

Consultation Response

Competition and Markets Authority

Care Homes for the elderly – draft consumer law advice

July 2018.

Reference: 2818

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About Age UK

Age UK is a national charity that works with a network of partners, including Age Scotland, Age Cymru, Age NI and local Age UKs across England, to help everyone make the most of later life, whatever their circumstances. In the UK, the Charity helps more than seven million older people each year by providing advice and support. It also researches and campaigns on the issues that matter most to older people. Its work focuses on ensuring that older people: have enough money; enjoy life and feel well; receive high quality health and care; are comfortable, safe and secure at home; and feel valued and able to participate.

The response also includes comments from Age Scotland.

Key Points and Recommendations

- Age UK supports the draft guidance as the public have raised concerns with us about many of the practices which are deemed unfair or in breach of consumer law. It is hoped that enforcement of the final guidance will raise standards of consumer protection across the sector.
- Age UK supports the proposed compliance review, provided it is done in full consultation with trading standards, regulators, Healthwatch UK, safeguarding teams, older people and their representatives. The CMA should also review the standard of information provided to residents and their representatives.
- The final guidance will need to include what will happen should the home be responsible for losing or breaking someone's property; the individual's protection after a change of management or ownership or from excessive costs for in-house services; and how homes communicate their waiting list policy.
- Age UK supports fee increases as long as their level and timing is within very narrow limits.
- Consideration should be given to linking fee increases for care homes to a mechanism similar to the Review Body on Doctors and Dentists Remuneration (DDRB)
- Ratios and descriptors of staffing teams will help support decision making for prospective residents and their representatives.
- Upfront information needs to have clear guidance around NHS Funded Nursing Care (FNC), explaining that it funds the nursing element of care home costs but does not provide for the other costs of residency.

Introduction

Age UK welcomes the draft guidance and the proposed compliance review. To assess how the final guidance is working in practice, we recommend that the CMA reviews compliance in due course and consults or surveys older people and their representatives. The CMA will also need to provide further clarity as to how the guidance will work in conjunction with local authority trading standards, safeguarding teams, Healthwatch UK and the sector regulators across the United Kingdom.

Older people and their families often have serious concerns about the move to a care home, even if this is the most appropriate setting for them to have their needs supported. The issues of consumer protection covered in the guidance reflect the concerns that the public have communicated to Age UK through our information and advice line. The following is a brief summary of calls Age UK has

received over the last 12 months concerning practices which we think would be regarded as unfair or in breach of consumer law under the draft guidance.

- Fee increases of £250 a week. Call describing £800 p/m increase with allegedly no written reason. Other calls describing fee increases with no apparent explanation.
- Relatives asked to be guarantors for the full cost of care home fees.
- Residents charged £700 a week during a temporary hospital stay. If the full cost of fees is levied on residents during an absence then the guidance states that this is likely to be unfair.
- Numerous examples of residents or their families enquiring about their right to withhold payment for aspects of care or the care home environment which they deem to be unsatisfactory.
- Not allowing the family members of perspective residents to see a copy of the care home contract.
- Care home seeking to add clause to resident's contract about what will happen in the event that they become eligible for local authority funded care.
- Resident asked to leave due to dispute between family members and care home management.

Reports like these demonstrate why we strongly support comprehensive guidance which protects older people and their representatives when they are entering into a contract with a care home. As the CMA's market study acknowledged, in many care markets there is little choice when selecting a care home and it is hoped that stronger guidance, properly enforced, will raise standards across the sector. Older people and their representatives are often reluctant to complain for fear of adverse consequences, especially given their lack of security of tenure, even when the care received is of a poor quality and undermines their dignity and wellbeing. A new guidance framework can, we hope, help to create a culture in which complaints are dealt with more thoroughly.

Whole scope of guidance

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

Age UK welcomes the draft regulations and believes that, on the whole, the regulations will help to improve care homes' ability to comply with their consumer law obligations. However, we would like to see the following additional issues covered in the guidance:

1. Paragraph 3.23(k) of the draft guidance does not include direct reference to the care home's liability if they lose, misplace, break etc. personal possessions belonging to a resident – something which is a well-known problem in the care home sector. It is important that residents and representatives have clarity about how they will be compensated if this happens. Age UK received the following call on this issue (identities have been changed to protect anonymity).

David, 89 has dementia and is in a care home. Daughter-in-law Megan says that home have lost David's dentures. Previously, she alleges that the care home had lost some of David's hearing aids. Megan stated to care home manager that she holds the home responsible for meeting the cost of replacement dentures. Megan says the manager is defensive about this.

Megan unsure what to do and whether she should pursue care home but otherwise believes her father-in-law's care is good. Megan says that she has power of attorney over David's finances.

2. The guidance should also make reference to what protections the resident and their representatives have in the event of a change of management or ownership - specifically whether the care home is acting fairly and working within their obligations if they wish to amend contract terms in their favour or increase fees more frequently than at the suggested annual intervals. Please see the following call to Age UK:

Denis has been living in a care home for 11 years in which time his fees have increased annually. Denis and his family are very happy with the home. However, it was recently sold and the family were reassured that it would be run along the same lines. The fees duly went up by 5.8% last summer. The care home management have also now said the fees will go up by a further 8% in December 2017. Management are saying this is due to an increase in father's needs but Denis's son disputes this.

3. Another issue the guidance should include is controls on exorbitant costs for in-house services such as hairdressing or chiropody. It is important that providers recognise that residents may have little choice over how they can access such services – due to the nature of their conditions they cannot 'shop around'. It may be reasonable for prices to reflect any increased staffing costs in accompanying and potentially managing residents' behaviour but homes should not seek to charge significantly more than current market rates. It is also important that the pricing structure of these services is not used as a stealthy mechanism for making up shortfalls in other funding. As the guidance makes clear, transparency and openness in upfront information is crucial, as well as providing residents and their representatives with adequate forewarning in the event of planned price increases.
4. The guidance also makes little reference to what happens if the resident or their representative is unsatisfied with aspects of quality of their care and the physical environment. For instance, during a resident's stay their regulatory rating may fall from 'good' to 'requires improvement' or 'inadequate'. Currently, consumers have little recourse to challenge poor practice and many have contacted Age UK about their desire to withhold fees due to sub-standard care. These residents can effectively be stuck in a poorly performing home and forced to pay large sums if they are unable to terminate the contract or leave and find alternative provision.
5. There is a gap in the regulations regarding how care homes communicate about their waiting list policy, which is discussed in greater detail in our response to question 2.3(b), as well as what the process is if a self-funded resident can no longer afford their fees.

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

The model contract on page 28 could include a brief explanation of what constitutes personal care, e.g. support with personal hygiene and toileting, along with dressing and maintaining your personal appearance.

The model contract on page 29 could also include auditory or mobility aids such as hearing aids or wheelchairs.

Providing upfront information (section 3 of the draft advice)

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

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

The guidance is comprehensive but, for the benefit of consumers and their representatives, it is vital that providers communicate it clearly, concisely and transparently. This should include providing copies of contracts, terms and conditions and other key information in accessible formats such as easy-read and large print. Contracts could also be indexed to assist people being able to find key terms. We recommend that CMA reviews the standard of information in any future compliance review.

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

Perspective residents and their families will need clarity from a care home about any arrangements for the payment of top-up fees between the local authority and the person(s) paying them. Care homes should not 'go behind the back' of the resident and local authority and directly approach families and representatives for the payment of top-ups.

Currently, self-funders of care receive no protection under the Human Rights Act whereas those partly or fully local authority funded do. It could be important for contract terms and conditions to highlight this so that residents and their representatives are aware of what legal protection they are afforded and how this might change if they were to move from a private to state funding.

The inclusion of staff ratios as well as descriptions of the staffing contingent will be of value to residents and their representatives. Mandatory staffing requirements are in place for childcare and recommended safe staffing guidance exists in the health service. Sector regulations mandate that 'sufficient' staffing is in place without quantifying specific numbers¹. Ratios and descriptors can help give residents and their representatives an indication of whether they feel the staffing level is sufficient, the level of need within the home and ultimately whether the home is suitable. Greater assurance about the numbers and levels of training of staff on duty at any one time (particularly at night-time, weekends and bank holidays) will give residents and representatives an indication of how responsive they will be in the event of an accident, emergency or sudden increase in needs. It will also provide a greater level of assurance that vulnerable residents have sufficient support since, unlike in health or childcare services, care home staff may not be comprehensively trained or

registered. If care homes are using monitoring technology in place of staff then they should explain why they think this technology allows them to be more responsive to residents and free up staff for other duties. If providers are unsure about publishing ratios as they believe they are unsure what constitutes sufficient staffing then they should contact the relevant regulatory body, trade or professional organisations. If they are concerned about publishing ratios because they think they are subject to change, then they should be prepared to explain how they will ensure 'sufficient' staffing is in place.

Families may also wish to know if there is a residents and relatives group and how the manager will communicate with them e.g. in meetings or through newsletters, emails, letters.

Age UK believes there should be clear guidance for prospective residents and their representatives regarding care home waiting lists. Age Scotland in particular has heard from callers who have found that not all care homes operate a 'one in, one out' policy. If that is the case, and care homes are at capacity they should make clear their waiting list policy, to help people assess their options.

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

Other key information which could be included which Age UK uses on its choosing a home checklistⁱⁱ includes:

- Whether residents will have a named staff member responsible for their care
- Whether residents can choose to have a male or female carer
- Level of staff training, particularly for services supporting those with dementia
- Whether the home has guest parking spaces
- Whether residents can bring furniture and belongings with them
- Whether the home has secure storage
- What the home's arrangements are for handling personal money
- What hours support staff like activity co-ordinators work and whether activities are run throughout the week (i.e. evenings and weekends)
- Whether the home can meet cultural, religious, dietary, accessibility or other requirements

In addition, we believe that many prospective residents and/or their representatives will want to know:

- The care home's policy on bringing pets with them
- The arrangements in place for primary health care: can residents retain their existing GP (if nearby)? Is there a single GP practice with which every resident is expected to register?

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

We would like to see care homes give better summaries of information rather than solely referencing bulky documents. Dementia friendly information is also required for people with cognitive impairment.

Care homes should also consider how information will be disseminated by advocates and staff working for the local authority.

Care homes and local authorities should ensure that state-funded residents and their representatives are aware of all terms and conditions relative to them e.g. timescales for vacating room after death of resident, particularly if extension of this period would incur charges.

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

Consumer law requires that self-funded residents are able to foresee, on the basis of clear and intelligible criteria, how their fees may change whilst living in the home and that they are able to evaluate the practical implications, before accepting an offer of a place. This is likely to require care homes to set out clearly in contracts with residents the circumstances in which fees may change and the method for calculating it. The CMA has suggested the following three approaches by which care homes may comply with the law: a) Fixing a resident's fees for the duration of their stay; b) Specifying the precise level and timing of any future fee increases within very narrow limits, e.g. 'your fees will be increased by £500 per annum on the first and subsequent anniversaries of your arrival at the home'; c) Reviewing residents' fees on an annual basis by reference to a relevant, objective and verifiable published price index e.g. 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.

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

In the context of the now delayed Social Care Green Paper in England and uncertainty about public funding, leading in many areas to increased fees for self-funders, it is important that there is an appropriate safety valve for costs, which have increased dramatically over the last few yearsⁱⁱⁱ.

It is important that care homes are funded at a suitable level to maintain quality of care for residents and setting fees at the same level from admission would leave homes with little capacity to respond to inflationary and other unexpected pressures and ultimately reduce their ability to provide quality care. For this reason, we do not support option a). Nor do we support option c) as fixing fee increases to an index like the CPIH or national living wage increases does not consider the wide range of inflationary pressures specific to health and care services such as staffing costs, overheads and increased regulatory responsibilities.

Age UK strongly supports the CMA's option b), assuming that this is warranted by increasing costs in running a home and taking into account whether a resident's needs have decreased. However, an arbitrary fixed amount for fee increases could promote rises where there is no justification, and for an arbitrary sum which may in fact bear no relation to the increased cost of running the service.

2.7 In relation to reviewing residents' fees on an annual basis by reference to a relevant published price index, do you consider that the CMA's suggested indices/approaches adequately reflect care

homes' cost drivers? Are there any other relevant, published price indices that you consider more accurately reflect annual increases in care home costs, whilst granting prospective residents (and their representatives) the foreseeability they need?

Fee increases for care homes could be linked to a mechanism similar to the Review Body on Doctors and Dentists Remuneration (DDRB)^{iv}. The DDRB is an independent body which makes recommendations to the health departments across the UK about if and how much doctors' and dentists' pay should increase. The DDRB is a framework which takes a much more considered look at how the health market manages cost pressures compared to other sectors which do not have the same level of state funded support and statutory responsibilities, and so are not accurately reflected by existing indices.

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

Please see answer to question 2.7.

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

The guidance makes little reference to instances of fluctuating and diminished needs and the potential challenges of obtaining an independent assessment to verify that a resident's needs have increased. It could be possible that the increase in care a home provides to support what they judge to be an increase in needs will influence the decision of the independent assessor, as the resident may have adapted to the increased level of support provided.

It is also appropriate that a timely independent assessment take place should a resident's needs decrease, allowing the home to step-down the level of support. It will be important to consider how long the needs would have to be increased/decreased to justify a change in fees; and how responsive and timely that assessment would be to go back to the prior funding agreement. It seems reasonable that care homes build into their business model the capacity for their 'sufficient' staffing to accommodate to changes in their residents' needs. We accept some degree of cost risk-sharing between residents and homes but the terms need to be transparent and fair and should not mean passing on all increases in running the business to them. It is also reasonable that residents' care plans are not so finely tuned that the resources required to support them can only deal with a narrow spectrum of needs. If a decrease in needs warranted a decrease in fees, the contract should make it clear whether this would be backdated to the point when the needs decreased or from the time when the assessment was made. Where fees are increased, it would be fair for fees not to be backdated and only increased after the outcome of the independent assessment.

General/additional

2.10 What, if any, aspects of the draft advice do you consider need further clarification or explanation, and why? In responding, please specify which section of the draft advice (and, where appropriate, the issue) each of your comments relate to, for example: a) Upfront information (section 3) b) Treating residents fairly (section 4) c) Quality of service (section 5) d) Complaints handling (section 6)

At what point should this be mentioned?

a) Upfront information (section 3)

The upfront information provided will need to have clear guidance around NHS Funded Nursing Care (FNC) and make it clear that this will fund the nursing element of care home costs only and does not provide for the other costs of residency. The Department of Health and Social Care (DHSC) is currently carrying out a review/update of the practice guidance for FNC. We would advise the CMA to consult with DHSC about the potential implications any changes will have for providers, local authorities, the NHS and the public.

As discussed in our answer to question 2.3(b) we believe information about waiting lists should be included in upfront information that care homes give to prospective residents and their representatives.

b) Treating residents fairly (section 4)

Age UK believes there should be greater transparency about the rates charged to local authority residents and self-funded residents. Both Age UK and Age Scotland receive many calls to our information and advice line concerning the different rates between local authority funded residents and self-funded residents. Please see the following examples:

Jean is a self-funder in a care home. Her son Brian felt it was unfair that there are two rates, the local authority rate, and the amount a self-funder pays. This was particularly distressing for him as he expected an increase in his mother's fees again this year, and feels this is unfair as she receives the same service as someone who is local authority funded.

Another caller discussed her mum's care home, where she is a self-funder, and felt that self-funders were experiencing a disproportionate rise in fees (5% last year, 3% this year) to cover the lack of increase in the local authority rate. She felt this was particularly unfair as there is no difference in the service provided.

We recommend that care homes communicate any difference in rates clearly on their website, and in their leaflets explaining why this is the case.

c) Quality of service (section 5)

Paragraph 5.9 (f) refers to not providing the food and drink to cater for a resident's requested or religious preferences. It should also make reference to providing necessary levels of support and monitoring at mealtimes.

d) Complaints handling (section 6)

We welcome the refreshed complaints handling guidelines, which stress the importance of them being easy to find, understand and use; effective and fair; and applied consistently.

Both Age UK and Age Scotland are aware of issues regarding care homes asking residents to leave with short notice if they, or their representatives, have legitimate questions about the care home's policies and practices, or have a complaint. Please see the following example:

Sheila and other family members had made some complaints regarding the quality of care their father was receiving, which was made to the care home rather than to the care inspectorate. After a brief period in hospital, their father was ready to be discharged only to be told that the care home felt that they no longer felt they could meet the level of care expected by the family. The only other available care home was 30 miles away from the family, making it hard to visit their father on a regular basis.

It is therefore essential that residents and their representatives are able to raise concerns in a safe environment where they can be taken seriously and acted upon. Updated guidance on the care home's responsibility is a welcome step, and we hope the CMA will take every opportunity to protect the rights of older people and their families.

ⁱ <https://www.cqc.org.uk/guidance-providers/regulations-enforcement/regulation-18-staffing#guidance>

ⁱⁱ https://www.ageuk.org.uk/globalassets/age-uk/documents/information-guides/ageukil5_care_home_checklist_inf.pdf

ⁱⁱⁱ <https://www.telegraph.co.uk/money/consumer-affairs/care-costs-spiralling-twice-inflation/>

^{iv} https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/602319/58665_DDRB_Book_Accessible.pdf