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

Helping care homes comply with their consumer law obligations

Response to consultation document

16 November 2018
CMA95

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1. Introduction

1.1 This document summarises the main points made by respondents to the CMA's consultation on its draft advice on consumer law for providers of residential and nursing care homes in the UK for people over 65 ('**care homes'**). It also sets out the CMA's responses to these points and the corresponding changes that it has made to the final advice. The final advice has been published together with a short 'at a glance' summary guide for care homes.

Background

About the CMA

1.2 The CMA shares with the Chartered Trading Standards Institute (CTSI) the role of providing advice to businesses to drive up standards through clarifying their obligations under consumer law.[1] Where it publishes advice, 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.

CMA care homes market study

1.3 On 2 December 2016, the CMA launched a market study into how well the market for the provision of care home services in the UK was working for residents and their representatives.

1.4 On 30 November 2017, the CMA published its final report on its market study.[2] Amongst its findings, it highlighted a number of consumer protection concerns, some of which could potentially infringe consumer law. The CMA announced that, as well as taking enforcement action against some care homes on issues it had prioritised, it would be consulting on advice for care homes on the standards of behaviour they should be meeting to comply with consumer law. There was strong support from stakeholders for the CMA to publish such advice.

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[1] The CMA 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. These enforcement powers are shared with other bodies, such as local authority Trading Standards Services.

[2] https://www.gov.uk/cma-cases/care-homes-market-study

Consultation

1.5 On 31 May 2018, the CMA launched a consultation on draft consumer law advice for care homes.[3] The draft advice set out the CMA's views on the application of consumer law to care homes. Consumer law applies across the UK and therefore the draft advice covered England, Wales, Scotland and Northern Ireland.[4]

1.6 The draft advice focussed on four key areas: upfront information; treating residents fairly; quality of service; and complaints handling. We took into account the information obtained by the CMA during its market study work,[5] in particular from care homes and their representative bodies, charities for older people, consumer groups and the families and representatives of care home residents.

1.7 We received 51 written consultation responses. The list of respondents is set out at **Appendix A**. We also held 'roundtable' events in June 2018 to further seek views and inform the consultation.[6] We would like to thank all respondents for their constructive engagement.

1.8 We have carefully considered the consultation responses and feedback from the roundtables. In section 2 of this document we summarise the key points made by respondents on the draft advice. We also summarise the CMA's response to these points and describe the main changes that have been made to the final advice in response.

1.9 The final version of the advice can be found on the CMA's care homes consumer protection case page.[7] To ensure the content of the advice is as accessible as possible to all care homes (particularly smaller homes), we have also published a **short guide** for care homes. This is intended to

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[3] UK Care home providers for the elderly - draft advice on consumer law, CMA, May 2018.
[4] Consumer law sits alongside sector-specific obligations that apply to care homes, such as the regulations, rules and standards expected and enforced by the Care Quality Commission (England), the Care Inspectorate (Scotland), Care Inspectorate Wales, and the Regulation and Quality Improvement Authority (Northern Ireland).
[5] Care homes market study - Final report. CMA, November 2017.
[6] Roundtables were held in Belfast on 19 June 2018, Edinburgh on 22 June 2018, Cardiff on 27 June 2018 and London on 29 June 2018.
[7] Separate from this consultation, the CMA had already consulted on draft advice on the charging of fees after the death of a resident. The final advice was published on 31 May 2018. That advice has been incorporated into the main advice, so that all of the CMA's consumer law compliance advice for care homes is set out in one place.

complement the full advice by providing a basic, high-level introduction to the key requirements of consumer law, as further developed in the main advice.[8]

1.10 Alongside the final advice, we have also published some short advice aimed at current and prospective care home residents and their representatives, to help them understand their rights under consumer law.

Next steps

1.11 Care homes should already be complying with consumer law. In light of the concerns set out in our final market study report, we made clear that we expected care homes to begin immediately reviewing their practices and contract terms to check they were compliant with consumer law. Care homes should do so again, now that the advice has been finalised.

1.12 Alongside the advice, we have published an **open letter** to care homes, drawing attention to the advice and setting out our expectations that they will review and, if necessary, make changes to the contract terms, policies and practices they use with residents, to ensure compliance. Care homes that use contract terms or practices which do not meet these standards may face **enforcement action** by the CMA or local authority Trading Standards Services and, in Northern Ireland, the Department for the Economy.

1.13 The open letter makes clear that our advice will also be relevant to local authorities and other public funding bodies that place residents in care homes. We are letting them know that they should take into account the general principles of fairness set out in the CMA's advice, when contracting with care homes on behalf of residents and when dealing with residents directly.

1.14 The CMA has already taken enforcement action against some care homes in relation to the charging of certain upfront fees and charging fees for extended periods after a resident's death. We will continue to monitor the sector. We plan to carry out a **sector review**, commencing in **November 2019**, to assess the level of compliance by care homes with consumer law and the progress that has been made since publication of our advice. As part of that review, we will analyse any information and other intelligence that we have received. Where necessary and appropriate, we may also request information from care homes and ask them to demonstrate their compliance with the law. We will work closely with local authority Trading Standards Services, sector regulators and other compliance partners in holding care homes to account.

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[8] A Welsh-language version of the short guide will also be available.

1.15 Should serious infringements be identified, either through ongoing monitoring or during the course of the compliance review, the CMA or another compliance partner (such as local authority Trading Standards Services) may decide to take further action.

2. Issues raised by the consultation and our response

Introduction

2.1 The CMA's consultation on draft advice on consumer law for care homes invited responses to the questions shown in bold, below. The key points made by consultation respondents are summarised, followed by the CMA's response.

Question 2.1

Does the draft advice cover all the important issues around the contract terms and practices used by care homes with their residents? If not, what else should this advice include and why?

2.2 Some respondents queried why the scope of the advice was limited to care homes for the over 65s. It was suggested that aspects of the advice would also be applicable to other adult care home services, not just those which cater for older people, and that a broader service-based approach would be better. For example, we were told that in Wales, the general regulatory approach is to have consistent requirements which, for the most part, apply across all care homes, regardless of the age of the residents.

2.3 Several respondents were concerned more generally that the scope of the draft advice was limited to care homes, which they considered to be only one element of adult social care provision, and which should not be considered in isolation. In particular, it was suggested that the advice should also cover the responsibilities of local authorities and other public funding bodies towards **State-funded residents** (such as where a person is funded under a local authority or NHS placement contract, and where there are contractual arrangements between local authority/NHS commissioners and care homes, and where local authorities provide information to prospective residents); and the commissioning practices of local authorities and NHS-funding bodies.

2.4 Some respondents raised concerns that the advice may be read as giving responsibility to care homes to address what they saw as shortcomings in the funding, procedures and timing of State support (for example, perceived poor commissioning practices).

2.5 Some respondents commented that the draft advice did not adequately capture all the distinctions in policy and legislation in the Scottish adult social care system, for example, in relation to the National Care Home Contract and Free Personal and Nursing Care payments.

CMA response

2.6 Although consumer law applies widely, we have not prepared this advice for purposes other than advising care homes for older people on how to comply with their obligations under consumer law.

2.7 When producing advice and guidance for business, the CMA generally focusses on sector-specific issues that have emerged from a market study or other in-depth analysis of a particular market from which we have obtained relevant expertise. Our advice focusses on the consumer protection related issues identified during the CMA's year-long market study of care homes for the over 65s. Our market study did not look at other types of care home. For this reason, whilst the same general consumer law principles may apply to other types of care home (such as those that accept a mix of younger and older residents), we consider that the advice should be clear that it is primarily intended for care homes for older people.

2.8 Similarly, we did not think it appropriate to widen the scope of the advice beyond care homes to include local authorities, the NHS and other public funding bodies more generally. The focus of the advice reflects the CMA's market study evidence-gathering and findings, which identified concerns that some care homes may not be treating residents fairly and may be infringing consumer law. Care homes' compliance with consumer law is vital, especially in a market where people may be very vulnerable.

2.9 We acknowledge, however, that consumer law is likely to be relevant to the wider relationships that exist between care homes, local authorities (and other public funding bodies) and residents. The advice will therefore be relevant to local authorities and other public funding bodies that place residents in care homes and which enter into contracts with care homes for residents' care. For example, where a resident is funded by the State, there will usually be a written contract between the care home and the funding body that is commissioning the placement. We would expect these contracts to be drawn up so that they meet the needs not only of the funding body and care home, but also the resident. Where someone paying a 'top-up' enters into a contract with a local authority, these contracts are likely to be covered by consumer law.

2.10 We have therefore made clear that local authorities and other public funding bodies that place residents in care homes should take into account the general principles set out in the CMA's advice, when contracting with care homes on behalf of residents and when dealing with residents directly.

2.11 In relation to the wider concerns expressed around State funding and support, the CMA has already directly addressed these in the various recommendations it made in the market study final report. For example, we

made recommendations around reforming the way local authorities plan and commission care, and to give greater confidence that the costs of providing care will be covered. We have continued to engage with Governments, local authorities and the industry so that these recommendations inform future social care policies. For example, in its response to the final report, the Department of Health and Social Care in England said that it largely accepted the CMA's findings on our recommendations around State funding and support. We continue to feed into the development of the forthcoming Green Paper from the Department of Health and Social Care on care and support for older people, which will be published later this year.

2.12 Finally, consumer law applies across the whole of the UK. A number of the consumer protection concerns identified during the market study and covered in the advice are relevant for all the UK. We have also written the advice to include specific references to relevant aspects of the adult social care system in Scotland, Wales and Northern Ireland - for example, to the National Care Home Contract in Scotland, and to 'HPSS Payments for Nursing Care' and continuing healthcare in Northern Ireland.

Question 2.2

Are there any reasons why the illustrative examples of contract terms and practices that the CMA considers are more likely to be fair or unfair might be problematic? Are there any better examples that could be used?

2.13 Most respondents thought that the illustrative examples were helpful in giving care homes a better understanding of the advice and how consumer law applies to them.

2.14 Some respondents raised specific queries in relation to some of the examples given in the draft advice.

2.15 Some respondents commented that the advice would be more useful for care homes if it included more examples of terms which the CMA considered to be 'fair'.

2.16 It was also suggested that, for ease of reference, all the examples should be placed in an Appendix, as well as referenced throughout the main document, or should be grouped together at the end of each section.

CMA response

2.17 We have made minor changes to some of the examples given in the draft advice to reflect relevant feedback from respondents and further improve clarity. For example, in relation to terms which set out how self-funding

residents' fees may change over the course of their stay in the home, we have amended the example to show how care homes can improve transparency and **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 recent past.

2.18 We have sought to provide illustrative examples of contract terms and practices that the CMA considers are **more likely to be fair or unfair** and, where possible, we have added additional examples to the advice. However, the CMA is not empowered to rule any terms to be 'fair'. Similarly, we are unable to approve terms or recommend terms for use on the basis that they are fair and therefore will not be open to challenge. Only the courts can provide the definitive interpretation of consumer law based on the facts of each case. Therefore, we can only set out situations where we would be more or less likely to take enforcement action, and a term which we may consider potentially 'fair' in the abstract could, in conjunction with other terms, be nonetheless considered unfair.

2.19 As such, where we give examples of terms that are more likely to be fair, we are **not** presenting these terms as fair (or likely to be fair) and immune from challenge in all circumstances. The assessment of fairness for the purposes of the Consumer Rights Act 2015 requires consideration of all the circumstances of each case and of the effect of other terms in the contract. The advice cannot, therefore, be a substitute for the law itself, and does not replace the role of the courts.

2.20 We also consider that it would be more beneficial to care homes for the examples to be embedded within the specific aspects of the advice to which they relate, rather than grouped together at the end of a themed section or within a separate Appendix.

Question 2.3

Do you agree with the CMA's views on the 'key information' that care homes should provide to prospective self-funded residents and their representatives when they make <u>first contact</u> with a care home? In particular:

a) **Is there any key information currently included in paragraph 3.15 of the draft advice that you do not think is likely to affect someone's initial decision about whether or not to shortlist, make further enquiries of or visit a particular care home, and if so why?**

b) **Is there any other important information that you think ought to be included here, and if so why?**

2.21 Most respondents agreed that the list of 'key' information in the draft advice was comprehensive and generally covered all the most important information that residents need on **first contact** to make informed choices (eg about whether or not to shortlist a particular care home or make further enquiries).

2.22 A number of respondents queried why the draft advice stated that its primary focus was on the provision of information to **self-funded residents**, as opposed to residents funded by the State. Those respondents considered that important information should be made available, upfront, to **all residents**, regardless of their funding, since much of it may also relevant to State-funded residents when making decisions about their care.

2.23 Respondents also highlighted that, in practice, there was not always a clear split between self-funded and State-funded residents. For example, it was suggested that some prospective residents might not know how their care is going to be funded if a financial assessment had not yet been undertaken by the local authority (or a Continuing Healthcare eligibility assessment had not yet taken place).[9] Similarly, it was suggested that there might be uncertainties around the funding status of a resident where they have been placed by a local authority under, for example, the 12-week property disregard rule.

2.24 There were mixed views on the provision of information about **staff ratios** (ie the ratio of staff to residents and, separately, of qualified staff to care assistants).

2.25 Some respondents thought that information on staff ratios was important for people when shortlisting homes and was currently not easy to find out. For example, they considered that staffing levels were important indicators of the quality and consistency of the care at the home. They took the view that a staff ratio would give an indication of whether staffing levels were sufficient (and the individual attention that a resident was likely to receive) and, ultimately, whether the home was suitable for their needs. It was further suggested that any staff to resident ratio should refer specifically to staff **providing care** (care workers) and exclude other staff members such as administration staff, cooks and gardeners.

2.26 Other respondents raised concerns that staff ratios were **not** an accurate indicator of care quality and were likely to be **misleading**, or difficult to present in a meaningful way without very complicated supporting information. For example, it was suggested that:

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[9] For example, if the person had urgent need of care, the care package might be arranged in parallel with the financial assessment.

- Staff ratios were difficult for people to interpret (unless, for example, expressed as 1:1).
- Ratios were highly fluid and likely to change frequently, depending on who was living in the care home and their needs, so would be difficult to keep up to date.
- Ratios may vary depending on many factors including:
    - resident dependency levels (eg a higher ratio may simply mean residents in the home had greater care needs);
    - type of home (eg nursing or residential only);
    - within different parts of the same home where one unit provides nursing care and another residential;
    - type of accommodation (over how many floors, for example);
    - the time of day (day time and night time, as well as week days and weekends);
    - the current mix of residents in a home, as care homes may need to flex staffing around current occupancy at the home; and
    - staff grades, experience and knowledge.

2.27 Some respondents also highlighted that sector regulations and guidance in England and Scotland reflected this complexity (as well as the highly dynamic ratio of staff to residents) by not expressly requiring specific, fixed staffing ratios. For example, in Scotland, the current statutory requirement for care homes is, having regard to the size and nature of the service, to *'ensure that at all times suitably qualified and competent persons are working in the care service in such numbers as are appropriate for the health, welfare and safety of service users'*. Similarly, in England the current statutory requirement is for registered care services such as care homes to deploy '*sufficient numbers'* of suitably qualified, competent, skilled and experienced staff to meet the needs of the people using the service at all times, without mandating specific numbers.[10]

2.28 Some respondents suggested that a better approach might be to give a **description of staffing** in the care home and how staff are deployed and

[10] Regulation 18 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014.

trained (eg staffing levels, number of permanent versus agency staff, training levels and staff qualifications).

2.29 A few respondents made suggestions for other important information that ought to be included in relation to the **'key features'** of the care home, such as the activities and entertainment available to residents in the home. These were viewed by those respondents as an intrinsic part of the care package to ensure residents had a good quality of life (for example, by supporting residents to continue to engage in their hobbies or interests or support and encourage them to leave the care home on excursions and outings).

CMA response

Provision of information to self-funded and State-funded residents

2.30 We have amended the advice to emphasise that upfront information should, in principle, be provided to **all** prospective residents, regardless of their funding arrangements (ie to both self-funded and State funded residents) to help them make informed choices about their care. We have also specified which pieces of upfront information are ultimately likely to be relevant only to **self-funded residents** (for example, indicative fee information for self-funded residents, and any requirements for permissible upfront payments).

2.31 We understand this is consistent with the approach taken in some sector-specific regulations, which require care homes to provide all prospective residents with certain information to enable them to make decisions about their care, but set out some additional requirements in relation to those residents who will be paying for their own care in full or partially. For example, in Wales a 'written guide' must be made available to all individuals, the placing authority and any representatives, providing important information about the service. The service agreement must also be provided early on to each individual or their representatives, but where someone is paying for their own care in full or partially, the care home is specifically required to provide them with a written contract that includes terms and conditions, fees (including top-ups or any late payment fees), arrangements and timescales for notifying individuals of contractual changes, arrangements for how payments are to be made and the rooms to be used in accommodation-based services.[11]

2.32 We have also added a reference in the final advice to short stay/respite care residents, to emphasise that they need to be given upfront information not only about respite services and costs, but also about **permanent placements**

[11] Regulation 20 of the Regulated Services (Service Providers and Responsible Individuals) (Wales) Regulations 2017 and corresponding Guidance.

(eg the weekly fee rates, requirements for upfront payments and other key information relating to permanent residency, including any particularly surprising or important terms and conditions).

Staff ratios

2.33 Our intention in including staff ratios within the 'key' upfront information requirements was to ensure that prospective residents are provided with an early indicator of the quality of care that they can expect in the home. Initially, we considered that a ratio would also ensure ease of comparison between homes which, for example, may have different weekly fee rates (eg to see whether one home was more expensive than another because of higher staffing levels).

2.34 We recognise that there may be considerable complexities in presenting this information in a meaningful way. However, we consider that a brief description of the care home's staffing arrangements (including information about the numbers and qualifications of staff working in the home) is important in helping prospective residents and their representatives compare the quality and consistency of the care received between different care homes. Whilst it may provide some degree of reassurance, we do not think that simply telling people that a care home has, for example, '*sufficient' or 'appropriate'* numbers of staff in place is likely to be meaningful or helpful in informing their decision about whether or not to shortlist, visit or make further enquiries of a home.

2.35 Therefore, in the final advice, we are no longer advising that care homes should provide information about staff ratios to prospective residents and their representatives. Instead, we advise that care homes should provide a **brief description of the home's staffing arrangements**, and how they meet residents' needs and assure care quality. We consider that this should 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 the typical duty rota during the day and night time and at weekends) and how they are deployed across the home (eg where the home has more than one floor/unit). Where care homes take steps to supplement their staffing to ensure residents' needs are met (for example, through the use of automated monitoring technology), they should describe them. We consider that this is information that care homes will already have to hand.

2.36 This information should be consistent with the information that care homes are already required to provide to their relevant sector regulator to demonstrate that their staffing arrangements are sufficient to meet residents' needs under relevant regulations. For example, in Wales, the 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), staff levels (including the day time and night time staffing levels that will normally be in place) and how staff will be deployed across the care environment/accommodation to oversee and meet the needs of those individuals.[12] In England, one of the 'Key Lines of Enquiry' which the Care Quality Commission employ as part of their assessment framework covers questions about the arrangements that a care service has in place for making sure that staff have the right mix of skills, competencies, qualifications, experience and knowledge, to meet people's individual needs, including within staff rotas. In light of the existing regulatory obligations, therefore, we do not consider that the CMA's advice imposes unduly onerous obligations on care homes.

Other key information

2.37 Based on the suggestions we received, we have made minor additions to the list of key information. For example, we have added a specific reference to 'activities and entertainment' within the facilities and services that may be available to residents in the home. However, as set out in the advice, the list of examples given is **not exhaustive**.

Question 2.4

In relation to the <u>important, additional information</u> that should be provided in good time before a resident accepts an offer of a place (paragraph 3.23 of the draft advice) is there any other information that you think is likely to affect someone's decision about whether or not to accept an offer of a place in a care home, and if so why?

2.38 Most respondents told us that the list of important additional information was comprehensive. There were, however, several suggestions for further information that could be provided in relation to 'what matters' most to residents and their representatives, including:

- Whether residents can choose to have a male or female carer.
- Whether the home has guest parking spaces.
- Whether residents can bring furniture and belongings with them.

[12] Under the Care Inspectorate Wales guidance, the Statement of Purpose can be used to provide information to anyone who may have an interest in the care home.

- Whether the home has secure storage.
- The care home's policy on residents bringing pets with them.
- The arrangements in place for primary health care.
- Links to local community and local transport.
- Any planned changes to the home such as building work.
- Where a registered manager is not in post, care homes should explain what alternative management arrangements were in place (as this would be more helpful to prospective residents than simply reporting the absence).

CMA response

2.39 We have included some of these suggestions within the **additional, important information** section of the final advice where we considered that they were likely to be relevant to a prospective resident and their representative's decision about whether or not to accept an offer of a place in a home (specifically, whether residents can bring pets to the care home, choose a male or female carer and whether the home can meet certain dietary or religious requirements).

2.40 We have also expanded the reference to providing information about a registered manager to include an explanation of what alternative management arrangements are in place, if there is no current manager in post.

Question 2.5

Based on your experience, are there any reasons why the ways in which the CMA has suggested care homes should provide information (including when and how it is provided) may not be workable in practice? Are there any better ways of providing information (particularly key information)?

2.41 There was strong support from respondents for the CMA's view that the most important, key information should be provided on **first contact** with prospective residents and their representatives, so that they can make informed choices about whether or not to shortlist, make further enquiries of or arrange a visit to a home (ie when researching their choices).

2.42 Some respondents questioned whether it was practical to provide all the key information on the home/landing page of a website, as this may result in overcrowded screens and 'information overload' for people looking for information. Some respondents also saw a risk that older people or their representatives may find information presented in this way overwhelming.

2.43 It was also suggested that the advice should clarify that where reference was made to the 'landing page' of a website we meant the 'home page'.

2.44 Some respondents said the advice needed to deal separately with 'planned admissions' and 'emergency admissions' from home or hospital. They questioned how care homes could meet their obligation to provide all the required information in 'good time' before a resident accepts an offer of a place in cases of emergency admissions. For example, we were told that a person may be admitted to a home within 24 hours. An example was also given of hospital discharges happening within 2 hours.

CMA response

2.45 The key legal principle underpinning this section of the advice is that care homes should not be omitting, hiding or concealing information that perspective residents and their representatives need to make informed decisions about their care. Information should be clear, simple and easy to find and provided in a way and at a time that ensures that they can genuinely understand and engage with it. People should not need to have pre-existing knowledge in order to be able to navigate and understand the information. Key information, in particular, should be very clearly and prominently provided.

2.46 In recognition of concerns expressed about the practicality of putting all the 'key information' on the home page of a website, we have amended the final advice to make clear that key information should be 'no more than one click away' from the home page. Depending on the design and functionality of a website, this might be achieved by prominently displaying the key information on the home page itself, or by using clearly labelled and prominently signposted icons/tabs on the website navigation menu of the home page, from which the information is directly accessible.

2.47 We have also recognised in the advice that people may also access online information using other devices (such as a tablet or mobile phone), rather than a desktop computer. Care homes should therefore take account of this possibility and ensure that all upfront information is provided in a clear, appropriately prominent and accessible manner through all media.

Emergency/rapid admissions

2.48 In relation to emergency/rapid admissions, we accept that in some circumstances there may be practical challenges for care homes in providing all the upfront information to someone in a timely manner before making them an offer of a place (for example where an admission is completed in just a few hours).

2.49 However, the fact that an admission may happen quickly is, in our view, a further reason why information must be given in a clear fashion and not an excuse for failing to provide the resident and their representatives with the information they need to make informed decisions.

2.50 We have made clear that care homes should take extra care to ensure that information is presented in a manner that residents and their representatives can genuinely engage with and understand in these circumstances.

Treating residents fairly: contract terms and business practices (section 4 of the draft advice)

Changes to a self-funded resident's fees during their stay in the home

Consumer law requires that self-funded residents are able to foresee, on the basis of clear and intelligible criteria, how their fees may change whilst living in the home and that they are able to evaluate the practical implications for them, before entering the contract. This is likely to require care homes to set out clearly in contracts with residents the circumstances in which fees may change and the method for calculating it. The CMA has suggested the following three approaches by which care homes may comply with the law:

a) Fixing a resident's fees for the duration of their stay;

b) Specifying the precise level and timing of any future fee increases within very narrow limits, eg 'your fees will be increased by £500 per annum on the first and subsequent anniversaries of your arrival at the home';

c) Reviewing residents' fees on an annual basis by reference to a relevant, objective and verifiable published price index eg the Consumer Prices Index including housing costs (CPIH), or the average of (i) the percentage increase in the CPIH over the previous year and (ii) the percentage increase in the National Living Wage rate compared to the previous year.

Question 2.6

In relation to these suggested approaches, what are the likely consequences? Are there any which you consider would not be workable in practice, based on your experience and why?

Fixing residents' fees for the duration of their stay (option a)

2.51 Most respondents told us that they did not think this suggestion would be workable, other than for a short stay placement (eg respite care).

2.52 Respondents highlighted that whilst care homes might know the average length of stay of their residents, they could not predict accurately how long an individual resident might remain in the home (or how much their future costs were likely to increase). For example, individuals may remain in a care home for just a couple of weeks or several years. Therefore, these respondents said that a fixed fee approach could potentially result in:

a) Care homes inappropriately or arbitrarily inflating the initial price to mitigate against fees being unsustainable in the long term (ie increase the rate to mitigate future cost pressures), meaning that fees would not reflect the care home's actual costs or give best value for residents;

b) Care homes placing themselves at risk of long-term financial difficulties if the initial price did not adequately cover any unforeseen cost increases (notwithstanding that they may still have the flexibility to increase fees for new residents). These potentially damaging consequences were likely to be particularly acute for small care homes.

2.53 One respondent suggested that residents could only be offered a fixed price if the length of their contract was fixed - if a resident remained in the care home beyond the end of the fixed contract period, they would need to commit to pay any reasonable increase in costs or give notice to move out.

Specifying the precise level and timing of future increases within very narrow limits (option b)

2.54 There was only very limited support for this approach from respondents.

2.55 For example, it was suggested that a cap on fee increases could only work if the figures used were realistic and exceptions were allowed for unexpected increases in costs. Capping increases at the level of the example given in the draft advice (£500 p.a.) would be unsustainable.

2.56 A few respondents suggested that, rather than specifying the absolute amount of any future increase, it would be more feasible to specify a fixed percentage increase or a percentage cap. However, with either approach, care homes would still need the ability to charge for unexpected or exceptional increases in their costs.

2.57 Most respondents raised concerns that such an approach might encourage care homes to specify **arbitrary amounts** (or percentage increases) that did not reflect their actual costs ie any fee increases would not be cost-reflective. This could result in residents being worse off, since it risked breaking the link between fee increases and cost drivers.

2.58 Some respondents asked that the final advice set out what a 'fair' figure (or set percentage increase) should be.

Reviewing residents' fees on an annual basis by reference to a relevant, objective and verifiable published price index (option c)

2.59 Most respondents thought that, in principle, linking annual fee increases to a price index provided a reasonable basis for varying existing residents' fees. However, concerns were raised that this was a complex area and that care homes' costs could increase unexpectedly. This is further dealt with at Question 2.7, below.

CMA response

2.60 We recognise that there may be practical challenges for care homes (and the risk of unintended consequences for residents) in fixing residents' fees for the duration of their stay or specifying the precise level and timing of future increases.

2.61 The CMA is not in a position to stipulate what is likely to be a 'fair' percentage increase or cap. Moreover, 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 genuine increases in costs.

2.62 Therefore, we have removed options a) and b) as examples of how care homes can ensure compliance with the law from the main body of the final advice. However, we still refer to them in a footnote, as both approaches constitute potential ways of achieving compliance with consumer law since they are, in principle, ways in which a business may ensure that their customers have foreseeability in relation to future price increases.

Question 2.7

In relation to reviewing residents' fees on an annual basis by reference to a relevant published price index, do you consider that the CMA's suggested indices/approaches adequately reflect care homes' cost drivers? Are there any other relevant, published price indices that you consider more accurately reflect annual increases in care home costs, whilst granting prospective residents (and their representatives) the foreseeability they need?

2.63 Although most respondents supported this approach in principle, some also pointed out that there is currently no relevant index for the sector that fully reflects care homes' cost drivers. For example, it was suggested that general inflation indices do not take into account the fact that some costs, such as food and utility prices, will rise more than the indices. Based on this, they considered that the Consumer Prices Index including housing costs (CPIH) may not fully reflect all the drivers of a care home's costs. Some respondents also highlighted that care homes face an unpredictable cost element because of the fees paid by local authorities and NHS funding bodies, which impact on their overall budgets and the fee increases they have to make for their existing self-funded residents.

2.64 Some respondents suggested that the best approach would be for care homes to calculate fee increases based on several indices to cover the different types of cost (ie non-staff costs and staff costs). For example, it was possible that non-staff costs could be based on specific tailored elements of the Retail Price Index or CPIH that reflected the main non-staff cost drivers of energy, food and medical supplies.

2.65 It was also suggested that where different indices were used, they would need to be appropriately **weighted** to reflect the mix of staff and non-staff costs incurred by an individual care home. For example, it was highlighted that a weighted approach was already used in some local authority block contracts with care homes eg 40% of any fee increase is based on the Consumer Prices Index and 60% on National Living Wage increases.

CMA response

2.66 We have amended the final advice to reflect feedback from respondents, and have given several index-based examples of possible approaches which we consider would comply with consumer law. These are set out at paragraph 4.46 of the final advice.

2.67 In our view, the advantage of using the indices that we have given as examples is that people are already familiar with them and they can be easily and publicly verified by residents and representatives. Otherwise there is a risk that using other indices could be quite subjective and may not genuinely reflect care homes' cost drivers.

2.68 Whilst we have included illustrative examples of potential approaches that care homes may follow to comply with the law, the examples are **not exhaustive** and we are not mandating any as being the only method of ensuring legal compliance. Subject to our reservations stated above, there may be other index-based approaches that care homes could use and which

may, for example, reflect other cost drivers. The key is that any index should be capable of independent verification, and be described with sufficient clarity in the contract, so that people can genuinely understand and predict the likely impact of their fees over the course of their stay.

Question 2.8

If you consider there are drawbacks to some or all of the approaches suggested by the CMA, what would be a better way for care homes to comply with the law and give residents greater foreseeability of future fee increases, and why?

2.69 A few respondents suggested that it might be possible to use an indicative 'cost of care' model to determine annual uplifts in self-funders' fees. For example, in Scotland a care home cost model is being developed to inform the National Care Home Contract rate for local authority funded residents, which breaks down the different cost elements associated with a care home placement and attributes a benchmark to each element.[13] This model also captures movements in elements such as staff costs (eg changes in the Scottish Living Wage and nursing hourly rate) and employers' contributions. We were told that the benchmarks used in the model were negotiated and agreed with care home representative bodies and further work is being undertaken on the commercial return. It was suggested to us in consultation that it might be reasonable for care homes to use a similar evidence-based approach to demonstrate increasing costs for **self-funding** residents.

2.70 Some respondents suggested that care homes should provide prospective residents with information about historic fee increases, to give them a reference point and an indication of potential future increases. There were also suggestions that care homes should set out in their contract terms that fees would only be raised in line with 'actual' cost increases expected during the coming year or could list the reasons why fees could go up.

CMA response

2.71 In principle, we think that an indicative 'cost of care' model could potentially be used to determine annual increases in self-funders' fees, although we note that the model being developed in Scotland is intended only to 'inform' local

[13] Scotland Excel, the Convention of Scottish Local Authorities (COSLA), the Coalition of Care and Support Providers (CCPS) and Scottish Care have developed a cost of care model to guide the rates paid by local authorities. The model of notional representative average costs for nursing and residential care is based on unique Scottish benchmarks, for example reflecting the Scottish Living Wage and staffing ratios.

authority fee rates. This is a similar approach to using a 'basket' of indices to cover the various care home cost drivers in order to determine the annual fee increase for self-funders.

2.72 We do not consider that the suggested approach of providing information about past fee increases would provide residents with the necessary degree of foreseeability required by consumer law. Most significantly, previous years' fee rises may not be an accurate indicator of the level of **future** fee increases. Moreover, they could give the misleading impression that future increases will match previous ones. To present a fee variation term fairly and transparently in a contract, we consider that it is likely to be necessary to provide an example of how fees could change **in future** (eg by reference to a relevant index), as well as a description of how they have changed in the past.

2.73 Similarly, a fee variation term will not necessarily be fair just because it is not on its face discretionary. For example, a term that says that fees will only be raised in line with 'actual' or 'expected' cost increases does not give residents any real degree of foreseeability as to what those future increases might be and may also be open to misuse, since such increases will not be capable of independent verification.

2.74 Further, a term which only lists the **reasons** for which fees might go up is unlikely to grant residents any more foreseeability as to future cost increases, as the prospective resident and their representatives would be unable to foresee the alterations that may be made and evaluate the practical implications for them, before accepting a place in the home.

Question 2.9

Based on your experience, where a care home has assessed a resident's care needs as having increased, do you consider there are any practical difficulties in following the steps set out in paragraph 4.46 of the draft advice before implementing any change to the resident's fees (ie liaising with relevant independent professionals to support the decision and engaging in meaningful consultation with the resident and their representative)? If so, how can this process be made more workable?

2.75 Some respondents made the general point that not every change in a resident's care needs or dependency should result in an increase in fees. They considered it important that the CMA's advice should not inadvertently encourage care homes to increase their fees automatically if a resident's needs increase. We were told by some respondents that care homes would often absorb any additional care costs, particularly towards the end of a resident's life, unless there was a significant change in the costs involved.

Liaising with relevant independent professionals (such as the resident's GP or hospital staff) to support the decision

2.76 There were mixed views on the practicalities of care homes liaising with independent professionals and, specifically, medical practitioners such as GPs, to evidence and support a care home's decision to increase an existing resident's fees because of a change in their care needs.

2.77 Although there was some support for the need for timely, independent assessments of changes in care needs, a number of respondents raised concerns that formalising the need to liaise with medical practitioners in **all cases** of a change in care needs was not realistic, as the healthcare system was not sufficiently resourced to make this practicable. In practice, a care needs assessment might be carried out by staff that were not medically qualified, such as a social worker or occupational therapist.

2.78 It was also argued by some respondents that, even where it would be possible to involve a resident's GP (or another health and social care professional) in a discussion with a resident or their representative, it did not necessarily mean they would be able to attend the care home to re-assess the resident. The need to review the change in care needs requires an in-depth knowledge of a resident which can be time-consuming.

2.79 Some respondents also said that there was already sufficient regulatory oversight and safeguards in place covering the assessment of care needs by **multi-disciplinary teams**, ensuring that care is appropriate and that residents and their representatives are involved in decisions about treatment.

2.80 A number of respondents suggested that the use of transparent dependency tools to assess care needs, linked to pricing, would help ensure that fee structures were fair and could be adjusted accordingly. For example, it was suggested that with any major change in the resident's circumstances, the care home should use a **recognised accredited dependency tool** to assess and evidence the change in care needs. We were told that there were a range of validated assessment tools which care homes could use to inform care needs.

Engaging in meaningful consultation with the resident and their representative before increasing the fees - changes in fees not taking effect until the consultation process had ended ie the new fee rate should not be backdated

2.81 Most respondents thought that it was reasonable to expect a care home to engage in meaningful consultation with the resident and their representatives about a change in care needs.

2.82 However, concerns were raised by some respondents about the consequences of care homes not being able to increase fees until after any consultation and notice period had ended, particularly if the increase in care needs arose from a serious decline in health for which **immediate** extra care would be required (for example, where one to one care was necessary). It was suggested that this might make it more difficult for care homes to work in a resident's best interest and ensure their increasing needs were met promptly, especially if a resident did not have mental capacity to make a specific decision, did not have an advocate and their family and friends were not easily contactable or interested.

2.83 Some respondents thought that the revised fee should be backdated to the date that the care home started to provide the greater level of care. They suggested that where residents or their representatives did not agree with the care home's assessment that the resident's needs had increased (and the corresponding increase in fees), the resident should not effectively have the final say on the increase in fees. Instead, they argued that the overriding objective should be to arrange care in the best interests of the resident and charge the fees necessary for the increased level of care. Some respondents considered that if care homes were not able to pass on increased costs of care to residents in these circumstances, they might need to terminate the resident's contract on the basis that they would no longer be able to meet their increased needs.

2.84 It was also suggested that, in the case of State-funded residents, a local authority would typically backdate the fees if it accepted that the resident's care needs had changed.

CMA response

2.85 The CMA's final position is set out at paragraphs 4.52 - 4.55 of the final advice.

2.86 We recognise that it may not be feasible for a care home to seek input from independent medical professionals to evidence and support every decision to increase fees, given the demands on the health service. We have advised that one way for a care home to justify and evidence its decision that there has been a significant and demonstrable change in someone's care needs is by using **recognised accredited dependency tools**. The assessment should be shared with the resident and their representatives, where possible.

2.87 We have also made clear that care homes should consult with the resident and their representatives where they assess or anticipate a significant and demonstrable change in care needs and give them advance notice of their

intention to increase fees. However, instead of requiring care homes to liaise with independent professionals (such as the resident's GP or hospital staff) in all cases of a change in care needs, we have amended the final advice to make clear that, **where there are disputes** (or where a dispute is anticipated), the care home should liaise with, for example, a **multidisciplinary team** (which could involve a social worker and nurse) to support their decision.

2.88 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. We have, however, made clear in the final advice that care homes should ensure that residents and their representatives have **appropriate safeguards**, namely, that the care home gives immediate notice of any fee increase the additional care will entail. Where the resident or their representative does not agree with the decision, the care home should liaise with relevant independent professionals (for example, a multidisciplinary team) and the resident should have the opportunity to leave **without penalty** when the fee increase takes effect. The care home should not apply the fee increase until any dispute is resolved, but where the decision is supported by an 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 the care home began providing the extra care.

Question 2.10

What, if any, aspects of the draft advice do you consider need further clarification or explanation, and why? In responding, please specify which section of the draft advice (and, where appropriate, the issue) each of your comments relate to, for example:

a) Upfront information (section 3)

b) Treating residents fairly (section 4)

c) Quality of service (section 5)

d) Complaints handling (section 6)

2.89 Some respondents said that the phrase 'elderly' in the title of the advice – by which we mean people aged over 65 - should be changed to 'older people', as this was more reflective of current standards on language and was viewed as preferable by residents themselves.

2.90 A few respondents asked that the CMA further clarify its position in relation to the permissibility of top-up payments by NHS Continuing Healthcare (CHC) residents to meet their lifestyle choices. Whilst it was acknowledged that it may be unlawful for a CHC resident to be asked by a care home to pay a fee for the care element of the package, they queried whether the resident could exercise the right to live in a home of their choice, even if its fees were not fully covered by the CHC payment.

2.91 It was also suggested that the CMA's final advice should cover the situation where ownership of the care home changes and, specifically, how existing residents' rights under their contracts may be affected in these circumstances.

CMA response

2.92 We have amended the advice to refer to 'UK care home providers for older people', in light of what respondents told us.

2.93 The CMA's advice is intended to help care homes comply with their obligations under consumer law, rather than to give general guidance on the applicability of detailed NHS rules. Nonetheless, when considering the application of consumer law in this sector, appropriate regard has to be taken of the sector specific rules, law and regulation.[14]

2.94 Following this approach, taking into account the relevant NHS rules, our advice makes clear that 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, care homes 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), and b) if it is not an assessed need, whether the type of private service is permitted under NHS rules. Failing to do this exposes the care home to the risk that it is engaging in conduct infringing consumer law.

2.95 Moreover, in the above context, the advice notes that unless it is possible to separately identify and deliver the NHS-funded elements of the service, it will not usually be permissible for CHC residents or their families to pay for higher cost services and/or accommodation (see paragraph 4.137(b) of the advice).

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[14] For example, terms in contracts between care homes and residents which undermine a resident's legal rights, such as the right to receive NHS funded healthcare services free of charge, by having the effect of obliging residents to pay the difference between CHC funding and the home's residential fees, are likely to be unfair under Part 2 of the Consumer Rights Act.

Requiring or in any other way securing from the resident (or their representative) such an impermissible payment, either as a condition of moving into a home or as a condition of staying in a home, is likely to infringe consumer law.

2.96 We have also now included text in the final advice setting out what care homes should do to protect residents' rights and ensure compliance with the law where ownership of a care home changes hands.

Question 2.11

Do you have any suggestions on the best ways of disseminating the content of the final advice to ensure that it is easily accessible to care homes and, in particular, to smaller care homes?

2.97 Most respondents suggested that the best way of disseminating the advice to care homes was through national sector regulators, as well as care home representative bodies and local authorities (for example, it was suggested that most local authorities had electronic circulation lists of care homes within their boundaries).

2.98 The feedback from most respondents was that, whilst the draft advice was clear and comprehensive, it was lengthy and might not be referenced easily by some care homes and, in particular, local care home managers. It was suggested that small care homes would benefit from a shorter, more user-friendly version of the advice, summarising the key points of the full advice in simple language.

2.99 Some respondents also said that whilst the use of illustrative examples of contract terms and practices in the advice was helpful, small care homes might not have the necessary knowledge needed to implement the advice and would benefit from further practical support such as toolkits and templates.

CMA response

2.100 We have worked closely with a range of stakeholders who have agreed to help publicise the advice to care homes across the UK. This includes the sector regulators in each nation of the UK, and care home representative bodies across the UK. We are grateful for their assistance.

2.101 We recognise the importance of ensuring that the content of the advice is accessible to all care homes and, in particular, smaller homes (for example, we understand that 57% of care homes for older people in Wales are single

home providers).[15] We have therefore produced a **short guide** to accompany the full advice, which is based on the key points section at the start of the main advice. We commissioned external designers to help us ensure the language and design were as user-friendly as possible. The short guide is available on the CMA website, alongside the full advice, in both HTML and PDF formats (so it can be easily downloaded and printed, if necessary). We are also producing a Welsh-language version of the short guide.

2.102 Whilst the advice sets out practical examples to help care homes comply with their consumer law obligations, only the courts can give a definitive interpretation of the law and how it applies to specific cases. Ultimately, care homes are responsible for ensuring that they are complying with the law. If in doubt, a care home should seek its own independent legal advice on the interpretation and application of the law.

2.103 We are, however, providing appropriate support to stakeholders who are developing initiatives designed to help further 'embed' the CMA's compliance advice. For example, we understand that:

a) A number of local authority Trading Standards Services, organised through SCOTSS (the Scottish Chief Officers' group), are planning to engage with care homes in Scotland to examine their trading practices with reference to the consumer protection issues identified in the CMA's market study. Participating local authorities will make use of the CMA's consumer law advice to help ensure that care homes understand and comply with their responsibilities under consumer law.

b) CTSI,[16] as part of its Business Education Service,[17] is planning to produce further simplified compliance training materials for care homes across the UK on key areas to complement the CMA's advice.

c) The Care Provider Alliance (CPA)[18] in England is intending to produce model contract clauses and supporting materials for its member care homes. This follows a recommendation in the CMA's market study final report that the industry take steps to develop model contracts that could be recommended for use by care homes with self-funding residents. In

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[15] 'The Care Home Market in Wales: Mapping the Sector', Public Policy Institute for Wales, 2015.
[16] The CMA shares with CTSI the role of providing guidance to businesses to drive up standards through clarifying their legal obligations.
[17] CTSI provides a 'Business Companion Service' containing free legal guidance for businesses on trading standards and consumer law. This is funded by the Department for Business, Energy & Industrial Strategy.
[18] The CPA brings together the ten main national associations which represent independent and voluntary adult social care providers in England.

addition, we understand the CPA is exploring opportunities in the sector for setting up a formal Primary Authority Partnership[19] with a local authority to receive tailored advice and support on consumer law matters.

Other comments and suggestions

2.104 A number of respondents highlighted that it was important not only to produce advice for care homes on their consumer law obligations, but also advice for care home residents and their representatives to help them understand and exercise their consumer rights.

CMA response

2.105 We agree that, for care homes to meet people's needs as well as possible, residents and their families or other representatives must be sufficiently empowered to identify and address any shortcomings in the service they receive. This applies equally to State-funded residents (who may not see themselves as being 'consumers') and self-funded residents.

2.106 When the CMA published its care homes market study final report, we said that, alongside the advice for care homes, we intended to produce short advice for residents and their families about their consumer rights.[20] We have therefore produced some short advice summarising the basic rights that residents and their representatives are entitled to under consumer law, and where they can go if they need further advice. This is available on the CMA website in HTML. A Welsh language version of the consumer advice will also be available.

2.107 We also welcome the awareness raising campaign being developed by the Convention of Scottish Local Authorities (COSLA) which seeks to equip consumers with a sound understanding of their rights if they decide a care home is for them. As well as COSLA, the campaign will bring together a wide range of partners including the Care Inspectorate, Scottish Care, Age Scotland, Care in Scotland and the Scottish Government and seeks to launch this winter.

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[19] The Primary Authority scheme allows businesses to form a legally recognised partnership with one local authority - the 'Primary Authority' - in order to receive tailored support in relation to one or more specific areas of law. See https://www.businesscompanion.info/en/quick-guides/miscellaneous/primary-authority-and-home-authority

[20] See paragraph 12.22, Care Homes market study – Final report, 30 November 2017.

Appendix A: List of respondents

1. Aberdeen City Health and Social Care Partnership
2. Association of Directors of Adult Social Services and Local Government Association
3. Age UK
4. Alzheimer's Society
5. Barchester Healthcare
6. Blackadder Corporation
7. Brendoncare Foundation
8. Bupa UK
9. Cardiff Council
10. Care England
11. Care Forum Wales
12. Care Inspectorate
13. Care Provider Alliance
14. Compare all Care
15. Conwy County Borough Council
16. Commissioner for Older People for Northern Ireland
17. Convention of Scottish Local Authorities
18. Care Quality Commission
19. Eldercare Solutions Ltd
20. Four Seasons Health Care Ltd
21. Hallmark Care Homes
22. Hampshire County Council
23. Hampshire Trading Standards

24. Healthwatch England
25. Independent Age
26. Kent County Council
27. Leicestershire County Council
28. Local Government and Social Care Ombudsman
29. Milestones Trust
30. National Care Forum
31. Ourris Properties Ltd and Ourris Residential Homes Ltd
32. Priory Group
33. Registered Nursing Home Association
34. Sanctuary Group
35. Scotland Excel
36. Scottish Care
37. Society of Chief Officers of Trading Standards in Scotland
38. Social Care Wales
39. Somerset Care
40. Scottish Public Services Ombusdman
41. Surrey Care Association
42. The Home of Comfort
43. The Orders of St John Care Trust
44. The Relatives and Residents Association
45. Welsh Government
46. Which?
47. Wrexham County Borough Council

4 individuals