of the Public Services Ombudsman Act (Northern Ireland) 2016, section 22(2)(a) of the Scottish Public Services Ombudsman Act 2002 and Section 33(1) of the Public Services Ombudsman (Wales) Act 2005.

Scotland, the Scottish Public Services Ombudsman can only investigate alleged maladministration on the part of the Care Inspectorate in terms of how it dealt with a complaint about a care home.

- The relevant sector regulator for the care home: you should explain that the sector regulators can investigate alleged breaches of their specific regulations on safety and quality which they are responsible for enforcing. The Care Inspectorate in Scotland, unlike the other national sector regulators, can also investigate individual complaints more generally.¹⁵⁸

6.31 Failing to follow your complaints handling procedure in practice (for example, by failing to respond to complaints or not properly investigating them) or relevant sector rules or other guidelines is likely to mean that you are not acting in accordance with the standards of 'professional diligence' required under consumer law.¹⁵⁹

Staff training

6.32 Under consumer law you are responsible for the actions of anyone acting in your name or on your behalf. It is not enough to have an accessible and fair complaints handling procedure; it must also be followed in practice. You should therefore ensure that your staff are trained in and have a good understanding of your complaints handling procedure, how it works, their role and responsibility in reporting and resolving complaints raised with them, and their role in supporting people if they want to make a complaint. You should also highlight to your staff any behaviours that are unacceptable eg intimidating complainants or threatening them with reprisals.

6.33 You should also maintain effective oversight of the actions of local managers and speak to residents, encouraging open reporting of complaints. It is important that any learning from complaints is cascaded throughout your care home(s) and leads to improvements.

¹⁵⁸ In Scotland, you should explain that someone can complain to the Care Inspectorate directly without having to first exhaust your own complaints handling procedure.

¹⁵⁹ Under the 'general prohibition' on unfairness in Regulation 3(3), CPRs.

Appendix A: Overview of relevant consumer law

Promotional, advertising and marketing activities



What you say must be true and accurate

This includes everything you say on your own website (or what you tell a care home listings site), in information packs or brochures, and what you tell people at open days or when they first get in touch

Sales and pre-admission processes before a resident moves in



You must give people the information they need to make informed decisions

This includes their decisions about whether to visit your home, make further enquiries or accept an offer. The information you give residents and their representatives (on your website, in information packs, during visits and when they contact you) is very important. You should account for the fact that people may be under time or emotional pressure

Services provided after the resident moves in



You must treat residents fairly when they are in your care home

This includes how you behave towards them once they are in the home. You must recognise that they may be particularly vulnerable. It could be difficult for them to leave the home if your service does not meet expectations or where they are unhappy, so always act fairly

Your terms and conditions



Using or enforcing an unfair term in your contracts with residents will be unfair

Your terms must be fair- they must not tilt the rights and responsibilities under the contract too much in your favour. Using unfair terms can also affect the decisions a resident makes (such as a decision about whether or not to raise a complaint or seek redress). This could be by misleading them about their rights and obligations, or by not giving them important information that they need to know

Complaints



You should have a written complaints handling procedure, which is fair and accessible

It should be **easy to find, easy to understand and use, fair and effective**. It should recognise the difficulties residents may face in making a complaint

1. This section gives a high-level overview of your main obligations to residents and their representatives under consumer law. It also sets out what may happen to you if you do not comply with consumer law.

The Consumer Protection from Unfair Trading Regulations 2008 (CPRs)

2. Generally, if you treat residents and their representatives fairly, then you are likely to be complying with the CPRs. However, if you mislead, behave aggressively, or otherwise act unfairly towards them (before or after the resident has moved in), then you are likely to infringe the CPRs and may face enforcement action.

Overview

3. The CPRs apply to anyone operating a care home, and anyone acting on their behalf.¹⁶⁰ They prohibit you from engaging in a wide range of unfair commercial practices in your dealings with 'consumers'.¹⁶¹
4. A 'commercial practice' is any practice directly connected with the promotion, sale or supply of your care home services. It can be a single act or omission, or a course of conduct over time, and can happen at any stage of your interaction with residents and their representatives (for example, before a contract is signed or before any care has been provided, and after the resident has moved into your home). This includes your:
 - Promotional, advertising and marketing activities (eg your website, marketing materials, brochures, open days, and information packs).
 - Sales processes before residents sign a contract or move into your home.
 - Services provided after a resident has moved into the home.
 - Enforcement of contract terms (eg when you ask a resident to leave the home).
 - Complaints handling procedure.

¹⁶⁰ You are responsible for the practices of anyone who acts on your behalf or in your name - this means that you, your staff and anyone else you employ, may be held liable for breaches of the CPRs.

¹⁶¹ 'Consumers' includes prospective or existing residents and their representatives (for example, family members and friends acting on their behalf), as well as other individuals, who are not acting for business purposes.

The scope of the CPRs – practices affecting the decisions of the ‘average consumer’

5. For there to be a breach of the CPRs, practices must normally have, or be likely to have, an effect on the decisions of the ‘average consumer’. This is not confined to decisions by the consumer about whether or not to sign a contract, but includes a wide range of decisions about whether or not to:
 - Browse your website.
 - Make initial enquiries of or visit your home (even if they eventually choose a different home).
 - Pay for additional or enhanced services.
 - Raise or pursue a complaint or concern.
 - Leave the home.

6. You must always remember that you are dealing with particularly vulnerable people.¹⁶² Under the CPRs, you will need to consider the needs of the average resident (bearing in mind that they may be frail and in poor health) and their family and representatives (bearing in mind the time pressures and emotional stress they are under and the fact that they are unlikely to be familiar with the process of choosing a care home). Unlike many other services, it can be very difficult for residents to move if they realise they have made an inappropriate choice, highlighting why, especially given their vulnerability, choices need to be the right ones. Examples of additional steps you may need to take to ensure that your practices are fair in these circumstances include:
 - Providing information about your services, fees and complaint handling processes in alternative, accessible formats such as large print, Braille, or audio for residents with a visual impairment.
 - Providing explanations about how the adult social care system works and what options are available to prospective residents and their representatives.
 - Enabling and supporting residents to make complaints.

¹⁶² The CPRs provide protection where practices, which might not negatively affect an average consumer, would be likely to impact someone who is vulnerable, due for example to their age or infirmity, or whom you target.

- Supporting and assisting residents to help them find alternative accommodation if they need to leave.

When will your practices be unfair under the CPRs?

7. The CPRs prohibit you from engaging in the following types of unfair practices.

The 'general prohibition' on unfairness (Regulation 3(3), CPRs)

8. You will breach the CPRs where you fail to meet the requirements of professional diligence (meaning honest market practice and good faith) and it impairs a resident's (or their representative's) ability to make an informed decision, causing them to take a different decision as a result.
9. 'Professional diligence' is an objective standard and is intended to reflect what a reasonable person would expect from you. So, just because other care homes may be engaging in bad practice, this does not make this the acceptable standard.
10. Sector-specific laws and regulations and the standards or guidance published or enforced by sector regulators (for example, the CQC in England, Care Inspectorate Wales, the Care Inspectorate in Scotland and the Regulation and Quality Improvement Authority in Northern Ireland) may inform the standard of professional diligence that you are expected to meet.

Misleading actions (Regulation 5, CPRs)

11. You must not give people false information about a wide range of things listed in the CPRs, or present it in a deceptive way (even if it is factually correct). Where this causes or is likely to cause a resident to take a different decision as a result, you will infringe the CPRs.
12. This includes information about your prices (such as your weekly fees and any other additional costs), the main characteristics of your residential care service (including the accommodation and facilities provided), the nature of your sales processes and residents' rights. For example, you should not tell prospective residents that your care home offers an extensive programme of daily activities when this is not true, as this may cause a resident to shortlist your care home over another, when they would not have otherwise.

Misleading omissions (Regulation 6, CPRs)

13. You must not mislead residents by failing to give them the information they need to make informed decisions about your service ('material information'). This includes where you hide information, or provide it in an unclear, unintelligible, ambiguous or untimely manner, and it causes or is likely to cause the resident to take a different decision as a result.
14. For example, where you provide prospective residents with information about the characteristics and price of your service (an 'invitation to purchase'), you must ensure that you provide them with the total price of your service, including any mandatory extras and, where there are additional charges that cannot reasonably be calculate in advance, the fact that such charges may be payable.

Aggressive practices (Regulation 7, CPRs)

15. You must not use practices which restrict people's decision-making ability through intimidation or exploitation, and which cause or are likely to cause them to take a different decision as a result.
16. 'Aggressive' practices include non-physical (including psychological) pressure, such as the use of threatening language and behaviour or behaviour that exploits someone's circumstances or misfortune (such as threatening to evict a resident unless they drop their complaint). In this context, it is relevant that you are dealing with people who are especially vulnerable due to their age, illness and, in the case of their representatives, under significant emotional pressures or distress.

The 'banned practices' (Schedule 1, CPRs)

17. The CPRs list 31 specific practices which will be unfair in all circumstances. For example, you should not advertise a type of room as being available at a specified price, and then refuse to show it to the prospective resident when they come to see it, with the intention of selling them a more expensive room ('bait and switch'). Examples of the 'banned practices' that are likely to be relevant to care homes are set out in paragraph 3.17 of this advice.
18. General guidance on the CPRs can be found on the CMA's webpages.¹⁶³

¹⁶³ See <https://www.gov.uk/government/collections/cma-consumer-enforcement-guidance>.

Consumer Rights Act 2015 (CRA)

19. The CRA sets out various rights and remedies for individuals in relation to services (Part 1) and protects them against contract terms (and notices) that could be used to give you an unfair advantage over them (Part 2).

Contracts for services (Part 1, CRA)

20. The law includes a term in your contracts with residents that you will perform your service with reasonable care and skill.¹⁶⁴ Where you fail to meet this standard, you will be in breach of contract and the resident may have a claim for compensation against you. We discuss this requirement in more detail in section 5 of this advice.
21. The CRA also ‘blacklists’ terms which might relieve you of your statutory obligations to residents (meaning the term is automatically unenforceable against residents). For example, a term that has the effect of excluding or restricting a resident’s rights where you fail to provide your service with reasonable care and skill is likely to be automatically unfair.¹⁶⁵

Your contract terms (Part 2, CRA)¹⁶⁶

22. You must ensure that your contract terms with residents are fair. If a term is not fair, it will not be legally binding on a resident.
23. Generally, your contract terms will be unfair if they put residents at an unfair disadvantage. Terms might be unfair where they tilt the rights and responsibilities under the contract too much in your favour (for example, where your terms give you the right to make significant changes to the contract without the resident’s consent).
24. Your terms must also be transparent. This means that they should be expressed in plain and intelligible language and, when in writing, be legible. Critically, they should be easy to understand and put residents into a position where they can make informed choices about what they are signing up to.
25. Your contracts should not contain concealed pitfalls or ‘traps’. You should take extra steps to prominently highlight surprising or important terms and

¹⁶⁴ Section 49(1), CRA.

¹⁶⁵ Section 57(4), CRA.

¹⁶⁶ By way of background, the CMA has produced detailed general guidance on the unfair terms provisions in Part 2 of the CRA. The general guidance (and a shorter overview guide for businesses) can be found on the CMA’s webpages. See <https://www.gov.uk/government/publications/unfair-contract-terms-cma37>.

bring them to the resident's (and their representatives') attention at the earliest opportunity, so that they understand and appreciate all the essential features of the contract before agreeing to it (since residents and their representatives are unlikely to understand standard written contracts or read them thoroughly).

26. As well as covering the terms and conditions in your contracts with residents, the CRA's fairness provisions also apply to 'notices'. This is wording that may not necessarily form part of your contract, but which relates to the rights and obligations between you and your residents. This could include statements made in writing or orally in your other communications – for example, brochures, service user guides, welcome packs, on your website, on a poster in your home, or even what a salesperson or staff member might say to a prospective resident before they agree to move into the home. These statements are treated in the same way as if they were a term in your contract with residents. Where we refer to a 'term' in this advice, this also covers a 'notice', unless specified otherwise.

Terms which may be regarded as unfair (including the 'Grey List', Schedule 2, CRA)

27. The CRA illustrates what 'unfairness' means by listing some types of terms that are likely to be unfair.
28. For example, your terms may be unfair if they cause or allow any of the following:
- Residents being denied full compensation when things go wrong.
 - Residents losing prepayments or being denied refunds when they leave your home.
 - Residents being subject to disproportionate financial sanctions or charges when they breach a term of the contract.
 - Changes to the terms of the contract or service provided after the contract has been agreed, without a valid reason specified in the contract.

Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (CCRs)¹⁶⁷

29. The CCRs require you to provide certain relevant pre-contract information to prospective residents in a clear and comprehensible manner, before they are bound by a contract with you.
30. You may also need to provide residents with additional information and cancellation rights in certain circumstances for contracts entered into at a distance (for example, where the contract is negotiated and agreed over the telephone or via email, rather than through face-to-face contact) or away from your business premises (for example, where the contract is agreed at the resident's home or in a hospital, rather than at the care home). Under the CCRs there is a right to cancel and withdraw from a distance or off-premises contract for services during the 14-day period from the date the contract is entered into.

What happens if you do not comply with consumer law?

31. Where you fail to treat residents and their representatives fairly and infringe consumer law, enforcers, residents and other compliance partners may take action against you.

Action by bodies that enforce consumer law

32. Non-compliance with consumer law could result in enforcement action by the CMA, local authority Trading Standards Services or, in Northern Ireland, the Department for the Economy. All have powers to enforce the consumer legislation referred to in this advice and can bring civil proceedings or (in relation to certain infringements) criminal prosecutions, as appropriate.¹⁶⁸
33. Enforcers can also seek redress for residents (including monetary compensation) or other remedies (such as the right for the resident to cancel the contract) where the resident has suffered loss as a result of unfair terms or practices giving rise to the enforcement action.
34. Further guidance on the CMA's approach to the use of its consumer powers can be found on the CMA webpages.¹⁶⁹

¹⁶⁷ SI 2013/3134. By way of background, general guidance on the CCRs can be found on the Business companion website. See <https://www.businesscompanion.info/en/quick-guides>.

¹⁶⁸ In Scotland, criminal proceedings are brought via the Crown Office and Procurator Fiscal Service (COPFS).

¹⁶⁹ See [CMA58 - Consumer protection enforcement guidance](#).

Action by residents under consumer law

35. A contract term (or consumer notice) which is found to be unfair is not enforceable against a resident, and any money paid because of that term may be recoverable by them. A resident would also be entitled to resist making payment on the basis that a term is unfair under consumer law.
36. In some circumstances, a resident may also have the right to seek redress in the courts under the CPRs in respect of misleading actions and aggressive practices.¹⁷⁰ This is in addition to any other rights to seek redress through any private civil action they may pursue for breach of contract.

Action by sector regulators

37. Sector regulators, namely the CQC (in England), the Care Inspectorate (Scotland), Care Inspectorate Wales and the Regulation and Quality Improvement Authority (Northern Ireland) may also take action in respect of any breaches of the rules and regulations which they are responsible for enforcing. The sector regulators are responsible for registering care homes and inspecting and monitoring them to ensure that they meet the standards of quality and safety set out in relevant regulations and guidance. For further details, see Appendix B.
38. Where appropriate, the CMA may choose to raise concerns about a care home with the relevant sector regulator and ask it to consider investigating under its own remit. The sector regulators could take action where the care and treatment you provide falls below their acceptable standards.¹⁷¹

Action by other compliance partners

39. Alongside working with other general enforcers of consumer law, the CMA may, where appropriate, work with other bodies with alternative, and sometimes non-legislative, powers for the purposes of ensuring consumer protection (so called 'compliance partners'). Bodies such as the Advertising Standards Authority (ASA) may have other methods of ensuring compliance but may be best placed to act based on the circumstances of the particular case.

¹⁷⁰ This may include the right to unwind the contract, receive a discount or seek damages for detriment caused by the breach. For further information, see [Department for Business, Energy & Industrial Strategy Guidance on the Consumer Protection \(Amendment\) Regulations 2014](#).

¹⁷¹ For example, sections 17 and 18 of the Health and Social Care Act 2008 relate to a manager's or care home's cancellation and suspension of registration in England by the CQC.

40. The ASA is the UK's independent self-regulator of advertising across all media. Its work includes acting on complaints and proactively checking the media to take action against misleading, harmful or offensive advertisements that contravene its Advertising Codes. Its Codes cover advertising and marketing communications, which are likely to include your brochures and marketing materials and information on websites directed at prospective residents and their representatives.

Ombudsmen

41. The Ombudsmen (the Local Government and Social Care Ombudsman in England, the Scottish Public Services Ombudsman, the Public Services Ombudsman for Wales and the Northern Ireland Public Services Ombudsman) may also consider and refer to the CMA's compliance advice when considering complaints about care homes.¹⁷²

Public funding bodies

42. Public funding bodies (such as a local authority, HSC Trust or NHS commissioning body) who contracted with you for the service on behalf of a resident, may also take action where your conduct breaches the terms of their placement contract with you.

¹⁷² The remit of the national Ombudsmen vary. For example, the Northern Ireland Public Services Ombudsman cannot currently investigate complaints from private funders.

Appendix B: Overview of key legislation specific to care homes

The following table provides details of key sector legislation, Standards and guidance in force at this time.

England	Care Act 2014 c. 23
	Health and Social Care Act 2008 c. 14
	Care and Support and After-care (Choice of Accommodation) Regulations 2014/2670
	Care Quality Commission (Registration) Regulations 2009/3112
	Health and Social Care Act 2008 (Regulated Activities) Regulations 2014/2936
	Care and support statutory guidance - Annex A (2018)
	Guidance for providers on meeting the regulations (2015)
Wales	Regulation and Inspection of Social Care (Wales) Act 2016 anaw 2
	Social Services and Well-being (Wales) Act 2014 anaw 4
	Care and Support (Choice of Accommodation) (Wales) Regulations 2015/1840 (W. 268)
	Regulated Services (Service Providers and Responsible Individuals) (Wales) Regulations 2017/1264 (W. 295)
	The Regulated Services (Registration) (Wales) Regulations 2017/1098 (W.278)
	Statutory Guidance: For service providers and responsible individuals on meeting service standard regulations (2018)
	The Code of Professional Practice for Social Care
Scotland	Public Services Reform (Scotland) Act 2010 asp 8
	Social Care (Self-directed Support) (Scotland) Act 2013 asp 1
	Social Care and Social Work Improvement Scotland (Requirements for Care Services) Regulations 2011 (SSI 2011/210)
	The National Care Home Contract
	The Health and Social Care Standards (2017)
Northern Ireland	Health and Personal Social Services (Quality, Improvement and Regulation) (Northern Ireland) Order 2003/431 (N.I. 9)
	Nursing Home Regulations (Northern Ireland) 2005 (SR 2005/160)
	Residential Care Homes Regulations (Northern Ireland) 2005 (SR 2005/161)
	The DHSSPS Residential Care Homes Minimum Standards (August 2011)
	The DHSSPS Care Standards for Nursing Homes (April 2015)

Appendix C: CMA consumer law advice on the charging of fees after death (published 31 May 2018)

Introduction

Background

1. The Competition and Markets Authority (CMA) is the UK's primary competition and consumer authority. It is a public authority, which from 1 April 2014 took over many of the functions formerly performed by the Office of Fair Trading (OFT) and the Competition Commission. It aims to make markets work well for consumers, businesses and the broader economy.
2. Effective enforcement of the law is central to the CMA's purpose. It has powers to enforce a range of consumer laws to tackle practices and market conditions that make it difficult for consumers to exercise choice – this includes powers to protect consumers from unfair contract terms (for which it has the lead role) and unfair business practices.¹⁷³ These enforcement powers are shared with other bodies, such as local authority Trading Standards Services.
3. The CMA also shares with the Chartered Trading Standards Institute (CTSI) the role of providing advice to businesses to drive up standards through clarifying their legal obligations. The CMA generally focusses on sector specific issues that have emerged from a market study or other in-depth analysis of business practices in a particular market where it has obtained relevant expertise.¹⁷⁴
4. On 2 December 2016, the CMA launched a market study into how well the care homes market for the provision of care home and nursing home services to over 65s in the UK was working for residents and fairly competing businesses.
5. On 13 June 2017, the CMA opened an investigation under consumer protection law, including laws on unfair contract terms, following concerns that a number of care home providers' contractual terms and practices might be

¹⁷³ Further details on the CMA's consumer powers and its approach on their use can be found in [Consumer protection enforcement guidance: CMA58](#)

¹⁷⁴ The CMA primarily provides guidance to businesses on specific issues identified in the course of its market studies, in connection with Part 2 of the Consumer Rights Act 2015 and issues where its particular knowledge of the market makes it best placed to advise business. Other business guidance on consumer law is produced by the CTSI and more information is available on the [Business Companion website](#).

unlawful. The focus of this investigation is on certain care homes who require fees to be paid for extended periods after a resident has died (in addition to concerns relating to care homes charging large upfront fees).

Consultation

6. On 30 November 2017, the CMA published the final report on its market study findings¹⁷⁵ and announced that it would be consulting on advice in relation to the practice of charging fees after death, due to concerns about some care homes and the:
 - (a) Extent to which they continue to charge fees after the death of the resident;
 - (b) Charging for any shortfall in NHS Funded Nursing Care (FNC) payments;
 - (c) Charging of third parties for any shortfall in local authority funding;
 - (d) Treatment of the resident's possessions, and
 - (e) Lack of clear and transparent contract terms.
7. On 19 January 2018, the CMA launched a consultation on draft advice for care home providers covering the issues above.¹⁷⁶
8. Following consideration of the information received during the CMA's market study and responses received to the consultation, the CMA has now finalised its advice, as set out in from paragraph 22 of this document.

Who this advice is for

9. This advice is for providers of residential care home and nursing home services for people in the UK over 65 ('care homes'). It relates to their dealings with self-funded and part-funded residents.

The purpose of this advice

10. The purpose of this advice is to help care homes understand and comply with their responsibilities under consumer law following the death of a resident. It will also be of interest to care home residents and their representatives, consumer groups, charities representing the elderly, representative bodies for

175 [Care homes market study - Final report](#)

176 [Care Homes for the elderly – charging fees after death](#)

care homes, government departments, enforcers of consumer law such as local authority Trading Standards Services, relevant Ombudsmen, and sector regulators.

11. This advice sets out the CMA's views on the application of two pieces of consumer law, namely Part 2 of the Consumer Rights Act 2015 (CRA) in relation to unfair contract terms and the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) in relation to unfair business practices. These laws apply across the UK and therefore this advice is relevant to England, Wales, Scotland and Northern Ireland.
12. This advice is not a substitute for the law itself, and it does not replace the role of the courts which is to provide the definitive interpretation of consumer law. It sets out the views of the CMA. Care homes, if in doubt, should seek their own independent legal advice on the interpretation and application of the law. They may also be able to get advice from any representative body they belong to, or any local authority with which they have a Primary Authority relationship.

Next steps

13. Now that the advice is finalised we expect all care homes to review as soon as possible and, where necessary, change their contract terms and practices or risk enforcement action.
14. Separately, the CMA is consulting on comprehensive advice on other consumer law concerns identified in the CMA's final market study report.¹⁷⁷ The final advice on the charging of fees after death, as set out from paragraph 22 of this document, will be incorporated into the comprehensive advice once finalised. This will ensure that all of the CMA's consumer law compliance advice for care homes is set out in one place.

What happens if you do not comply with consumer law

15. Where you fail to treat residents and their representatives fairly and infringe consumer law, enforcers, residents and other compliance partners may take action against you.

¹⁷⁷ Chapter 11 of the Care Homes market study - Final report identifies these concerns.

Action by bodies that enforce consumer law

16. Non-compliance with consumer law could result in enforcement action by the CMA, local authority Trading Standards Services or, in Northern Ireland, the Department for the Economy. All have powers to enforce the consumer protection legislation referred to in this advice and can bring civil proceedings or (in relation to certain breaches) criminal prosecutions, as appropriate.
17. Where appropriate, enforcers can also seek redress for residents (including monetary compensation) or other remedies (such as the right for the resident to cancel the contract) where the resident has suffered loss as a result of the unfair terms or practices giving rise to the enforcement action.
18. Further guidance on the CMA's approach to its use of its consumer powers can be found on the CMA webpages.¹⁷⁸

Action by residents under consumer law

19. A contract term (or consumer notice) which is found to be unfair is not enforceable against a resident, and any money paid because of that term may be recoverable by them. A resident would also be entitled to resist making payment on the basis that a term is unfair under consumer law. In some circumstances, a resident may also have the right to seek redress in the courts under the CPRs in respect of misleading actions and aggressive practices.¹⁷⁹ This is in addition to any other rights to seek redress through any private civil action they may pursue for breach of contract.

Action by sector regulators

20. Sector regulators, namely the Care Quality Commission (in England), the Care Inspectorate (Scotland), the Care Inspectorate Wales and the Regulation and Quality Improvement Authority (Northern Ireland) may also take action in respect of any breaches of the rules and regulations which they are responsible for enforcing. The sector regulators are responsible for registering care homes and inspecting and monitoring them to ensure that they meet the standards of quality and safety set out in relevant regulations and guidance.

¹⁷⁸ [Consumer protection enforcement guidance: CMA58](#)

¹⁷⁹ This may include the right to unwind the contract, receive a discount or seek damages for detriment caused by the breach. For further information, see BIS, [Guidance on the Consumer Protection \(Amendment\) Regulations 2014, August 2014](#).

Ombudsmen

21. The Ombudsmen (the Local Government and Social Care Ombudsman in England, the Scottish Public Services Ombudsman, the Public Services Ombudsman for Wales and the Northern Ireland Public Services Ombudsman) may also consider and refer to the CMA's compliance advice when considering complaints about care homes.¹⁸⁰

Compliance advice

Introduction

22. In this section, we provide the CMA's views on what care homes (which are, where appropriate, addressed directly in the advice as 'you') need to do to meet their consumer law obligations in relation to the following matters that may arise following the death of a long-term resident,¹⁸¹ including any contractual terms which permit care homes to:
- (a) Continue to charge residential fees for care or accommodation (or both) of a self-funded resident (see paragraphs 27 to 38);
 - (b) Continue to charge residential fees for part-funded residents (see paragraphs 43 to 45);
 - (c) Charge for any shortfall in Funded Nursing Care (FNC) payments (see paragraphs 46 to 47); and
 - (d) Charge third parties for any shortfall in local authority funding (see paragraphs 48 to 50).¹⁸²
23. This advice also covers the treatment of residents' possessions (see paragraphs 39 to 42) and the transparency of related terms in your contracts with residents¹⁸³ (see paragraphs 51 to 52). However, the main issue for the CMA is the maximum length of time for which you can reasonably continue to charge fees following the death of a resident.

¹⁸⁰ The remit of the different national Ombudsmen vary. For example, unlike the other national Ombudsmen, the Northern Ireland Public Services Ombudsman cannot currently investigate complaints from private funders.

¹⁸¹ The CMA's focus is on long-term residents as opposed to respite residents.

¹⁸² The CMA recognises that some care homes do not charge any fees following the death of a resident, in which case many of the consumer law compliance issues raised in this advice will not arise.

¹⁸³ Where we refer to the 'contract' in this advice, we are referring to the document which sets out the rights and obligations between the resident and the care home. This document is commonly named by care homes as the Admission Agreement, Contract of Admission and Residency or Resident's Agreement.

Our approach to assessing the fairness of relevant terms in care home contracts

24. We consider that contract terms which have the effect of requiring residents or their representatives to continue to pay fees beyond the point at which possessions are cleared from the room are in principle likely to be unfair. This is because, once residents' representatives have cleared residents' rooms, the contract is likely to be of no benefit at all to them.
25. At the time the contract is entered into, it is likely that residents would have a reasonable expectation that their representatives will continue to have access to their room for a short period following their death. This will enable their representatives to pack up and remove the resident's possessions. We can see that, in principle, it is reasonable for care homes to continue to charge fees during this brief period. It is also in care homes' legitimate interests to use contract terms which ensure a degree of certainty as to when they will be able to recover the room, so that it can be re-occupied by a new resident as soon as possible.
26. As explained in more detail below, we are unlikely to object to contract terms which permit a care home to charge fees:
 - (a) For no more than a reasonable short and fixed period of up to three days, from the day following the resident's death, provided that provision is made for fees to stop being charged if a new resident occupies the room within this period (see paragraphs 27 to 31); or
 - (b) Until possessions are cleared from the resident's room by their representatives, provided that a reasonable backstop period of no more than ten days is included in the contract term for fees to cease from that point (see paragraphs 32 to 35).

Care homes could also include terms which permit a representative, after the death of a resident, to request in writing an extension of the fixed period or backstop period, respectively.

Length of usual payment period of residential fees after the death of a self-funded resident

Charging fees for a fixed period

27. As indicated above, we consider that it can be legitimate for contracts to set out a specific period during which fees will continue to be paid, where this period is a reasonable estimate of the amount of time it would reasonably take

residents' representatives to clear the room. Doing this provides care homes with the certainty of a guaranteed income for a period following a resident's death, and allows them to plan for the admission of the next resident. Preparation of the room for a new occupant can usually only begin once the room is cleared of the resident's possessions and the room is handed back to the care home by the resident's representatives.

28. Any fixed period which obliges the payment of fees, after the resident's death, should be short. This reflects care homes' legitimate interests to use contract terms which ensure swift recovery of the room. It also reflects residents' interests not to be required to pay fees beyond the point in time when the contract is no longer of any benefit to them or their representatives.
29. It is the CMA's view that a payment period of up to three days (beginning from the day following the resident's death) should normally strike the right balance between the legitimate needs of the care home and the resident. The CMA notes that many care homes offer resident rooms on a fully furnished basis, with residents usually bringing into the home items such as clothes, photographs, pictures, soft furnishings and maybe a few small items of furniture, all of which are relatively easy to remove. In these circumstances, a payment period of up to three days (beginning from the day following the resident's death) should normally allow residents' representatives sufficient time to remove possessions, without undue pressure. We would be unlikely to challenge this period.
30. As many residents pay their residential fees in advance, in practice this means that, after their death, you should usually refund any advance payments that go beyond the short fixed term period. Such refunds should be timely. Concerns are likely to arise if terms make provision for refunds beyond 28 days from the date on which they become due or, where applicable, 28 days from the date on which you have identified those who are entitled to receive the refund.
31. Further, if a room is re-occupied during the short fixed payment period (for example, where another resident moves into a room which has already been cleared),¹⁸⁴ fees should cease from the point when the room is re-occupied. We can see no basis for contract terms that provide for fees to continue to be paid for the resident's room after their death, when the room has been reoccupied by another resident, since this would allow you to charge twice for the same room.

¹⁸⁴ That is a resident who is either new to the home or transferring from another room.

Charging fees until possessions are removed

32. If it is your policy to continue to charge fees for a period following a resident's death, an alternative approach is to link payment directly with the time it takes a resident's representatives to clear the room.¹⁸⁵ This too would be consistent with the legitimate interests of residents, in requiring payment only for as long as the room remains uncleared. It also protects your reasonable interests, in that it incentivises residents' representatives to move possessions swiftly, so that the room is available to you early for re-occupation.
33. This type of contract term accommodates more fully the range of circumstances that can arise when a contract is entered into. For example, the time needed by a resident's representatives to organise the removal of possessions may vary.¹⁸⁶ Such a term can also accommodate more fully the range of circumstances which can arise, following the death of a resident.¹⁸⁷ Further, such terms may be beneficial to smaller care homes which may have to rely on external organisations to store possessions if they are not removed from the room by residents' representatives in a timely manner.
34. However, for this type of contract term to be fair, it is the CMA's view that provision should be made for a backstop period where the payment of fees will cease, even if possessions have not been removed by the resident's representatives from the room. This reflects a general legal duty upon you to take action to reduce your losses, for example by taking steps to ensure reoccupation of the room.
35. With regard to what constitutes a reasonable backstop period, the CMA considers that a period of no more than ten days, starting from the day following the resident's death, is likely to be reasonable. A backstop period provides an element of certainty for you as to when the room will be handed back to you. However, a period of longer than ten days would not sufficiently recognise that a point of time is likely to be reached when ultimately the removal of the possessions from the resident's room becomes your responsibility, thereby enabling you to get on with preparing the room for reoccupation.

¹⁸⁵ Note the need for timely refunds of any advance payment is equally applicable to such a term.

¹⁸⁶ Depending, for example, on the amount of possessions to be cleared from the room, which will be dependent on whether the room has been provided on a furnished or unfurnished basis.

¹⁸⁷ Depending, for example, on the nature of the resident's death (eg whether it was sudden or expected).

Extending the usual payment periods by agreement

36. There may be circumstances in which a resident's representative is unable to clear the room within the time period usually provided for them to do so in your contract terms (for example where they are overseas) but they do not wish you to clear the room. In order to provide for this eventuality, you could include a term which permits a representative to request an extension. Such a term should set out clearly that the fees will remain payable during the agreed extended period (if you intend to continue charging).
37. In order to prevent confusion or disagreements about what has been requested, it would be appropriate to require that the request be made in writing (for example by email). The request must not be a pre-selected option on standard paperwork. It should be made on the representative's initiative, following the resident's death.
38. Consent to such a written request should not be unreasonably withheld by you, and we would be likely to object to any term which requires payment of a fee for you to consider the request.

Treatment for possessions

39. It is reasonable for you generally to expect residents' possessions to be cleared within a short period of time after death. However, there may be occasions when residents' representatives do not do this, for example, if they are abroad, or lack transport or mobility, or simply do not organise the room clearance in time. Consequently, the contract terms should set out clearly what steps you will take in such circumstances. These terms must also be fair, as set out below
40. If possessions have not been removed by the resident's representative within the period specified in the contract and a longer period has not been agreed in writing, we would expect you to take steps to inform the resident's representative before clearing the room in order to allow you to prepare it for a new occupant. We would be unlikely to challenge, for example, a term which, after the expiry of the fixed term or backstop period, allows you to pack up the resident's possessions, and if necessary remove the resident's possessions from the resident's room, in order to allow you to prepare the room for a new occupant.
41. Contract terms which permit you to clear the room should set out what, if anything, you will charge for doing so, and any charges payable for storage of possessions. Any such charges should reflect the costs which you have

reasonably incurred, for example, for removal of possessions and storage thereafter.

42. If it is necessary for possessions to be stored and they remain uncollected, we recognise that ultimately a point could arise when it will become clear that possessions will not be collected at all. We consider that it is reasonable for you to make provision in the contract for such circumstances, including allowing for the disposal or sale of residents' possessions, as appropriate, provided that:
- (a) If possessions are to be disposed of or sold the timing of this is reasonable and clearly set out in your contract;
 - (b) Your terms make provision for adequate notice to be given to residents' representatives before disposing of or selling the possessions;
 - (c) If the appropriate course is to sell items (eg because they are of some financial value), you are obliged to obtain a reasonable price for the possessions; and
 - (d) If any monies are received from the sale of possessions then your relevant term makes provision for such sums, minus your reasonable expenses, to be returned to a resident's representative, within a reasonable timeframe (ie no longer than a 30 day period following the sale).

Residential fees payable by a third party after the death of a part-funded resident

43. Where a person is eligible for local authority funding but would like to move to a care home, or into a room, that costs more than the local authority will pay, then a 'third party', who could be a family member or friend, can pay a 'top-up' fee to meet the additional cost.¹⁸⁸ If a local authority is meeting a person's needs by arranging a place in a care home, it is responsible for contracting with the care home and paying the care home's charges for meeting those needs in full, including where a top-up fee is required. When all parties are

¹⁸⁸ In some limited circumstances, the resident can pay the top-up fee themselves. In these circumstances the concerns we raise regarding breaches of consumer law in relation to third party top-up payers still equally apply. Further, the term 'top-up' does not feature in the relevant legislation for Wales (The Care and Support (Choice of Accommodation) (Wales) Regulations 2015 and the supporting Part 4 and Part 5 Code of Practice (Charging and Financial Assessment) Annex C). The official terminology is 'additional cost'.

agreed, the local authority may choose to allow the third party to pay the care home directly for the top-up rather than via the local authority.

44. If it has been agreed that a third party will pay top-up fees directly to you, they will typically have an agreement with you in addition to a written agreement with the local authority. There will also be an agreement between the local authority and you in respect of the resident's placement and funding thereof. The terms of any third-party agreement with you must be provided on the same terms as your agreement with the local authority.¹⁸⁹
45. Consumer law concerns will arise if you require a third party to continue making top-up payments for a payment period that is longer than the period of local authority payment following a resident's death. Such an obligation is contrary to sector legislation (see footnote ¹⁸⁹) and the effect of such a provision is to penalise the third party for making payments directly to you rather than via the local authority. In order to be fair, the CMA would generally expect your contract terms governing the period for which top-up payments must be paid to be the same as those that apply between you and the local authority, so as to ensure that the third party is not subjected to more onerous contract terms than if they were paying the top-up fee via the local authority.

Fees payable to cover 'shortfalls' in any contributions which are no longer paid by the State upon (or shortly after) the death of the resident

Charging for any 'shortfall' in FNC

46. FNC is the contribution paid by the NHS to care homes in England and Wales, in order to support the provision of registered nursing care for eligible residents. The policy intention of the FNC payment is that the average cost of nursing care by a registered nurse is covered by the NHS, and should not be paid for by the resident.
47. The NHS stops FNC contributions on, or shortly after, the death of a resident because the nursing care by a registered nurse is no longer needed and cannot be provided to the resident.¹⁸ Given that it is the intention that payment for specified nursing care by a registered nurse is the NHS's liability rather than the resident's, the CMA can see no legitimate grounds for contract terms that require payments for FNC to continue for a period after the death of a

¹⁸⁹ See for instance, for England, the Care and Support and After-care (Choice of Accommodation) Regulations 2014, Regulation 3(1) specify the conditions which must apply in order for the local authority to be required to meet the adult's preference for accommodation. Regulation 3 (1)(e) provide "where the preferred accommodation

resident. It is the CMA's view that terms which have the effect of transferring this liability from the NHS onto the resident, or their representative, are unfair.

Charging for any 'shortfall' in local authority funding

48. As explained above, where a person is eligible for local authority funding but would like to move to a care home, or room, that costs more than the local authority will pay, a third party can pay a top-up fee to meet the additional cost (see paragraphs 43 to 45).
49. Just as terms of an agreement between you and a third party which require the third party to continue to pay a top-up fee after the local authority's contribution has ceased following the death of a resident are likely to be unfair (see paragraph 45), so too are terms which require the third party to meet the shortfall in the local authority's contribution, ie to pay the amount the local authority was paying.
50. The effect of such a provision, in an agreement between the care home and the third party, is to require the third party to take on responsibility for residential fee payments which far exceed the top-up fee they agreed to pay whilst the resident was alive. It takes advantage of the third party's unfamiliarity with the subject matter, and is contrary to what a well advised third party, acting on equal bargaining terms, would agree to.

Clear and transparent contract terms

51. Prospective residents and their representatives need prominent, clear, accurate and full information about the contract terms that will apply in the event that the resident dies. Such terms should be brought to the prospective resident's attention and clearly cover:
 - (a) The length of time, if any, that you will expect fees to be paid following death or how the length of time will be determined;
 - (b) The deadline for personal possessions to be removed from the room by residents' representatives and the action you will take if the deadline is not met;
 - (c) Whether, if necessary, items can be stored, if so for how long, whether there is a storage charge and if so, how much is the charge or how it will be determined; and
 - (d) The steps you will take to dispose of or sell items which are not, or cannot be, removed within the home's required timescale, which should include

the provision of written notice to residents' representatives before disposing of or selling the possessions.

52. As well as presenting these clearly in the contract, you should also communicate clearly to the resident's representative, as soon as possible following the resident's death, the information listed above. It is important also that in good time, before you take any steps that may involve the packing up of possessions or incurring costs, you inform the resident's representative of the proposed course of action. This will allow the representative to take steps to remove the possessions themselves and to avoid or reduce storage charges or any other charges, as applicable.

A summary table of the CMA's approach

Do not:

- Be afraid to discuss with prospective residents and their representatives the rights and obligations of a resident who dies during their contract with you;
- Hesitate to inform sensitively a resident's representative of their rights and obligations shortly following a resident's death including the time period they have to remove possessions, what will happen if they do not meet this timeframe and any charges that may arise;
- Charge fees for more than a fixed period of three days, following the resident's death;
- Alternatively, charge fees after possessions are cleared from the room by the resident's representative or, if this is not done, beyond ten days;
- Require a third party top-up payer to continue to make payments, after the resident's death, when the local authority's payment period has stopped;
- Raise the level of fees payable after a resident's death in order to cover a shortfall in State funding;
- Clear a resident's room of their possessions without informing the resident's representatives first and giving them a reasonable opportunity to clear the room themselves;

- Charge the resident's representative inflated storage charges;
- Reserve the right to take ownership of a resident's possessions which are not collected from your care home;
- Dispose of or sell the resident's possessions too quickly;
- Dispose of or sell the resident's possessions without giving their representative adequate notice of what you intend to do; and
- Reserve the right to keep all the proceeds from a sale of the resident's possessions.