

UK care home providers for the elderly – draft advice on consumer law

Helping care homes comply with their
consumer law obligations

Consultation document

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This publication is also available from the CMA's webpages at www.gov.uk/cma.

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1. About the consultation

Introduction

- 1.1 The Competition and Markets Authority (CMA) is consulting on draft consumer law advice for providers of residential care homes and nursing home services for people in the UK over 65 (referred to in this document as 'care homes').
- 1.2 The purpose of the advice is to help care homes understand and comply with their responsibilities under consumer law. Complying with consumer law is an important part of running a care home as it gives protections to residents (and their representatives), who may be very vulnerable. The CMA and other enforcers can take action against care homes that infringe the law.
- 1.3 Many of the issues covered in the draft advice were highlighted during the CMA's year-long [market study](#) into how well the care homes sector was working. The market study identified a number of concerns that some care homes may be treating residents unfairly and potentially infringing consumer law.
- 1.4 When the CMA published its [final report](#) on its findings in November 2017, it announced that (as well as taking targeted enforcement action against some care homes on issues it had prioritised for early action) it would be consulting on advice for care homes on the standards of behaviour they should be meeting to comply with consumer law across the full range of concerns which had been identified.
- 1.5 There has also been strong support from stakeholders, including from those within the care homes sector and amongst consumer groups and charities representing the elderly, for the CMA to publish comprehensive consumer law advice for care homes. In developing this draft advice, the CMA has informally sought initial views from a number of stakeholders on style, structure and the key issues it should cover.
- 1.6 Separate from this consultation, the CMA has 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 is not part of the current consultation, but will be incorporated into the fuller advice once finalised, so that all of the CMA's consumer law compliance advice for care homes is set out in one place.
- 1.7 Care homes should already be complying with consumer law. In light of the concerns set out in the final market study report, the CMA made clear that it

expected all care homes to begin immediately to review their practices and terms to check they were compliant with consumer law. Care homes should do so again when this advice is finalised.

- 1.8 The CMA is already taking forward action against certain care homes that it considers are unfairly charging large upfront fees, and charging fees for extended periods after a resident has died. It is also continuing to monitor complaints and other intelligence and may decide to open further investigations against other care homes, and on other issues, before the publication of its final advice if it identifies serious concerns about potential infringements of consumer law. However, this advice, when finalised, will set out the standards that the CMA expects all care homes to follow. Care homes that use contract terms or practices which do not meet these standards may face enforcement action.
- 1.9 Alongside the final advice on complying with consumer law, the CMA also plans to provide some short accessible advice for residents and their representatives to help them understand their rights under consumer law.
- 1.10 The CMA intends to undertake a follow-up compliance review across the care homes sector after publication of its final advice to assess what progress has been made. It will work closely with local authority Trading Standards Services, sector regulators and other compliance partners in holding care homes to account.

Scope of this consultation

- 1.11 The consultation and the draft advice are primarily intended for care homes for people over 65.
- 1.12 It may also be of interest to care home residents and their representatives, enforcers of consumer law such as local authority Trading Standards Services, representative bodies for care homes, sector regulators, consumer groups, charities representing the elderly, relevant Ombudsmen, local authorities, Health and Social Care Trusts in Northern Ireland and other funding bodies who arrange and pay for care home placements, and Government departments.
- 1.13 The draft advice sets out the CMA's views on the application of consumer law to care homes. It is relevant for all care homes, irrespective of whether their residents pay their own fees or are State-funded.
- 1.14 Consumer law applies across the UK and therefore the draft advice covers England, Wales, Scotland and Northern Ireland.

- 1.15 The draft advice focusses on the following key areas:
- (a) **Upfront information:** what sort of upfront information care homes should provide to prospective residents and their representatives, and when and how they should do so
 - (b) **Treating residents fairly:** what care homes should do to ensure that their contract terms and the way they treat residents and their representatives are fair
 - (c) **Quality of service:** complying with the obligation to provide services to residents with reasonable care and skill
 - (d) **Complaints handling:** what care homes should do to ensure that their policies and procedures are easy to find, easy to use and fair.
- 1.16 The draft advice focusses on the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) in relation to unfair business practices and the Consumer Rights Act 2015 (CRA) in relation to unfair contract terms and performing services with reasonable care and skill.
- 1.17 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), the Care Inspectorate Wales and the Regulation and Quality Improvement Authority (Northern Ireland). The draft advice does not provide guidance on the sector rules and regulations enforced by these sector regulators.
- 1.18 The draft 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.

Background

About the CMA

- 1.19 The 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.

- 1.20 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. These enforcement powers are shared with other bodies, such as local authority Trading Standards Services.
- 1.21 The CMA also shares with the Chartered Trading Standards Institute the role of providing guidance 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.

CMA care homes market study

- 1.22 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.
- 1.23 On 30 November 2017, the CMA published the final report on its market study findings. Amongst other findings, it highlighted a number of consumer protection concerns, some of which have the potential to breach consumer law. Examples of the CMA's concerns included where care homes: were not being clear enough, upfront, about their fees or terms and conditions; had a potentially wide discretion to increase fees for self-funded residents once in the home; were not acting fairly when asking a resident to leave; and were charging fees for extended periods after a resident had passed away.
- 1.24 The CMA announced in its final report that it would be consulting on new advice on fees charged after death in early 2018 and that it also planned to consult in Spring 2018 on more extensive consumer law advice to help improve compliance across the sector.
- 1.25 The CMA also recommended that national Governments introduce stronger sector rules, so that compliance with consumer law is embedded into the existing regulatory regime for care homes and is monitored by the sector regulators as part of the inspection or evaluation regime. Further, it made recommendations for specific rules requiring care homes to display indicative fees and their terms and conditions on their websites, to safeguard deposits in full against the risk of insolvency, and to notify the sector regulator when they ask residents to leave or impose any ban on a visitor. The Department of Health and Social Care (England) and the Welsh Government have published their responses to the recommendations.

CMA consumer law enforcement

- 1.26 The CMA is already taking forward action against certain care homes that it considers are unfairly charging large upfront fees, and charging fees for extended periods after a resident has died. Further details can be found on the CMA's [case page](#).

Previous OFT unfair terms guidance for care homes

- 1.27 It has been nearly 15 years since the OFT (the CMA's predecessor) published guidance on unfair terms in care home contracts in October 2003. Since then, both the market and consumer law have moved on considerably. The OFT guidance has been withdrawn by the CMA. It should not be relied on either as a statement of the law or CMA policy. Current general CMA guidance on unfair contract terms can be found at [Unfair contract terms: CMA37](#), which replaced all previous OFT/CMA guidance on unfair contract terms when the CRA came into force on 1 October 2015.

2. Questions for consideration

In responding to these questions, please give your reasons and any relevant supporting information or evidence.

Scope

- 2.1 Does the draft advice cover all of 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 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?

Providing upfront information (section 3 of the draft advice)

- 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 **first contact** 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?
- 2.4 In relation to the **important, additional information** 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?
- 2.5 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**)?

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 accepting an offer of a place. 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.

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?

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?

2.8 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?

2.9 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?

General/additional

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)

2.11 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?

3. Consultation process

- 3.1 We are publishing this consultation on the CMA's webpages and sending it to a range of interested parties to seek views on the questions set out in section 2 of this document.
- 3.2 We are also planning to hold roundtables in England, Scotland, Wales and Northern Ireland during the consultation period (during the latter part of June 2018). Due to the limited number of places available, attendance will be by invitation only. If you are interested in attending one of the roundtables please email carehomesconsultation@cma.gsi.gov.uk

Duration

- 3.3 This consultation will run for six weeks, from 31 May 2018 to 12 July 2018. Responses should be submitted by post or email, by no later than 5pm on Thursday 12 July 2018 and should be sent to:

Care homes consultation team
7th Floor
Competition and Markets Authority
Victoria House
37 Southampton Row
London WC1B 4AD

Email: carehomesconsultation@cma.gsi.gov.uk

How to respond

- 3.4 Please respond to as many of the questions as you can and support your answers with any evidence or examples you may have.
- 3.5 When responding to this consultation, please state whether you are responding as an individual or are representing the views of a group or organisation (including those representing consumer or business interests). If the latter, please make clear who you are representing and their role. The data use statement below sets out how the CMA may use information provided to it as part of this consultation.

Data use statement for responses

- 3.6 This section sets out how the CMA may use the information provided to it during the course of this consultation.

- 3.7 The information you provide will help to inform the CMA's final advice for care homes on consumer law.
- 3.8 We may wish to refer to comments received in response to this consultation in future publications. Where appropriate, we may also use the information you provide in the carrying out of the CMA's other functions (for example, in enforcement action) or may share information with another regulator or public authority (such as local authority Trading Standards Services). However, we may only publish or share information in specific and limited circumstances set out in legislation (principally, Part 9 of the Enterprise Act 2002). In particular, prior to any publication or any such disclosure, we must have regard to (among other considerations) the need for excluding, so far as is practicable:
- (a) Any information relating to the private affairs of an individual which might, in our opinion, significantly harm the individual's interests; or
 - (b) Any commercial information relating to a business which, if published or shared, might, in our opinion, significantly harm the legitimate business interests of that business.
- 3.9 If you consider that your response contains such information, that information should be marked 'confidential information' and an explanation given as to why you consider it is confidential.
- 3.10 Any personal data you provide to us in responding to this consultation will be processed by the CMA, as controller, in line with data protection legislation. This legislation is the General Data Protection Regulation 2016 (GDPR) and the Data Protection Act 2018.
- 3.11 'Personal data' is information which relates to a living individual who may be identifiable from it.
- 3.12 We are processing this personal data for the purposes of our work. This work relates to the performance of the CMA's functions under Part 8 of the Enterprise Act 2002 and the Consumer Rights Act 2015, by, in particular, developing public confidence in consumer markets and the consumer protection regime as a whole and by demonstrating how the CMA is acting to ensure that consumer law is complied with.
- 3.13 This processing is necessary for the performance of our functions and is carried out in the public interest in order to protect consumers.
- 3.14 For more information about how the CMA processes personal data, your rights in relation to that personal data, how to contact us, details of the CMA's

Data Protection Officer, and how long we retain personal data, see our [Privacy Notice](#).

- 3.15 Our use of all information and personal data that we receive is also subject to Part 9 of the Enterprise Act 2002.
- 3.16 Further details of the CMA's approach can be found in the Transparency and Disclosure: Statement of the CMA's Policy and Approach (CMA6).¹
- 3.17 Please note that information provided in response to this consultation, including personal information, may be the subject of requests from the public for information under the Freedom of Information Act 2000. In considering such requests for information we will take full account of any reasons provided by respondents in support of confidentiality, the GDPR, the Data Protection Act 2018 and our obligations under Part 9 of Enterprise Act 2002.
- 3.18 If you are replying by email, this statement overrides any standard confidentiality disclaimer that may be generated by your organisation's IT system.

Compliance with the Cabinet Office Consultation Principles

- 3.19 This consultation is compliant with the latest Cabinet Office Consultation Principles. The Cabinet Office Consultation Principles criteria can be found at www.gov.uk/government/publications/consultation-principles-guidance

After the consultation

- 3.20 We intend to collate responses to the consultation and publish an anonymised summary of the responses received that fall within the scope of the consultation. We aim to publish the final version of the compliance advice for care homes during Autumn 2018. These documents will be available on our webpages at www.gov.uk/cma and respondents will be notified when they are available.

¹ See www.gov.uk/CMA-transparency-and-disclosure-statement