

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

Helping care homes comply with their
consumer law obligations

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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.
- 1.2 Consumer law gives important protections to care home residents and their representatives (which may include their family). Complying with consumer law is an important part of running a home. 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 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 principles and points you need to know. We have cross-referred to the later sections of the advice, which address each area in much more detail.
- 1.4 This advice covers:
 - **Upfront information** – what information you should provide to prospective residents and their representatives, and when and how you 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** – complying with your obligation to provide your services to residents with reasonable care and skill
 - **Complaints handling** – what you should do to ensure that your policies and procedures are easy to find, easy to use and fair

Purpose and scope of this advice (section 2)

Is this advice for me?

1.5 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 effective procedures for **dealing with complaints**, which are fair and easy to use

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

¹ References in this advice to 'State-funded' residents include those residents funded by the NHS, their local authority and Health and Social Care Trusts in Northern Ireland.

What happens if I get it wrong?

- 1.7 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 proceedings**.
- 1.8 Residents may also be able to seek **damages** in the courts and unfair terms in your contracts will be **unenforceable** against them.
- 1.9 A detailed overview of relevant consumer law is set out in Appendix A.

Providing upfront information (section 3)

- 1.10 Section 3 of this advice describes the information you need to provide upfront to prospective residents and their representatives. It also outlines when and how it should be provided. This is important, so that people can make informed choices (such as which homes to visit), understand what important terms will apply during their stay and evaluate the practical implications for them.
- 1.11 Most of these information requirements (for example, information about your fees) relate to residents who are paying for their **own care**. However, State-funded residents will also need relevant important upfront information.
- 1.12 To comply with your consumer law obligations, you must take into account the **vulnerability** of prospective residents and their representatives. The law requires that you consider the difficult circumstances in which they 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.

Key principles

You must provide prospective residents and their representatives with the information they need to make informed decisions, **when they need it**.

This information must be provided:

- **In a clear, accurate, intelligible, unambiguous, prominent and timely manner**
- **In all the right places**
- **In good time before the resident accepts an offer of a place**

In particular:

- **Prominently highlight** the most important **key information** in the places people initially look for information (eg on your website, in information packs and brochures) and explain it to people on their first visit to your home and when they make initial enquiries
- **Provide other important information** in good time before the resident must decide whether or not to accept an offer of a place in your home

What you need to provide people with when they first contact you

1.13 Different people will initially seek information about care homes in different ways. You should **prominently highlight key information** on your website, in information packs and marketing materials and explain it to people when they make initial inquiries over the phone, by email or in person.

1.14 Paragraph 3.15 of this advice describes the key information that you should provide to prospective residents and their representatives at the **earliest possible opportunity (ie first contact)**. By way of overview, this includes:

Funding and fees

- Whether you accept self-funded² and State-funded residents

² In Northern Ireland many self-funders are placed by HSC Trusts, those who are not are referred to as 'private funders'. In this advice, 'self-funders' covers both categories of people. The term 'self-funder' refers to any care home resident who pays for all their own care.

- An accurate indication of the total weekly fees that you typically charge
- What services are included in the weekly fees and what they cover and any optional, additional services which are not included and may need to be paid for separately
- Any significant, additional charges (and an estimate of cost) that are likely to 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 and how it can be refunded

Main characteristics/key features

- Facilities and services available to residents
- The ratio of staff to residents
- Your home's latest inspection rating or grade from the sector regulator and a link to the report

Highlighting particularly surprising or important terms and conditions

- Minimum period self-funding requirements
- How the resident's fees may change during their stay

1.15 You must also ensure that your marketing and advertising claims are **truthful and accurate**. You must not mislead prospective residents by, for example, selectively highlighting positive customer reviews to counter an adverse regulator inspection report.

What you need to provide people with before they accept an offer of a place

1.16 You must ensure that **important, additional information**, such as your terms and conditions, is provided to prospective residents and their representatives when they want or need it, so that they can make informed choices about whether or not to accept an offer of a place in your home, in good time.

1.17 This information should be provided to prospective residents and their representatives in a clear, accurate, unambiguous and timely manner (for example, in an information pack provided when they arrive to view rooms or

discuss care needs for the first time, and before agreeing to a care needs pre-assessment) and made clearly and readily available on **your website**.

- 1.18 Paragraph 3.23 of this advice describes the important additional information that should be provided to prospective residents and the representatives. By way of overview, this includes:
- A copy of your standard contract/terms and conditions (including details of the overall care and services provided, fees payable and by whom and the resident's rights and obligations)
 - Details of any trial period (including length)
 - Your complaints-handling policy
 - The conditions and notice period for ending the contract
 - What is and is not covered by your insurance
- 1.19 Once a care needs pre-assessment has been undertaken and the resident has selected the services they want to receive, you must **confirm the offer** (including the **final, total amount** that the resident will have to pay), in good time before they need to accept it. **Where information has changed** since it was first provided, the resident and their representatives must be informed and must expressly agree to the changes.

Treating residents fairly (section 4)

- 1.20 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.
- 1.21 A 'term' covers any conditions, rules or contractual terms which are intended to bind the resident or a third party, such as a guarantor. It can include statements in your brochures, on your website and in your service user guides.

Key principles

- Your terms must set out all the rights and obligations between you and the resident. You must ensure that your terms are as **simple, clear and unambiguous** as possible.
- 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 with the resident 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

1.22 Section 4 sets out examples of terms that may be unfair in certain circumstances. By way of overview, 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 large deposit and, for example, give you a wide discretion to retain a deposit without justification, or where the purpose for which you require it is not clear
- Require other substantial upfront payments (unless, for example, it is an advance payment of the resident's regular residential fees)
- Require a guarantor, without providing clear and transparent details of the extent of their potential liability for the resident's defaults
- Exclude or restrict your liability if you are at fault when things go wrong
- Require residents always to pay full fees for periods when they are temporarily absent, even when you make specific cost savings

- Require fees to be paid for extended periods after a resident's death³

Varying your terms, service or fees

- 1.23 Residents should receive the service they expect and on the agreed terms and not something that is, in significant respects, different.
- 1.24 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 into 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 when changes are necessary because of new safety legislation
- Terms must not give you a **wide discretion** to make changes. 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

- 1.25 In particular, your terms must set out clearly the **circumstances** in which the resident's fees may change during their stay and the **method for calculating the change**. If your contract simply says that any increases will be 'cost reflective', or 'reasonable' or limited to 'unexpected changes', this is unlikely to be fair.
- 1.26 To comply with your consumer law obligations, you could:
- Fix the resident's fees for the duration of their stay or specify the precise level and timing of any future increases

³ Separate to 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 this advice once finalised.

- Review the resident's 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
- 1.27 You may increase a resident's fees at other times where there is a significant and demonstrable change in their care needs. You should consult with residents and liaise with independent professionals (such as their doctor) before implementing any increase (ie it should not be backdated).
- 1.28 Exceptionally, major changes in legislation or regulations might significantly increase your costs. Where this directly results in a **significant and demonstrable** increase in your costs, we would be less likely to prioritise enforcement action where you increase a resident's fees at the time of the annual review to reflect the costs increase, to the extent that it is not already covered by any price indexation used.

Asking a resident to leave

- 1.29 The circumstances in which you can terminate your contract with a resident must be **clearly and prominently explained** in the contract and limited to **valid reasons**, for example, where you can no longer meet the resident's care needs even after making any reasonable adjustments, manage challenging behaviour or because they have repeatedly failed to pay their fees.
- 1.30 You must 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.
- 1.31 You must never restrict a resident's right to have visitors or threaten to do so by way of retaliation in response to a complaint.

Terms specific to State-funded residents

- 1.32 The key principles of fairness set out above also apply to terms applicable to State-funded residents. This includes top-up fee arrangements for local authority funded residents and NHS Continuing Healthcare. You may be required to take additional steps to ensure that the resident and their representatives understand the implications and options available to them.

Providing a quality care home service (section 5)

- 1.33 Section 5 of this advice describes your obligation under consumer law to provide services to residents 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.

- 1.34 The regulations, rules and standards expected and enforced 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.
- 1.35 If you do not comply with the regulatory rules and requirements enforced by the sector regulators or fail to have regard to their guidance, you may also infringe your obligations under consumer law.

Complaints handling (section 6)

- 1.36 Section 6 of this advice describes how you should handle any complaints from residents or their representatives, in compliance with consumer law.

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 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 residents
 - Applied **consistently** across your care homes

Discouraging someone from making a complaint

1.37 You must never, for example:

- Threaten to restrict or ban visitors, or ask a resident to leave the home by way of retaliation in response 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 an external body such as an Ombudsman, the Care Inspectorate in Scotland, or the appropriate local authority

Easy to find

1.38 Your complaints procedure must, for example, be publicised on your website, in your service guide and throughout the home.

Easy to understand and to use

1.39 You should, for example, make clear what sort of concerns and issues your complaints procedure covers. You should address any language and communication barriers and encourage the use of advocacy and other third party support the resident may need to bring a complaint.

Your complaints handling procedures should be effective and fair

1.40 You should, for example:

- Initially try to address any straightforward concerns informally
- Ensure, where possible, that any investigation is carried out by someone independent of the concerns being raised
- Provide a full response within 28 days

Applied consistently

1.41 You should ensure that your staff are trained in, and have a good understanding of, your complaints procedures and how they work. 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, 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.
- 2.4 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. 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 even criminal prosecution.
- 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
 - (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).
- 2.7 The advice will also be of relevance to local authorities (and other funding bodies) who arrange and pay for care home placements.

What does this advice cover?

Scope

2.8 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 regulators⁴ on registration of a care home, standards of care and safety. Similarly, it does not cover housing law. Appendix B provides links to other resources.

Types of care home provider

2.9 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

2.10 In our view, consumer law will generally apply to care homes' terms and practices, regardless of whether their residents are:

- (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, HSC Trust or the NHS

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

The key areas

2.12 The advice focusses on the following key areas:

- (a) **Upfront information:** ensuring that you give prospective residents and their representatives clear, accurate, prominent and timely **upfront information**, so that they have the information they need to make informed choices when choosing a care home.

⁴ The Care Quality Commission (England), the Care Inspectorate (Scotland), the Care Inspectorate Wales and the Regulation and Quality Improvement Authority (Northern Ireland).

- (b) **Treating residents fairly:** ensuring that your **contract terms** (eg in your residency agreements) and **business practices** that you use with residents and their representatives are fair.
- (c) **Quality of service:** ensuring that you perform your services with reasonable care and skill.
- (d) **Complaints:** ensuring that your **complaints-handling** policies and procedures are easy to find, easy to use, fair and effective.

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

Relevant consumer law⁵

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

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

2.15 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 will require you to provide certain information to prospective residents in a clear and comprehensible manner,

⁵ See Appendix A of this advice for a more detailed overview of relevant consumer law.

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

2.16 Consumer law sits alongside sector-specific obligations that apply to care homes, such as laws, regulations, standards and guidance.⁶ Sometimes they overlap. Failing to comply with sector-specific rules may be relevant to a finding that consumer law has been infringed.

What do you need to do?

2.17 As a care home, you should:

- (a) Immediately review this advice.
- (b) Carefully consider whether you need to make changes to your contracts and business practices to ensure compliance with the law (which may involve reviewing whether all your charges are fair).
- (c) Consider putting mechanisms in place to ensure that all your care homes are complying with the law. For example, ensuring that important information is clearly, accurately and prominently provided, upfront, including on websites, in information packs and in marketing materials, and that fair complaints-handling procedures are being followed.
- (d) Ensure that all customer-facing staff understand these requirements and comply with them, since you will be responsible for their actions under consumer law.

2.18 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

⁶ Such as the regulations and standards enforced by the Care Quality Commission (England), the Care Inspectorate (Scotland), the Care Inspectorate Wales and the Regulation and Quality Improvement Authority (Northern Ireland) and guidance such as, in England, the Department of Health's National Framework for NHS Continuing Healthcare and NHS-funded Nursing Care and the NHS-funded Nursing Care Practice Guide.

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.

What happens if you do not comply with consumer law?

- 2.19 Where 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 injunction⁷ (and, where appropriate, seek compensation for affected residents) or - in relation to certain breaches - criminal prosecutions.
 - (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.⁸

⁷ Or an interdict, in Scotland.

⁸ 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 Moving into a care home is one of the biggest and most emotionally charged decisions that individuals, their family or 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 circumstance. People's capacity and time available to read and understand material may be limited.
- 3.2 The information provided in your information packs and marketing materials, at open days, in response to telephone and email enquiries, on your website and during visits to your care home is critical.
- 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).

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, intelligible and unambiguous manner, with appropriate prominence.
- 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 need to visit homes to take a decision about whether or not to commit to a particular home, before signing a **contract**.
- 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), whether or not they have asked for it, so that they can make informed choices about whether or not to shortlist, make further enquiries of or arrange a visit to your home (ie when researching their choices).

- (b) **Important, additional information** is provided to prospective residents and their representatives when they want or need it, and in **good time before they accept an offer of a place** in your home (and before signing a contract).
- 3.7 Once the prospective resident has decided to go ahead with a home, they will need to have a care needs pre-assessment and select the particular services they want to receive. Following this, you must **confirm the offer** (including the final, total amount that the resident will have to pay), in good time before the resident must accept it.
- 3.8 The information provision requirements set out in this section relate primarily to **self-funded residents**. However, where a prospective resident is wholly or partly State-funded (for example, by the local authority) and there is a placement contract between you and the funding authority, it is important that prospective residents and their representatives are provided with relevant important information in good time before the resident accepts an offer. For example, they will need to understand the level of care that you have agreed to provide, what is included and excluded from the agreed care package, any optional services they can purchase, important terms that may affect them and mechanisms for redress if care is not supplied as expected (as set out in the contract between you and the funding authority).

Providing key information on first contact with prospective residents

- 3.9 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 budget and how this compares with other homes.
- 3.10 Where key information is not provided on first contact (eg where you only provide it after the resident has already visited your home or has expressed an interest in moving in, or reveal it only gradually throughout the admissions process), prospective residents and their representatives may decide to shortlist or visit homes that are not affordable or will not consider others that may be more suitable (infringing consumer law).⁹

⁹ This is likely to be a misleading commercial practice under regulations 5 and/or 6 of the CPRs, where the action or omission affects the resident's decisions. In cases of emergency admissions, it may not always be possible to provide all the key information to residents and their representatives on first contact. However, you must ensure that it is provided to them as soon as reasonably practicable and, in any event, in good time before the resident enters into a contract with you.

When	What	How
<p>Key information to be provided to prospective residents and representatives on first contact</p>	<p>Funding and fees</p> <ul style="list-style-type: none"> • Whether you accept self-funded and/or State-funded residents • An indication of the total weekly fees you typically charge (full range) • What services are included in the weekly fees and what they cover • Any optional, additional services which are not included and may need to be paid for separately • Any significant, additional charges (and an estimate of cost) that are likely to be unavoidable for some residents because of their circumstances, eg accompanied medical appointments • Details of any upfront payments, such as the amount of any deposit, what it covers and how it is refunded, and any requirement to pay weekly fees in advance <p>Characteristics/key features of home</p> <ul style="list-style-type: none"> • Specific care needs your home is registered to cater for • Facilities (including accommodation) and services available to residents • The ratio of staff to residents • Your latest inspection rating or grade from the sector regulator and a link to the inspection report <p>Surprising or important terms and conditions</p> <ul style="list-style-type: none"> • Minimum period self-funding requirements • How resident's fees may change whilst in the home 	<p>This key information should be:</p> <ul style="list-style-type: none"> • Prominently highlighted on the landing page of your website • Prominently highlighted in information packs and marketing materials provided in response to initial enquiries (eg using executive summaries or 'key facts' documents) • Explained to prospective residents during initial enquiries by phone or email (directing them to your website and/or sending an information pack for further information) • Explained to prospective residents during their first visit to your care home (with an information pack to take away, highlighting key information) • Provided in different formats and languages

How you should provide the key information

- 3.11 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), 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 home. You must therefore ensure that key information is provided in **all the right places**, 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.
- 3.12 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**. For example, you should ensure that it is:
- (a) Prominently highlighted on the **main landing page of your website**, alerting prospective residents and their representatives, upfront, to the key information that they are likely to need when shortlisting homes (for example, using prominently signposted 'important information about our service' and 'our fees and charges' sections).¹⁰
 - (b) Prominently highlighted in your **resident information packs** and **marketing materials** such as brochures (for example, by using **executive summaries** or inserting a '**key facts**' document). It will not be enough to merely include key information in your terms and conditions or give it to residents when they move in.
 - (c) Specifically drawn to the attention of and explained to prospective residents and their representatives when they make **initial enquiries by telephone or email**. For example, you should ensure that your customer services department/customer facing staff are **trained to provide key information** and, where appropriate, tell enquirers where and how they can find out more (for example, by directing them to where they can find further information on your website or by sending them an information pack).
 - (d) Specifically drawn to the attention of and explained to prospective residents and their representatives during their **first visit to your home**

¹⁰ Where you provide information about your home to a third party website, you must ensure that that information is (and remains) truthful and accurate and is not likely to mislead prospective residents or their representatives. Where you fail to do this, you may infringe consumer law.

(whether it is an arranged visit or an unannounced 'drop-in'). For example, where a resident's representative makes an unannounced visit to make preliminary enquiries, you should ensure that - as well as explaining it to them during the visit - staff provide them with an information pack and/or 'key facts' document to take away, which prominently highlights the key information. You should also ensure that **important or surprising terms** (for example, a requirement for an upfront payment) 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 during the first visit to the home).

- (e) Provided in **different formats and languages**, to take account of the needs of prospective residents (for example, in Easy Read and large print for people who require this).¹¹

3.13 You must also ensure that any claims or statements that you or your staff make (whether in writing, visually or orally) are **truthful and accurate**. 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.¹² For example, you should not:

- (a) Claim that your care home has an extensive range of daily activities on offer (for example, cookery classes), has an activity coordinator or hospitality team, or has an in-house chef, 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 that your care home has 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 their relatives, or where the reviewer has been incentivised in some way to write a positive review.

¹¹ You must also comply with your obligations under 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 patients, service users and carers with a disability, impairment or sensory loss.

¹² You may also be in breach of the Advertising Standards Authority's self-regulatory '[UK Code of Non-broadcast Advertising and Direct and Promotional Marketing](#)' (CAP Code).

- (e) Selectively highlight positive customer reviews on your website or in marketing materials to undermine an adverse inspection report rating from the sector regulator.
- (f) Provide false 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 regulator's inspection report to give a misleading overall impression about its findings.

3.14 In addition, where you do any of the following, this will be unfair in **all circumstances**:¹³

- (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 having obtained the necessary authorisation. For example, falsely claiming that your care home has been accredited by the Gold Standards Framework Accreditation for End of Life Care.
- (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 with a sector regulator, such as the Care Quality Commission (CQC), or for 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, when that is not the case.

¹³ These are 'banned practices', as set out in Schedule 1, CPRs, and will always be unfair regardless of the circumstances.

The key information you should provide

- 3.15 The following is a **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):

Funding arrangements

- (a) Confirmation of whether you accept self-funded residents, local authority-funded residents and/or State-funded residents. Where you accept local authority residents, you should alert prospective residents and their representatives, upfront, to whether a top-up fee may be required.

Fees, charges and payments

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

- 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, making clear which type of care 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, in England and Wales, the **NHS Funded Nursing Care contribution** some residents may be eligible for. For example: *'The weekly fees quoted for nursing care exclude any NHS Funded Nursing Care contribution a resident may be eligible for (currently £156 a week), which will be deducted'*.
- Where appropriate and applicable, you make clear that indicative fees quoted are for **guidance only** and subject to an individual care needs pre-assessment and the type of room and services chosen.

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

Indicative Prices/Weekly Fees Guide

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 pre-assessment and the type of room and services chosen.

- (c) Information about **what services are included** in the weekly fees and any optional **additional services 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**. 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, where you charge residents for being accompanied by a member of staff to medical appointments (where friends, representatives or relatives are unavailable), 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 say simply 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*'.

- Where there are additional charges for everyday items or charges that vary in accordance with the resident's choices (for example, hairdressing, toiletries, medical supplies), you should tell residents **what those items/services are and where they can find a current price list** (for example, via a prominent link on your website and displayed at the reception desk in your care home).
- 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.
- If applicable, you make clear any additional **surcharge** that you add on top of charges for services provided by a third party.
- Where you accept **local authority or State-funded residents**, you provide prospective residents and their representatives with an indication of which additional services/charges 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
- Laundry undertaken on the premises (and 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 stationary, confectionary, alcoholic beverages, particular snacks, special soaps and toiletries
- Clothing, shoes and slippers
- Dry cleaning
- Private telephone line rental and calls, internet and cable 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
- Optician
- Dentistry
- Physiotherapy
- Other privately arranged healthcare
- The NHS continence service assess and provides a maximum of four pads per 24 hour period. Any additional pads are charged at a cost.

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

(d) Information about any other **upfront payments** required, such as:

- **Weekly fees payable in advance** of moving in, including the amount, what they cover, and how fees are refunded should the resident decide not to move in.

- Where applicable, the **amount**¹⁴ of any deposit that you require:
 - (a) Where you require a **security deposit**,¹⁵ 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); and details of where and by whom the deposit will be held.
 - (b) Where you require a **reservation deposit**,¹⁶ 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;¹⁷ and the circumstances in which the deposit (or any part of it) will or will not be refunded (including whether any refund is made if the resident decides not to move in).¹⁸

Key information about your home

- (e) An overview of the **main characteristics/key features**¹⁹ of your service, including a description of:
 - The specific care needs your home is registered to cater for (eg nursing, residential, dementia, end of life, respite, palliative, continuing, frail elderly, rehabilitation etc)
 - The accommodation/rooms residents can expect in the home

¹⁴ 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).

¹⁵ 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.

¹⁶ 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.

¹⁷ 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.

¹⁸ 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.

¹⁹ 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 before they accept an offer of a place.

- The facilities and services available to residents in the home
- The size of the home (eg how many beds it has)
- Ratio of staff to residents
- Ratio of qualified staff to care assistants
- Your home's latest **inspection rating**²⁰ (or, in Scotland, grade) from the relevant sector regulator and where to find a copy of your most recent performance assessment **inspection report** (for example, a link to the regulator's website).

*Highlighting particularly surprising or important terms and conditions*²¹

(f) Any terms and conditions that 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, whether the decision is at the discretion of the local care home manager, or whether a guarantor may be required); and
 - The implications if they become eligible for State-funding **during the minimum period** (for example, whether they may be asked to leave the home if the local authority fee rate is not sufficient or a top-up cannot be arranged).
- An explanation of how the resident's **fees may change** after they have moved into the care home

²⁰ In England, there is also 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.

²¹ 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.

Information to be provided in good time before the resident accepts an offer

- 3.16 Following the initial research stage, prospective residents and their representatives will need to decide which of their shortlisted homes is best for them. This will usually mean visiting homes, before making a final decision.
- 3.17 Important, additional information must be provided to prospective residents and their representatives when they want or need it, and **in good time before they need to make a decision** about whether to accept an offer of a place (for example, on their first arranged visit to your home, and before they agree to have a care needs pre-assessment). You may also need to provide them with more personalised and tailored information at this stage (for example, information about any guarantor requirement or specific conditions that the prospective resident must satisfy before being offered a place).
- 3.18 Where you fail to provide this information accurately, where you provide it **late** in the admissions process (for example, after the resident has agreed to have a care needs pre-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 otherwise (infringing consumer law).²²

²² You are also likely to be breaching 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	What	How
<p>Other important information to be provided in good time before resident accepts an offer</p>	<p>Includes:</p> <p>Terms and conditions</p> <ul style="list-style-type: none"> • Copy of your current standard contract/terms and conditions and service user guide for self-funders • Details of any trial period • Conditions and notice period for ending the contract <p>Regulatory information</p> <ul style="list-style-type: none"> • Information about how the home is regulated and by whom • Details of who is registered as running the home • Whether there is a registered manager currently in post <p>Other relevant information about your home</p> <ul style="list-style-type: none"> • Information about your policies if a resident's funding arrangements change whilst in the home • Complaints handling policy • Latest food hygiene rating • Information about contents insurance arrangements <p>Personalised/tailored information relevant to prospective resident's circumstances</p> <ul style="list-style-type: none"> • Eg requirement for a 'guarantor' 	<p>This important information should be clearly and accurately provided:</p> <ul style="list-style-type: none"> • In an information pack (eg when the resident and their representatives arrive at the home to view rooms or discuss care needs for the first time, and before they agree to a care needs pre-assessment) • On your website (eg using clearly labelled tabs and prominent weblinks), and prospective residents must know how to access it (eg your staff and marketing materials refer people to where they can find information on your website) <p>Tailored/personalised information relevant to that resident should be explained to them in the home (and any further questions answered)</p>

How you should provide this information

3.19 You should ensure that this information is provided to prospective residents and their representatives in a clear, accurate, unambiguous and timely manner. For example, when they come to view rooms or to discuss care

needs for the first time, you should ensure that they are given a **resident information pack** on arrival, setting out important information (including the prominent key information described in paragraph 3.15). You should also ensure that a trained member of staff explains any specific additional information relevant to the particular resident's circumstances (for example, the need for a guarantor) and answers any further questions the resident or their representatives may have.

- 3.20 Where you operate a website, you should also ensure that this information is **clearly and readily available online**, and that prospective residents and their representatives **know how to access it**. For example, important additional information could be provided using **clearly labelled tabs** on the menu bar of your homepage or by **providing prominent weblinks** to the information, such as an electronic version of your terms and conditions and service user guide. Your marketing materials and customer services staff should also refer people to where they can find important information about your service (for example, by providing links to your website).
- 3.21 In particular, you must ensure that your **terms and conditions** are brought to the prospective resident's attention (and anyone else who will be party to the contract) and that they understand them, in good time before they accept an offer, so that they can take informed decisions about whether or not your home is suitable for them. They should be easy for prospective residents and their representatives to find. For example, a copy of your standard contract or resident's agreement for self-funders should be clearly signposted on your website, included in information packs you send out in response to initial enquiries, and provided when someone first visits your home.
- 3.22 Where you accept **State-funded residents** and there is a placement contract between you and the funding authority, the prospective resident should always be given a statement of terms and conditions and a copy of any agreement they will be asked to sign, at an early stage of the admissions process. This should include, among other things, details of the overall care and services to be provided, the fees payable and by whom, the parties' rights and obligations and terms and conditions.

The information that you should provide

- 3.23 The following is a non-exhaustive list of important information that should be provided to prospective residents and their representatives at this stage:
- (a) A copy of your standard (pro-forma/sample) contract/terms and conditions and service user guide for self-funded residents. 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). Where you try to enforce these terms against a resident, this may infringe consumer law.

- (b) Details of any trial period (including length).
- (c) Information on your policies if a resident's funding arrangements change whilst in the home. For example, if a self-funded resident becomes eligible for local authority or NHS CHC funding during their stay at your home, or where a resident is no longer eligible for NHS CHC and becomes self-funded.
- (d) Your trading name, the address at which you are established and your telephone number (unless it is already apparent from the context) and your complaints-handling policy.²³
- (e) The name and contact details of an appropriate alternative dispute resolution (ADR) provider and the circumstances when you will submit to an ADR procedure if a resident has exhausted your internal complaints-handling process.
- (f) The conditions for you or the resident to end the contract, including the notice period and the means by which the termination should be notified (eg by written notification and to whom).
- (g) Information about how your care home is **regulated** and by whom (for example, in England, by the CQC).
- (h) Details of who is registered as running the care home and whether there is a **registered manager** currently in post.
- (i) Your latest food hygiene rating.
- (j) Information about any requirement for a '**guarantor**' who will be liable for the payment of fees if a self-funding resident cannot pay. This should include, for example, the guarantor's role and responsibilities, the

²³ 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 before they accept their place.

circumstances in which they will be liable, what fees/charges they may be liable for and the potential extent of their liability.²⁴

- (k) 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.

✓ **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.

- (l) Any other information specifically required by sector-specific regulations, rules or guidance.²⁵
- (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), any additional information required by the 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).²⁶

²⁴ See section 4 of this advice for a discussion around the substantive fairness of terms requiring a resident guarantor.

²⁵ See, for example, the information set out in the Regulated Services (Registration) (Wales) Regulations 2017.

²⁶ General guidance on the CCRs can be found on the Business companion website. See <https://www.businesscompanion.info/en/quick-guides>.

Confirming and finalising the offer of a place

3.24 You must also ensure that, once a care needs pre-assessment has been undertaken and the resident has selected the services they want to receive (including the type of accommodation) you confirm the **final, total amount** that the resident will have to pay (including the total gross weekly fees inclusive of taxes and any upfront payments),²⁷ **in good time before they need to accept an offer of a place**. You must also ensure that, 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 they accept the offer (or sign a contract).

When	What	How
<p>Confirming and finalising offer of a place (once a care needs pre-assessment has been completed and prospective resident has selected services they want)</p>	<ul style="list-style-type: none"> • The final, total amount the resident will have to pay (including the total gross weekly fees inclusive of all applicable taxes and any other upfront payments) • Details of any information that has changed since it was first provided to the prospective resident • The contract, which can be taken away to be signed 	<ul style="list-style-type: none"> • Confirmed orally and in writing • Obtain express consent of prospective resident and their representatives to any changes to information previously provided

²⁷ 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 pre-assessment, you need to get the resident's **express agreement** to the change before they accept their place.

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, notices²⁸ and regulations that your residents (or third parties, such as guarantors) are bound by, and which together form the contract between you.²⁹
- 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, will be an important consideration for a court when assessing the fairness of your terms.

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

- 4.3 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.
- 4.4 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 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**.

²⁸ 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 before they agree to move into your home.

²⁹ Or wording which otherwise relates to the rights and obligations between you.

- (c) Are written in plain and simple language that an ordinary person would understand, avoiding legal jargon such as ‘implied terms’, ‘indemnify’, ‘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.³⁰
- (f) Use meaningful headings to make your terms easy to navigate.
- (g) Are legible for elderly residents. For example, this may mean having contracts in larger font for the visually impaired.

4.5 **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**. We set out below specific types of term that are likely to be unfair and how you can ensure that you comply with your consumer law obligations.

Before the resident moves in

Binding residents to ‘hidden’ terms

- 4.6 As set out in section 3 of this advice, you must ensure that your terms and conditions are brought to the attention of prospective residents and their representatives in **good time before they accept 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.
- 4.7 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 a number of documents located in different places (making them difficult to find and review).

³⁰ Where there is more than one possible interpretation of a term, consumer law requires that it should be given the meaning that is most favourable to the resident.

- (b) Where a prospective resident is required to make a payment to you **before** the pre-contract care needs pre-assessment is completed and/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 other terms.
- (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 unfair³¹**

‘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’

Terms requiring deposits

- 4.8 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, may 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.
- 4.9 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

³¹ Note that we provide these example terms for illustrative purposes only in the context of this advice. The assessment of fairness for the purposes of the CRA requires consideration of all the circumstances of each case and of the effect of other terms in the contract.

only gradually or late in the admissions process) this is likely to infringe consumer law.

Security deposits

- 4.10 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. 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 unsatisfied with your service, for fear of losing their deposit. You must also ensure that your arrangements for returning security deposits are **fair and transparent**.

✘ 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'

- 4.11 **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 3.15(d) of this advice).
 - (b) The reasons 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 insolvency).³²

- (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 dispute resolution), 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 or not 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's actions (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 set out in your contract
- (g) Deposits are **returned as quickly as possible** once the resident has left the home and the final account has been issued and agreed by the resident or their estate (for example, no more than 28 days), other than in exceptional circumstances, such as where there is a need to obtain probate or to 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).

³² 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.

Reservation deposits

- 4.12 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 may be unfair under consumer law, as it may act as an unfair financial sanction should the resident decide not to move in.
- 4.13 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 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.
- 4.14 **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 3.15(d) 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 on your waiting list 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 dispute resolution), 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 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 or credited against their fees.

Terms requiring substantial upfront payments

- 4.15 A term requiring a resident to pay a substantial, wholly or partially non-refundable fee on signing a contract is likely to be unfair under consumer law.³³ It can 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 for terminating the contract at any time.
- 4.16 The CMA is also concerned that payments that are sometimes required on the signing of a contract (or anytime thereafter) are likely to unfairly require residents to pay for services which they do not benefit from, or which are in fact paid for through the regular residential fees.³⁴ Examples of the types of payments which we consider are likely to infringe consumer law include charges for:
- (a) Maintenance of common parts of the care home. Residents will reasonably expect, or usually have, the right to enjoy these areas through payment of their regular residential fees.
- (b) Activities related to admissions (eg pre-contract care 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

³³ It is also likely to be unfair under consumer law to require the prospective resident to make a substantial payment before they have concluded a contract with you.

³⁴ 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.

can meet your legal 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 placement enquiries). These types of activities can be carried out before your staff have even met the prospective resident. In any event, they are usually carried out before the fee has been paid and before the prospective resident or their representative has agreed to this type of work being undertaken for payment.
- (d) Joining or moving into a care home (eg to cover the costs incurred by the home to settle the resident into the home). 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.

4.17 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 (whilst the requirement to pay them upfront may exploit the resident's need to be admitted to the home).

4.18 **You are likely to mislead prospective residents and their representatives and infringe consumer law where, for example, 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 or contributes to your profits. Concerns are also likely to arise if the costs or expenditure you incur on the communal areas are not tracked by you adequately, or at all.
- (b) Funds specific services provided to the resident as part of the **admissions or moving in process**, when they are simply the steps that you carry out to assess, admit and settle in all residents.³⁵ We are also likely to have concerns where there are attempts to justify the fee on the basis that it is calculated to cover estimated costs arising more generally across all residents or homes. In these circumstances, a conclusion is likely to be reached that the fee has been misleadingly represented to prospective residents.

³⁵ That is, it is likely that no specific service is in fact provided at all in return for this payment.

(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 specifically in return for the payment or the fee is not calculated in line with such costs (for example, the payment is determined by the amount you consider residents will pay or have paid in the past). This type of description is likely to be intended to give the obligation to pay the fee some legitimacy, leading residents to pay them without challenge.

4.19 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.

Terms requiring someone to act as a 'guarantor'

4.20 Some care homes 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.

4.21 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, in good time before they accept responsibility.³⁶ 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 before you will accept 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.³⁷

4.22 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 you have provided the resident and guarantor with

³⁶ See paragraph 3.23(j) of section 3 of this advice for upfront information about a guarantor requirement.

³⁷ 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.

upfront information about the guarantor requirement and that you have taken appropriate steps to ensure that they have understood and agreed to this obligation in good time before the resident accepts an offer of a place. It is open to the resident or the care home to give notice to terminate if a guarantor is unwilling or unable to continue to pay the weekly fees going forward, or to agree alternative funding arrangements (such as where the resident has become eligible for State funding).

- 4.23 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'

- 4.24 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.

- 4.25 **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 important upfront information about the requirement (including what this is likely to require), in good time before the resident accepts an offer of a place in your home (see paragraph 3.23(j) of this advice).

- (b) Your terms are **transparent**, enabling guarantors to easily understand and foresee how they might be affected and evaluate the practical implications for them. Your terms should avoid the use of technical or legal jargon (such as ‘indemnify’ or ‘joint and severally liable’) that residents and guarantors 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; and
 - 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) 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 through no fault of the resident or guarantor.
- (d) 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 on contracts signed for a person lacking capacity.
- (e) 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.
- (f) You give **reasonable 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), so that they can take appropriate action to remedy the default if possible.

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

- 4.26 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 (for example, 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 minimum period, or requiring them to self-certify that they have sufficient assets to self-fund for this period.
- 4.27 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, call or visit your home. This may be particularly relevant if they are just above the eligibility threshold for State funding.
- 4.28 We do not object to minimum funding period terms in principle. For example, 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.
- 4.29 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 commissioning authority 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 NHS 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 meet its obligations to the resident and, if necessary, make suitable alternative arrangements for them.
- 4.30 **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 4.106 on 'top-up' payments).

4.31 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.³⁸ 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 leave

³⁸ 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).

the home if the local authority fee rate is not sufficient or a top-up cannot be arranged.

After the resident moves in

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

- 4.32 For your contracts to be considered fairly balanced, residents should be entitled to receive the service they expect, and on the agreed terms, and not something that is, in significant respects, different.
- 4.33 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'

- 4.34 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 to ever 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.
- 4.35 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.³⁹ The circumstances should be clear, and narrow in scope and effect.

4.36 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**.⁴⁰ For example, we would be unlikely to object to 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 4.43, 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 notice** of the change to residents and their representatives, in **good time 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 at least correspond with the period of notice that the resident must give to end the contract. 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 deposits), if they decide to move out before the variation takes effect.

4.37 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 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

³⁹ See, for example, paragraph 3.15(f) of section 3 of this advice (highlighting surprising or important terms).

⁴⁰ 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.

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.⁴¹

✓ **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 the resident's fees during their stay

- 4.38 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.
- 4.39 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 with consumer law, your fee variation terms should 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

⁴¹ 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.

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.⁴² In addition, we consider that general fee reviews should be limited to **once a year**.

✘ 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'

4.40 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 any fairer**. This type of general wording is both unclear as to what residents can expect and open to abuse, 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.

4.41 Similarly, a term which merely states that any increases will be 'cost reflective' or 'reasonable' or limited to 'unexpected changes' is unlikely to be any fairer, 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.

✘ 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'

⁴² 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 information packs, in marketing materials and during initial visits) alongside other key information – see paragraph 3.15(f) of section 3 of this advice.

4.42 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.

✘ 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 not more than 10% above the Consumer Prices Index’

4.43 We consider that you are more likely to comply with consumer law in the following ways:

- **Fixing a resident’s fees** for the duration of their stay;
- Specifying the **precise level and timing** of any future increases in price within very narrow limits, so that they effectively form part of the agreed price, provided that the details are clear and prominently drawn to the resident’s attention before they agree to the contract (for example, ‘your fees will be increased by £500 per annum on the first and subsequent anniversaries of your arrival at the home’)
- Reviewing residents’ fees on an annual basis by reference to a relevant, objective and verifiable **published price index**, clearly specified and explained in the contract. This grants the prospective resident a degree of **foreseeability** in relation to future fee increases, whilst ensuring that increases will not be calculated on an arbitrary basis. For example, you may consider linking fee increases for existing residents to the percentage increase in the Consumer Prices Index including housing costs (CPIH)⁴³ over the previous year, or, to the **average** of (i) the percentage increase in the CPIH over the previous

⁴³ 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>.

year and (ii) the percentage increase in the National Living Wage (NLW) rate compared to the previous year.⁴⁴

4.44 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,⁴⁵ the CMA would be less likely to prioritise enforcement action against you 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.⁴⁶ In such circumstances you should ensure that:

(a) 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.

(b) Your terms clearly set out and explain the limited circumstances in which you may increase fees in these circumstances.

4.45 As with variation terms generally, you must also ensure that you provide residents and their representatives with **advance notice** of the change,⁴⁷ in good time before it takes effect, and that residents can obtain a **pro-rata refund** of prepayments if they did decide to leave before the change takes effect.

4.46 We would not object to **more frequent** changes in a resident's fees where:

- The resident requests and receives an enhanced service or larger room

⁴⁴ 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. The averaging is designed to reflect the fact that staff costs represent around half of the cost of a care home place, whilst keeping the calculation as simple and transparent as possible for residents. The NLW on its own is likely to exaggerate increases in care home costs.

⁴⁵ 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.

⁴⁶ We would expect such situations to be truly exceptional and only to occur after a **major change** to legislation or regulations that is outside of your control. 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.

⁴⁷ 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.

- There is a change in the resident's **care needs** (for example, where they require increased levels of care), but residents should also receive a **reduction in fees** where their care needs reduce. However, where you assess changes by reference to care 'bands', these should be limited; there should be a **significant and demonstrable change** in the resident's needs to justify the change. To ensure compliance with the law, you should liaise with relevant independent professionals (such as the resident's GP or hospital staff) to evidence and support your decision and engage in meaningful and transparent **consultation** with the resident and their representatives before implementing a change in fees, so they can challenge your decision if they wish. Any change in fees should not take effect until the consultation process has ended (ie the new fee rate should not be backdated).

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

'Your fees will be reviewed on an annual basis (namely, on the first and subsequent anniversaries of this agreement), 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 no less than 6 weeks' notice in writing before the change takes effect. The increase will take effect on the date notified unless, before it is due to take effect, you give us 28 days' notice to end this agreement.

Your fees may increase or decrease at other times where there is a significant change in your care needs, as assessed by medically qualified staff. We will consult with you and your representatives before implementing a change in your fees for this reason and you will be entitled to see the details of the assessments we have received as part of the consultation 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'

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

- 4.47 FNC 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. FNC payments are made directly to care homes, and the resident does not receive any money directly.
- 4.48 The policy intention of FNC is that the average costs of nursing care by a registered nurse is covered by the NHS, and should not be paid for by the resident. It does not cover the wider non-nursing care or accommodation provided to the resident.
- 4.49 In England, the Department of Health's *National Framework for NHS Continuing Healthcare and NHS-funded Nursing 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.⁴⁸
- 4.50 Your terms, together with the upfront information you provide to residents about your fees, should clearly explain how you treat FNC payments when the eligible resident is self-funded. In particular:
- (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).
 - (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).
- 4.51 Making your terms **transparent** in the manner described above will help to ensure that:

⁴⁸ The 2018 version of the [national framework](#) document takes effect in England on 1 October 2018 (see paragraph 257). The guidance also states that: 'The Care home provider should set an overall fee level for the provision of care and accommodation. This should include any registered nursing care provided by them. Where a CCG 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, unless there is an agreement in place for this to be paid via a third party (e.g. a local authority). The balance of the fee will then be paid by the individual, their representative or the local authority unless other contracting arrangements have been agreed.' The current guidance for Wales is the "[NHS Funded Nursing Care in care homes Guidance 2004](#)".

- (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.

4.52 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.

4.53 If a self-funder contract, for example, defines the overall/gross monthly 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 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 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

4.54 It is the intention that 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 they have been temporarily admitted to hospital.⁴⁹

⁴⁹ 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, CCGs 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).

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

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

When things go wrong

Excluding or restricting your liability to your residents

4.56 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).⁵⁰

4.57 **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 safely administer medicines).⁵¹

(b) Say that 'residents use facilities at their own risk', as it 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 stolen because of your failure to keep them safe or take reasonable security precautions at the home.

⁵⁰ See section 5 of this advice for more detail.

⁵¹ Such a term is also 'blacklisted' and unfair in all circumstances under the CRA.

- (f) Attempt to exclude or restrict a resident's legal right to deduct the amount of any arguable claim they have against you from anything they must pay (preventing unnecessary legal proceedings). Where this right to 'set-off' is excluded, residents may have no choice but to pay in full, even where your service fails to meet expectations, and then sue for compensation.⁵²
- (g) Deny residents the right to a refund or compensation in all circumstances, even where you have breached the terms of the contact.⁵³

4.58 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

4.59 Residents and their representatives are in a position of vulnerability. In some cases, residents may lack full mental capacity. Terms that allow you to impose disproportionately high charges for breach of contract are likely to be unfair under consumer law, where they have a penal purpose or effect.⁵⁴ 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 context, restrict their ability to make free or informed choices through intimidation or exploitation.

4.60 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.

⁵² 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.

⁵³ Such a term may also be blacklisted under the CRA.

⁵⁴ Such a contractual requirement may also be automatically void to the extent that it amounts to a penalty under the common law.

- (b) Require residents to pay interest on outstanding fees at a rate excessively 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 has not been calculated by reference 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'

- 4.61 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 net 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**.
- 4.62 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 why).

Visiting rights in care homes

- 4.63 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 legislation⁵⁵ and therefore, 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.⁵⁶

- 4.64 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.⁵⁷
- 4.65 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.
- 4.66 **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 verbally or physically assaulted or threatened to 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

⁵⁵ 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).

⁵⁶ 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*'.

⁵⁷ In particular, the prohibition on 'aggressive' commercial practices in the CPRs.

restricted) and is subject to an internal appeal mechanism whereby the affected parties can dispute your decision.⁵⁸ 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.⁵⁹ 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.⁶⁰

4.67 For further information, the CQC has produced information on visiting rights in care homes at http://www.cqc.org.uk/sites/default/files/20161025_Visiting-rights-information-detailed.pdf

Treatment of temporary absences from the home

4.68 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).

4.69 Generally, a term that requires a resident to always pay full fees, regardless of whether allowance could be made by you for savings or gains available as a result 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 as a result 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

⁵⁸ This may, for example, be covered by your complaints procedure, which should be fair and transparent.

⁵⁹ For example, in England and Wales, these reasons should be agreed through a Mental Capacity Act 2005 decision-making process. See www.cqc.org.uk/mca and also the [Mental Capacity Act Code of Practice for England and Wales](#).

⁶⁰ 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>.

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.

4.70 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 take into account the **period** for which the resident is required to pay full fees. A degree of flexibility is more likely to be achieved where you limit the period for which full fees are payable, after which a discount will be applied.

4.71 **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 the resident's 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, 8-10 weeks) to ascertain whether they are likely to be able to return to the home, and discuss and agree with them and their representatives what should happen with regards to the further retention of the room (see paragraph 4.77- 4.88, below, on termination of contracts).⁶¹
- (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.

⁶¹ 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.

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

'If you are away from the care home (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 8 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

4.72 You may want to include terms in your contracts 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).⁶² However, it is important that you recognise the practical and 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 will be in.⁶³

Trial periods and short stays

4.73 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.

4.74 Even during trial periods, a sudden and unexpected termination can leave residents and their representatives facing significant inconvenience and

⁶² 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*'.

⁶³ See *Overy v Paypal (Europe) Ltd* [2012] EWHC 2659 (QB).

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 may 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'

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

- (a) 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 the resident is seriously disruptive), so residents and their representatives can have a degree of foreseeability as to when this may happen.
- (b) The resident and their representatives are given **adequate notice** of termination, so that they have sufficient opportunity to make alternative arrangements (for example, 7 days). You should keep the resident's placement under review during the trial period, and give sufficient notice if you are likely to terminate at the end of the period.
- (c) 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 you are able to re-allocate the resident's room, you should always return any accommodation fee payments to the outgoing resident which relate to the same period, to avoid double recovery.

4.76 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 7 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 earlier) will be refunded to you'

Termination terms

Acceptable reasons for terminating a resident's contract

- 4.77 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 4 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'

- 4.78 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).
- 4.79 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).
- (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.
- (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).
- (f) Where the resident has repeatedly failed to pay their fees, and significant fees remain outstanding.⁶⁴
- (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

- 4.80 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 may not have adequate time and opportunity to make arrangements for suitable alternative accommodation.
- 4.81 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

⁶⁴ For example, we would consider a delay of three months in paying fees to be undue, which may justify service of notice (in the form of a final warning) requiring payment to be made within 28 days, failing which the resident's contract may be ended. See *Office of Fair Trading v Ashbourne Management Services Ltd & Ors* [2011] EWHC 1237 (Ch).

longer).⁶⁵ 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 apply in Scotland⁶⁶ and Northern Ireland.⁶⁷

- 4.82 Therefore, even in cases of very serious breaches of contract or behaviour, unless the resident (or those who are lawfully authorised to act on their behalf) genuinely agrees to leave on shorter notice, you must always provide them with at least 28 days' written notice of termination and, should they be unwilling to leave upon the expiration of the notice, apply to court for an order to evict.
- 4.83 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

- 4.84 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, improve poor behaviour or catch up with missed payments) and, where necessary, appeal a decision to end the contract.
- 4.85 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.
- 4.86 Where you intimidate, exploit or pressurise residents or their representatives into leaving the home, this will be unfair under consumer law.⁶⁸ 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).

⁶⁵ 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.

⁶⁶ The Rent (Scotland) Act 1984.

⁶⁷ The Private Tenancies (Northern Ireland) Order 2006.

⁶⁸ For example, the prohibition on 'aggressive' commercial practices in regulation 7, CPRs.

- (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, including by giving warnings and consulting with you and your representatives. Where we ask you to leave, we will provide you with 28 days' written notice, but we will work with you to find suitable alternative accommodation'

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

4.87 To help you to comply with your consumer law obligations, you should ensure that 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 and prominently explained in your contract** (for example, by using an executive summary or 'key facts' document), which should be clearly signposted on your website and included with resident information packs, so that residents and their representatives can easily understand why the contract 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) Where the resident's behaviour puts them, fellow residents or staff at risk of harm, you give the resident a **warning and consult** with them and their representatives on how to manage periods of challenging behaviour to prevent similar incidents reoccurring (this is especially relevant for dementia patients, who may not be in full control of their actions). In extreme cases (for example, where a violent resident poses an immediate and significant risk of serious physical harm to staff or other residents) you should contact your local authority for advice and assistance and, where necessary, contact the Police.
- (e) Where you think a contract may need to be terminated because of the resident's changing care needs, you should 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
 - Any independent advocate acting for or assisting the resident
 - Relevant medical professionals (which could include the resident's own GP and Consultant Specialist)
 - Where applicable, the placing authority (local authority, NHS) and the resident's care worker
- (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 assistance in finding suitable alternative accommodation. You should also contact the local authority, who may be able to assist you in finding suitable accommodation (both temporary or permanent) to meet the resident's eligible needs.

Residents and their representatives are given full disclosure of the reasons for being asked to leave (for example, advice in GP reports or serious incident reports);.

- (g) Where the resident has missed a payment, you 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 because of single missed payment.
- (h) 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 there is an appeal mechanism against the decision of a local home manager rather than giving them sole discretion to terminate the contract. You should also consider the use of ADR services such as mediation or conciliation to help defuse concerns where the resident or their representatives disagree with or complain about the decision.
- (i) 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 supplied.
- (j) 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

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

- (a) Your terms **clearly and prominently** set out how much notice is required from the resident, how it must be given and to whom (for example, this may be 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 or email).
- (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 mitigated your loss arising from the resident's departure).

✓ **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)

4.89 Separate to 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 this advice once finalised.

Terms specific to State-funded residents

Top-up fee arrangements⁶⁹

4.90 Where a person is eligible for local authority 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 (for example, a family member) and in some cases, the resident themselves, may be able to pay a 'top-up fee' to make up the difference.⁷⁰ Top-up fees may also arise where someone who was a self-funding resident becomes eligible for local authority funding at some point after they have moved into a care home.

4.91 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 arrangement. Moreover, top-up payments should generally be paid to you by the local authority under the terms of their agreement with you. The local authority

⁶⁹ 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'.

⁷⁰ 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.

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. The local authority also remains responsible for ensuring that all fees (including the top-up) are paid to the care home.

Arranging a top-up payment through the local authority

- 4.92 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.
- 4.93 The involvement of the local authority ensures that it remains responsible for ensuring 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 agreeing with the person and their family whether to move the person into standard accommodation that does not require a top-up or to fund the top-up itself.
- 4.94 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 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).
- 4.95 If you do not tell the resident and third party about the option of covering the short fall 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 mislead residents and their representatives and infringe consumer law, as it exploits their unfamiliarity with the legislation and statutory guidance relating to top-ups.⁷¹ In England, the legislation stipulates that top-ups should always be arranged between the local authority and the payer.⁷²
- 4.96 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 or third party to make additional top-up payments to cover a 'shortfall'

⁷¹ For England, see the [Care and support statutory guidance](#).

⁷² The Care and Support and After-Care (Choice of Accommodation) Regulations 2014.

as a condition of moving in, then this is likely to infringe consumer law and be inconsistent with the legislation in England and Wales.

- 4.97 Once the resident is in the home, any increase in the top-up payments should always be made in line with your placement agreement with the appropriate local authority - for example, following an annual review where any proposed increases to the top-up fee are negotiated and agreed with the local authority, who should consider whether it will meet the extra costs. You are likely to mislead residents and 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 NLW or the extra costs of agency staff.⁷³ Such an action would also be inconsistent with the legislation in England and in Wales.

Arrangements where it has been agreed that the payer will make the top-up payment directly to you

- 4.98 Where it has been agreed with the local authority and third party 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),⁷⁴ 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.
- 4.99 If you seek to impose more onerous terms on third parties 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. It is also not permitted in England and Wales under their legislation.
- 4.100 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

⁷³ 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.

⁷⁴ Care and support statutory guidance, paragraph 8.33.

and obligations, infringing consumer law, even if you do not seek to enforce those terms in practice.

Terms in top-up agreements

4.101 Any agreement for top-ups must contain **clear, accurate, and unambiguous** information concerning, for example:

- (a) How much the top-up will be.
- (b) The frequency of the payments.
- (c) How often it will be reviewed.
- (d) How any increases in the top-up fee 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) What the third party's liability is if they fall into arrears with the top-up payments.
- (g) What may happen to a resident's placement if the person paying the top-up fee can no longer pay or afford the top-up, for example whether your contract allows you to move the resident to another room or, ultimately, end the agreement.

4.102 As well as being transparent, you must ensure that any terms you rely on in your agreement are **fair** (for example, in relation to how future fee increases will be calculated).

4.103 In the event that the top-up payment 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

4.104 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 4.77 – 4.88 for termination of contracts).

4.105 Where a self-funded resident does become 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.

4.106 However, a term that obliges a self-funded resident's representative to commit at the outset 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 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.

✘ 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'

NHS Continuing Healthcare Funded residents and top-up payments

4.107 Some of your residents may be in receipt of NHS Continuing Healthcare funding (CHC), 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.

- 4.108 You are not allowed under NHS rules⁷⁵ 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 body (such as the local Clinical Commissioning Group or Trust).
- 4.109 Where you seek to make such charges, for example, by asking a resident or their relative for a one-off payment to cover some of your business or care costs or demanding a regular top-up to the weekly fee to cover a 'shortfall' in funding (either as a condition of moving into the home or to stay in the home), this is likely to infringe consumer law.⁷⁶

Offering additional private care services

- 4.110 Under NHS rules, where you offer additional private care services (so-called 'lifestyle choices' such as aromatherapy or beauty treatments which the NHS would not normally fund as they are not clinically necessary) to CHC residents, the decision to purchase any of these services should always be a voluntary one for the resident.
- 4.111 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 lifestyle choices or to upgrade to a better room and pay extra is likely to be unfair.
- 4.112 Where a CHC resident expresses a preference for, or requests, higher-cost accommodation (such as a better room) or services, in line with Department of Health and Social Care guidance in England,⁷⁷ you should first refer the

⁷⁵ Residents should never be charged for their NHS care, or be allowed to pay towards an NHS service (except where specific legislation is in place to allow this) as this would contravene the founding principles and legislation of the NHS.

⁷⁶ 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.

⁷⁷ The "National Framework for NHS Continuing Healthcare and NHS-funded Nursing Care" – see both the [current version](#) of the national framework and the [2018 version](#) which takes effect in England on 1 October 2018. For Wales, see "[Continuing NHS Healthcare - The National Framework for Implementation in Wales](#)" (page 61).

matter to the appropriate NHS 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).
- (b) If it is not an assessed need, whether that the type of private service is permitted under NHS rules. Failing to do this may infringe consumer law.

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 an ‘implied’ term of your contracts with residents.⁷⁸
- 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 4.56 – 4.58 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 also likely to be unfair.

Relevance of sector-specific requirements

- 5.4 The sector regulators⁷⁹ are responsible for enforcing specific regulatory requirements relating to quality and safety in care homes. 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 to prevent people from receiving unsafe care and treatment.⁸⁰ 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

⁷⁸ Under section 49(1), CRA.

⁷⁹ The CQC in England, the Care Inspectorate Wales, the Care Inspectorate in Scotland and the Regulation and Quality Improvement Authority in Northern Ireland.

⁸⁰ Health and Social Care Act 2008 (Regulated Activities) Regulations 2014, Regulations 9-20. In Scotland, the relevant standards are the Health and Social Care Standards 2017. 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.

equipment used are suitable and safe and, where applicable, available in sufficient quantities.

- 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 could ultimately affect your registration. Some of these rules have offences attached and the sector regulators can bring prosecutions if these are breached.
- 5.7 Their regulatory requirements and 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.
- 5.8 Therefore, if you breach these regulatory requirements or ignore their guidance, you could face enforcement action from the sector regulators, in addition to infringing consumer law.

Conduct likely to fall below the required standard

- 5.9 There is no exhaustive list of what you must do to meet this standard. However, in our view, the following are examples of behaviour which would be likely to breach the statutory requirement:
- (a) 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.
 - (b) Failing to refer a resident whose condition has deteriorated for a specialist risk assessment.
 - (c) 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.
 - (d) Failing to involve a resident or someone acting on their behalf in discussions about their care, treatment and support.
 - (e) 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.

- (f) Not providing the food and drink which a resident may need, or not taking into account the fact that they are a vegetarian or have needs based on religious beliefs.
- (g) Not monitoring the levels of prescribed medicine you have in stock for a resident or failing to re-order them in time.
- (h) Failing to ensure that staff who are taking care of residents with dementia have the necessary training and skills.

6. Ensuring that complaints handling processes and practices are accessible, effective and fair to residents and their representatives

- 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.⁸¹ This will help you to address the needs and expectations of residents and to maintain a high standard of care.
- 6.2 Given the **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 processes 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.
- 6.3 **To help you to comply with your consumer law obligations, you should ensure that you have a written complaints 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.
- 6.4 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.

⁸¹ In this advice we use the term 'complaints' to mean any expression of dissatisfaction that a care home or member of staff has not met the standard people would expect. It also covers 'concerns' that people may have which never become formal complaints.

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

If you or your staff:

- (a) **Fail to publicise your complaints handling processes** eg where you simply tell people that ‘the home has a complaints 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 complain** eg by threatening residents with reprisals that will affect their care.
- (d) **Discriminate against or victimise complainants** eg by threatening to restrict or ban their relative(s) or friend(s) from visiting them, or by threatening to ask the resident to leave the home, or by 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 by 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.

6.5 Alongside your consumer law obligations, there are statutory sector-specific rules 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 minimum standards you should follow to comply with your obligations under consumer law.⁸² Further details are provided in Appendix B.

⁸² 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.

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 well-publicised.</p> <p>For example:</p> <ul style="list-style-type: none"> • On your website • In your service user guide and welcome pack • On display throughout the home (eg posters in reception and communal areas) 	 <p>Easy to understand and use</p> <p>Make sure you take into account the different needs of your residents.</p> <ul style="list-style-type: none"> • Make information and assistance available in different languages and formats (eg Easy-Read, Braille, audiotape/CD) • Allow residents to complain in a variety of ways (eg freephone, text, online, letter, meetings) • Encourage the use of advocacy, and other support and advice services the resident may need • Give the option to report something anonymously (eg Complaints or Comments Box) 	 <p>Effective and fair</p> <p>Make sure your procedures are written and followed in such a way that complaints are dealt with fairly and effectively.</p> <p>For example:</p> <ul style="list-style-type: none"> • Make clear who is responsible for handling complaints • Ensure any investigation is carried out by someone independent • Give clear and reasonable timescales for investigating • Ensure a complaint can be escalated internally to a more senior level if the person is unhappy with how it has been dealt with • Clearly explain how and when a complaint can be escalated to an external body if someone is still unhappy (eg the Ombudsman, local authority, sector regulator) 	 <p>Applied consistently</p> <p>Make sure your staff are trained in and have a good understanding of:</p> <ul style="list-style-type: none"> • Your complaints procedure • How it works • Their role and responsibility in reporting/resolving complaints raised with them • Their role in supporting people if they want to make a complaint
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Ensuring your complaints handling procedures are easy to find

- 6.6 You must give or make available a copy of your complaints handling policy to prospective residents, before they become bound by any contract with you.⁸³
- 6.7 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.
- 6.8 Your complaints procedure must be **easily located and visible**. For example, it should be prominently highlighted:
- On your website
 - In your service user guide, welcome or information packs
 - In your contracts with residents
 - 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, in a service user booklet kept in all bedrooms)
- 6.9 You should also clearly explain your complaints procedures 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 procedures are easy to understand and use

- 6.10 It is important that your complaints 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

⁸³ As required by regulation 9(1) of the CCRs.

special needs and may not be able to make a complaint in writing or may find it very difficult to do so.

- 6.11 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
- 6.12 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 Easy Read and large print, Braille, or audiotape or CD for residents with visual impairment, or using British Sign Language for deaf residents – so that no complainants are disadvantaged by their vulnerabilities.
- 6.13 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 **advocate or representative** (such as a friend or relative).
 - (b) Highlighting potential sources of local **independent advocacy, advice and support services** that the resident may contact. You should make it clear how a complainant can access independent advocacy, advice and support services (where available), and give the contact details (including in your written complaints 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.
- 6.14 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 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

6.15 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.

Frontline resolution stage

(a) You should have an **informal pre-stage complaints process**, which aims to resolve initial straightforward concerns as soon as practically possible. You should explain how concerns raised at an informal resolution stage can be escalated to a more formal complaint stage if the matter is not satisfactorily resolved.

Formal complaint stage

(b) You should set out clearly **where** and **how** complaints can be made, including:

- Who to approach to discuss a complaint
- Who is responsible for handling the complaint
- The different ways in which complaints can be submitted (see paragraph 6.11)
- How complaints can be reported **anonymously** (see paragraphs 6.14 and 6.15(i))

(c) You should set out clearly the **type of issues** your complaints process covers. 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 escalate their complaint and where these differ depending on the nature of the concern raised. For example, a concern which raises safeguarding issues should normally be raised with the sector regulator.

- (d) You should explain **how individuals can be supported to make a complaint by** a representative, 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 6.13).
- (e) You should **acknowledge** complaints quickly

Investigation process

- (f) You should set out clear and reasonable timescales and a way for residents to respond to any requests for further information.
- (g) You should set out **clear** and **reasonable timescales** within which residents can expect to hear back about their complaint, at each stage of the process – for example:
- Investigations into complaints should be launched immediately upon receipt and within a maximum of 28 days⁸⁴ 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
 - Where the complaint relates to a time-sensitive issue, such as a decision by a registered manager 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 days, the complainant should be informed of any delays and the timetable for completing the investigation
- (h) You should ensure that any investigation of a complaint is carried out by someone **independent** of the concerns raised, so as to avoid managers or staff investigating 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.
- (i) 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

⁸⁴ This is the period specified in the 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.

should be actively protected from disclosure unless they have expressly consented to it or there are statutory obligations that make this necessary, such as safeguarding.

- (j) 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, or refer to the appropriate authorities for investigation (this may include sector regulators or local authority safeguarding teams)
- (k) You should ensure that residents are kept regularly updated on the progress of the investigation.
- (l) 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

- (m) You should ensure that residents and people acting on their behalf can, and know how to, **escalate a complaint internally** within your organisation if they are unhappy with how it has been dealt with.
- (n) You should aim to have a streamlined complaints process with as few steps as necessary, given the vulnerability of residents. They should be able to appeal to someone at a more senior level to review the matter if it is not satisfactorily resolved at a local level - this is especially important for sensitive issues such as a complaint made about a decision to ask a resident to leave.

Escalating a complaint to an independent external body

- (o) You should make clear in your written complaints procedure and decision letter that if a resident is still unhappy 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.
- (p) You should clearly explain how and when the complaint can be escalated to the local authority, HSC Trust, NHS or other commissioning authority, the sector regulator (in Scotland), Ombudsman, and any other 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 placement authority:** you should make clear in what circumstances the resident can escalate their complaint to the local authority or HSC Trust or NHS authority (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:**⁸⁵ 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 residents. However, in Northern Ireland, residents who are entirely privately-funded do not have access to the Northern Ireland Public Services Ombudsman.
- **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.

(q) You should also consider the use of **ADR** where complaints cannot be easily resolved, for example where the matter is particularly acrimonious. Where the resident and you agree, services such as **mediation** or **conciliation** can be used to resolve resident dissatisfaction or defuse problems before they escalate by helping to get to the real issues and underlying concerns driving the complaint. This can help provide an efficient and fair process.

6.16 Failing to follow your policies and procedures 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

⁸⁵ 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.

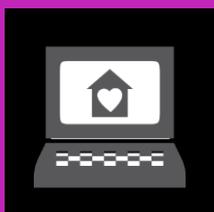
accordance with the standards of 'professional diligence' required under consumer law.⁸⁶

Staff training

- 6.17 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 procedures, 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.
- 6.18 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.

⁸⁶ Under the 'general prohibition' on unfairness in regulation 3(3), CPRs.

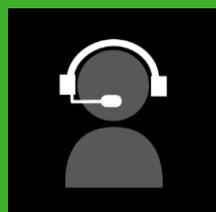
Appendix A: Overview of relevant consumer law



Promotional, advertising and marketing activities

What you say must be truthful and accurate

This includes what you say on your own website or a care home listings site, in any brochures or information packs you provide, and what you tell people at open days or in response to initial enquires.



Sales and pre-admission process before a resident moves in

You must provide people with the information they need to make informed decisions

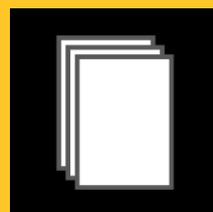
This includes decisions about whether or not to shortlist/visit your home, make further enquiries or accept an offer. The information you provide to prospective residents and representatives on your website, in information packs, during visits and in response to initial enquiries is critical, recognising that decisions often need to be made under considerable time pressure.



Services provided after the resident moves in

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

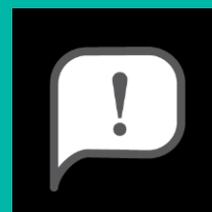
This includes how you behave towards residents when providing them with care services once in the home (recognising their particular vulnerability). They may be unwilling or unable to leave the home if your service does not meet expectations or where they are unhappy.



How you enforce your terms and conditions

Using or enforcing a term in your contract with residents that is unfair (under unfair terms law) is also likely to be an unfair commercial practice

The use of certain kinds of unfair term can distort resident's decisions, for example, by misleading them about their rights and obligations, or by omitting important information that they need to know to make informed decisions (such as a decision about whether or not to raise a complaint or seek redress).



Complaints handling

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

This includes making sure your complaints handling procedure is **easy to find, easy to understand and use, fair and effective** (recognising the barriers 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.⁸⁷ They prohibit you from engaging in a wide range of unfair **commercial practices** in your dealings with 'consumers'.⁸⁸
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 even 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 enquirer 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

⁸⁷ 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.

⁸⁸ '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.

- Complaints handling procedures (including when you can ask a resident to leave the home)

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 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.⁸⁹ 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 as far as possible 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 audiotape for residents with a visual impairment

⁸⁹ The CPRs provides 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**.

- Providing explanations about how the care system works and what options are available to prospective residents and their representatives
- Enabling and supporting residents to make complaints
- Helping residents to 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, the Care Inspectorate Wales, the Care Inspectorate in Scotland and the Regulation and Quality Improvement Authority in Northern Ireland) may be treated as **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 main characteristics and price of your service, you must ensure that you provide them with the **total price** of your service, including any mandatory extras and, where the price of any optional extras cannot be calculated in advance, an accurate indication of the price the resident is likely to pay.

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 resident when they come to see it, with the intention of selling them a more expensive room ('bait and switch'). Further examples of 'banned practices' are set out in paragraph 3.14 of section 3 of this advice.

18. General guidance on the CPRs can be found on the CMA's webpages.⁹⁰

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**.⁹¹ 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.⁹²

Your contract terms (Part 2, CRA)⁹³

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.

⁹⁰ See <https://www.gov.uk/government/collections/cma-consumer-enforcement-guidance>.

⁹¹ Section 49(1), CRA.

⁹² Section 57(4), CRA.

⁹³ 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>.

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 important terms** and 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 substantial 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) ⁹⁴

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 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 negotiated at the resident's home or in a hospital rather than at the care home). For example, under the CCRs there is a right to cancel and withdraw from a distance contract for services during a 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 breaches) criminal prosecutions, as appropriate.
33. 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 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.⁹⁵

⁹⁴ 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>.

⁹⁵ 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.⁹⁶ 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), 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. 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 minimum standards.⁹⁷

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.

⁹⁶ 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.

⁹⁷ 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.⁹⁸

⁹⁸ 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.

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)
Scotland	Public Services Reform (Scotland) Act 2010 asp 8
	Social Care and Social Work Improvement Scotland (Requirements for Care Services) Regulations 2011 (SSI 2011/210)
	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)