

Factsheet 60w ● December 2020

Choice of care home if the local authority is contributing towards your care fees



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1 Information about this factsheet

This factsheet explains what rights care home residents have to choose which home they will live in – and its location – when their local authority assists with the placement. This could be:

- from the time you first start living in a care home (as you lack sufficient funds to fully self fund your care, so the local authority contributes towards the cost); or
- where you have previously arranged and paid for your full care home placement costs privately (i.e. because you had assets above the capital limit, so were not eligible for local authority assistance towards the fees), *but* your assets have since been reduced due to ongoing care costs and, as such, you now require local authority assistance.

It is therefore worth reading this factsheet if you are currently in a position to fully self fund as – although you can more or less choose whichever home you wish (provided it can meet your care needs) – there could be implications at a later date should you require local authority assistance and the home you chose when you were self funding is more expensive than the authority would normally pay towards. This issue is explained in further detail below in section 6 and 7.

Note: the capital limit

Further information on the capital limit and its effect on care home funding can be found within this factsheet below, in section 3. Alternatively, for more detailed, overarching, information on the capital limit and the financial means test for care homes, see Age Cymru's Factsheet 10w *Paying for a permanent care home placement in Wales*.

This factsheet also provides information on **third party top-ups** in relation to meeting care home costs – see section 6 below.

You may wish to read this factsheet in conjunction with Age Cymru's other resources on care home funding and local authority service provision, including:

- Factsheet 10w *Paying for a permanent care home placement in Wales*;
- Factsheet 38w *Treatment of property in the means test for permanent care home provision in Wales*;
- Factsheet 39w *Paying for care in a care home in Wales if you have a partner*;
- Factsheet 41w *Social care assessments for older people with care needs in Wales*.

Note: The information given in this factsheet is applicable in Wales. Different rules may apply in England, Northern Ireland and Scotland. Contact Age UK, Age NI and Age Scotland respectively for further information – see section 11 for their contact details.

1.1 Definitions and terminology

Local authority social services departments

In this factsheet references to the ‘**local authority**’ or ‘**council**’ will refer to the *adult social services department* of the local authority. The relevant social services department may be referred to as the following, or similar variations:

- social care department;
- adult social services;
- older persons’ department;
- older persons’ team.

Adult social services teams are responsible, among other duties, for assessing people’s need for ‘care and support’ or ‘social care’ services and deciding whether those needs meet the eligibility criteria.

Note: Finding contact details for your social services department

If you have internet access, you can search for your local authority using your postcode on the Welsh Government's website:

www.gov.wales/find-your-local-authority

Alternatively, contact details for your authority should be available in your local telephone directory, or our Age Cymru Advice line can provide them – see section 10 for contact details.

'Care homes'

The term 'care home' covers any establishment providing accommodation with either:

- just personal care; *or*
- personal care together with nursing care.

Often the terms 'residential care home' and 'nursing care home' might be used to differentiate between the two types of home, though within each of these brackets there can be variation in the types of care needs that the home may be able to handle (Age Cymru's Factsheet 10w *Paying for a permanent care home placement in Wales* and Factsheet 29w *Finding care home accommodation in Wales* have sections with further information on the different types of care home).

Both residential care homes and nursing care homes can provide various specialisms/services (e.g. dementia care). However, a home must not provide nursing care if it is not registered for that purpose. Some homes may have some beds registered as providing accommodation and personal care only, and other beds registered for nursing care as well.

All care homes must be registered as 'service providers' with the regulator, the Care Inspectorate Wales (CIW), who are responsible for the inspection and registration of homes – see section 10 below for contact details for CIW. There are private sector care homes which are run for profit by private organisations or individual proprietors; voluntary sector homes (non-profit making and run by bodies such as registered charities, religious organisations or housing associations); or homes that are still run directly by the social services department of the local authority.

2 Legislation covering the social care system in Wales

2.1 The Social Services and Well-being (Wales) Act 2014 and accompanying Code of Practice guidance – relevance to the social care system in Wales

This Act was fully implemented in April 2016 and is the main legislation that covers the social care system in Wales, including:

- the social care assessment process;
- related rules in regard to arranging and paying for residential care homes or nursing care homes¹;
- the guidance documents that local authorities must use when assessing needs; and
- the guidance documents that local authorities must use when means testing people who may need to pay towards their services.

Many of the sections in this factsheet (and other Age Cymru factsheets on social care topics) will use this Act – and the Welsh Government guidance for local authorities which accompanies it – as a main source of information. References will be provided in the text where relevant.

2.2 Emergency legislation due to the coronavirus (COVID-19) which may affect the Social Services and Well-being (Wales) Act 2014 – the Coronavirus Act 2020

On 30 April 2020, the Welsh Government published the following statutory guidance on how local authorities can use temporary modifications to some elements of the *Social Services and Well-being (Wales) Act 2014* due to powers created under the *Coronavirus Act 2020*:

Adult social services during the COVID-19 pandemic: guidance – How local authorities support adults and adult carers during COVID-19

¹ The Act also affects the rules in regard to arranging and paying for care at home/non-residential services, though that issue is not covered in this particular factsheet.

A copy of the guidance can be accessed on the Welsh Government website at:

www.gov.wales/adult-social-services-during-covid-19-pandemic-html

The Welsh Government is clear that local authorities should not be abandoning the usual duties placed upon them by the *Social Services and Well-being (Wales) Act 2014* – in favour of the *Coronavirus Act 2020* measures outlined above – unless it is absolutely necessary:

“The modifications should only be exercised as a last resort where this is essential in order to maintain the highest possible level of services”.

“Local authorities should comply with the unmodified 2014 Act requirements and related Codes of Practice for as long and as far as possible” – i.e. to follow the normal rules as outlined in the rest of this factsheet.

Note: For more detailed information on this topic, see the beginning of Age Cymru’s Factsheet 10w *Paying for a permanent care home placement in Wales*.

3 Background – obtaining help from your local authority and the financial means test for care home provision

This section provides a basic background to care home charging in general, before focussing – in the subsequent sections – on issues around the choice that people have in regard to which care home they will move into, in instances where the local authority is assisting towards the cost.

For information on the charging procedures as a whole, see Age Cymru’s Factsheet 10w *Paying for a permanent care home placement in Wales*.

3.1 Assessment of needs and eligibility for services

Your local authority must carry out an assessment of your care and support needs to establish that you require a care home *before* it can assist you with the cost of the placement.

The authority must use national eligibility criteria to make this decision.

This particular issue is not covered in any detail in this factsheet, but further information can be found in Age Cymru's Factsheet 41w *Social care assessments for older people with care needs in Wales*.

Note: Under the *Social Services and Well-being (Wales) Act 2014* a local authority has a **legal duty** to carry out an assessment of anyone living in its area who *may* need community care services, once it becomes aware of this need.

Also, someone's right to have their needs assessment is **not** affected by the level of their financial resources or other circumstances. *However*, subsequent services provided as a result of the assessment are likely to be charged for. How much you pay will be determined via a financial means test – see Age Cymru's Factsheet 10w *Paying for a permanent care home placement in Wales* for further details on this.

3.2 The Welsh Government's guidance for local authorities on the financial means test

Most people who have been assessed as needing a care home will be expected to pay something towards the costs of their accommodation and personal care. Your **income**, **savings** and other **capital / assets** will generally be taken into account in determining how much you should contribute.

Note: Disregarded capital or income

There are certain types of capital and income that can be disregarded in the financial means test; or certain *situations* where they should be disregarded. For information on disregards (for either income or capital), see Age Cymru's Factsheet 10w *Paying for a permanent care home placement in Wales* and 38w *Treatment of property in the means test for permanent care home provision in Wales*.

When conducting a financial assessment of someone who needs to go into a care home – and subsequently working out what charge a service user should pay – all local authorities in Wales will need to comply with the following Welsh Government guidance document:

Social Services and Well-being (Wales) Act 2014: Part 4 and 5 Code of Practice (Charging and Financial Assessment) (version 5 – April 2020)

A copy can be accessed on the Welsh Government website at:

www.gov.wales/code-practice-charging-social-care-services

Information on choice of accommodation is contained in this Part 4 and 5 Code of Practice guidance

As well as containing information on the financial assessment of care home residents, of particular relevance to this factsheet, the above guidance also contains the information for local authorities in regard to choice of accommodation for residents when the authority is assisting with funding.

This includes the rules on when an authority may be justified in asking for a third party top-up.

See section 4 & 5 below for information on choice of accommodation and section 6 & 7 for further details on top-ups.

3.3 The capital limit

There is a ‘capital limit’ in regard to the assessment of assets and/or savings in the local authority means test. This will determine whether or not someone will be expected to meet the **full cost** of their care home placement.

The current capital limit in Wales for the care home charging means test is **£50,000²**.

Capital and savings of £50,000 and above

If you have capital assets and/or savings of £50,000 or more you will be expected to meet the **full cost** of your care home placement.

Capital and savings below £50,000

If your capital is worth less than £50,000 in total, it will be fully disregarded in the local authority means test for care home provision. **As such, you will be able to get assistance towards your care home fees from your local authority.**

In these cases, the authority will pay the whole fee to the care home, but receive an ‘assessed contribution’ from you (determined by the financial means test) to pay towards the overall cost.

Note: Although you do not have to make any contribution towards care home fees from your capital below £50,000, you will still be expected to contribute from your day to day income – for example, your State Pension, or occupational/private pension. After doing so, you will be able to keep a small amount of money for spending on personal items that are not part of your care and support package (known as the ‘*minimum income amount*’) - Age Cymru’s Factsheet 10w *Paying for a permanent care home placement in Wales* has further information.

² It’s possible that this figure could change in April 2021. If you are reading this factsheet after April 2021, you may wish to contact Age Cymru Advice for any updates on the capital limit figure – see section 10 below for contact details.

3.4 Local authority duties in regard to information & advice and advocacy

The *Social Services and Well-being (Wales) Act 2014* places duties on local authorities to provide “information, advice and assistance...relating to care and support”³. This would include information and advice on various issues around arranging and paying for care.

The Act also contains duties for authorities in regard to advocacy services. If you have difficulty in expressing your views and needs and feel that this would be excessively difficult in regard to discussions on services to be provided and how you will be charged, then an advocacy service may be of help.

In many instances, the duties that fall on the local authority will be to make people aware of the availability of advocacy support, should they wish to utilise this. Alternatively, in other situations the authority will have a specific duty to “arrange an independent professional advocate” for someone⁴.

Age Cymru’s other factsheets, 41w *Social care assessments for older people with care needs in Wales* and 10w *Paying for a permanent care home placement in Wales*, have further information on this topic.

4 A care home resident’s right to choose which home they will live in – guidance to local authorities in the Welsh Government’s Code of practice

4.1 Background

As touched upon above in section 3.2, a person’s rights in regard to choice of care home accommodation is contained within the Welsh Government’s guidance – ‘*Social Services and Well-being (Wales) Act 2014: Part 4 and 5 Code of Practice (Charging and Financial Assessment) (version 5 – April 2020)*’.

³ Social Services and Well-being (Wales) Act 2014: Part 2 Code of Practice (General Functions), Welsh Government

⁴ Social Services and Well-being (Wales) Act 2014: Part 10 Code of Practice (Advocacy), Welsh Government

There is a specific section – *Annex C: Choice of Accommodation and Additional Costs* – towards the end of the Code of Practice which focuses on the issues covered in this factsheet. The guidance applies equally to:

- prospective care home residents (i.e. those that need to enter a care home for the first time, but arrangements are still in the process of being finalised);
- “those who have already been placed by a local authority”; and
- “those who have been self funding their own residential care but who because of diminishing financial resources subsequently need local authority support”⁵.

Note: The rights which are outlined in the rest of this section below do not apply to residents whose care is fully funded by the NHS – i.e. as part of an NHS continuing healthcare package. For information on this topic, see Age Cymru’s Factsheet 20w *NHS continuing healthcare and NHS-funded nursing care in Wales*.

4.2 Moving into your ‘preferred accommodation’

The local authority care needs assessment process will have determined what type of accommodation will best suit your needs. When the authority makes arrangements for you to enter a care home, you have a right to choose the particular provider or location (your ‘preferred accommodation’), subject to certain conditions, as outlined below.

The local authority should give you information about suitable care homes in your area (for example, it may have a ‘preferred list’ of providers), though your choice should **not** be limited to those settings or individual providers with which the local authority already contracts or operates.

4.3 Conditions in regard to preferred accommodation

The authority must make an arrangement for you to enter the home you choose, provided that all of the following four points are met:

⁵ Social Services and Well-being (Wales) Act 2014: Part 4 and 5 Code of Practice (Charging and Financial Assessment), Welsh Government (version 5 – April 2020)

- 1.)

It appears to the local authority that the home you have chosen will be suitable for your assessed needs.

For example, some care homes are not necessarily able to care for people with particular types or levels of need. The Code of Practice guidance (Part 4 and 5) advises that, “in exercising choice, a local authority must ensure the care home accommodation for which a person expresses a preference is suitable to meet their assessed needs and identified well-being outcomes established as part of the care and support assessment process. In doing this authorities must take account of any specific impairment or sensory needs a person has, so as to ensure the chosen accommodation has appropriate facilities or specialist services to meet these”.

- 2.)

It is available.

The home has a current vacancy (and the room available will be suitable for your needs).

- 3.)

The cost to the local authority is not more than it would normally expect to pay for someone with *your assessed needs*.

It should be noted that the cost that the authority would reasonably expect to pay for accommodation will not be a uniform figure – it should vary, depending on the different elements of care that people may require to meet higher, or lower levels of need, or more complex types of care packages etc.

- 4.)

The provider of the accommodation is willing to enter into a contract with the local authority, subject to the authority’s usual terms and conditions for such care.

The Code of Practice guidance (Part 4 and 5) advises that, “in placing a person in a care home of their choice, a local authority must not stipulate strict or unreasonable conditions in contractual arrangements with the care home as a means to avoid or deter the arrangement and avoid meeting the person’s choice of accommodation. This includes where the local authority may need to enter into a contract with a provider that it does not currently have an arrangement with. Where this occurs, it should ensure that the contractual conditions are broadly the same as those it would negotiate with any other provider whilst taking account of the individual circumstances”.

4.4 **If your preferred accommodation is in a different local authority area in Wales; or a different part of the United Kingdom**

Welsh Government guidance confirms that if someone “chooses to be placed in a care home that is outside [their] local authority’s area, the local authority **must** still arrange for their preferred accommodation provided that the conditions...are met”⁶ (i.e. the four conditions outlined in the previous section).

Meanwhile, the *Social Services and Well-being (Wales) Act 2014* confirms that someone’s choice of accommodation extends to “the provision of care home accommodation in [any part of] the United Kingdom”⁷.

4.5 **If your local authority advises that it cannot enter into a contract with a specific home**

If the local authority refuses to arrange a place in your preferred accommodation it must have a clear, justifiable reason for doing so (for example, it may be that the authority is literally unable to arrange the placement, as the home concerned has no vacancies; or it may be that the authority is unwilling to contract with the home, as it feels it will not be able to adequately meet all of your care needs).

⁶ Ibid

⁷ Welsh Statutory Instruments 2015 no. 1840 (w. 268) – Social Care, Wales: The Care and Support (Choice of Accommodation) (Wales) Regulations 2015 – Explanatory Note

The authority should **set their reasoning out in writing** if they are unable or unwilling to arrange your preferred accommodation for you. In these situations the authority “**must also** offer suitable alternatives”, so that the person can decide on another home instead⁸.

5 Local authority limits on funding

As noted above in section 4.3, one of the basic conditions attached to the provision of preferred accommodation is that it should not cost more than the local authority would *usually* expect to pay to meet a particular individual’s assessed needs.

The local authority’s ‘usual cost’ (also referred to as ‘usual amount’, ‘usual rate’ or ‘usual limit’)

At the start of the financial year, each authority will generally set **maximum amounts** that it will be prepared to pay for *particular types* of care – i.e. there shouldn’t be a single usual cost used, as this wouldn’t reflect the realistic cost of care for those with more intensive needs – thus the level must be set at a rate sufficient to allow assessed care needs to be adequately met.

The Code of Practice guidance confirms that “when considering the cost of care in its area, the local authority is likely to have identified a range of costs which apply to different circumstances and settings”⁹.

Note: Also, be aware that these limits are not absolute and that there are circumstances in which a local authority might have to vary its usual limit. These are explained below in section 7.

⁸ Social Services and Well-being (Wales) Act 2014: Part 4 and 5 Code of Practice (Charging and Financial Assessment), Welsh Government (version 5 – April 2020)

⁹ Ibid

How the usual cost might be worked out

If you are given a figure for the local authority's usual cost, check what it represents and whether it includes the amount that you will be assessed to contribute. Often the amount given is for the **total cost of the placement including the resident's contribution** – if so, the local authority's contribution will be the usual amount *less* the resident's contribution.

For example, if the authority says its usual cost is £650 per week for someone with your needs, they may mean that this is the price that they consider a care home should charge as the total amount for the placement – the 'usual cost' for this type of accommodation. However, you will be required to make a contribution towards that figure based on their means test of your capital and income. So, as an example, the local authority might assess you as being able to contribute £200 per week, in which case the authority's total contribution would be £450 (even though the usual cost that has been stated is £650).

6 Third party 'top-up' payments for more expensive accommodation (or in specific situations, resident 'self top-ups')

If you would prefer to live in a care home that costs more than the local authority's usual cost, the local authority must arrange this provided that another person is willing to meet the difference between the usual cost and the actual level of the home's fees.

This is usually known as a top-up or third party contribution/payment.

That particular care home would also need to be suitable in the other ways already discussed above – for example, it would have to be able to adequately meet all of your care needs.

The person making the third party contribution could be a family member, friend, or other person who is willing and able to assist the care home resident on an on-going basis.

Note: In certain situations a resident may make a top-up themselves – see section 6.4 below.

If you have had to move into more expensive accommodation out of necessity

You should not be asked to find a third party to make a top-up payment if you have moved into a more expensive home out of **necessity**, rather than personal preference: **it must always be your choice** – see section 7 below for further information on this topic.

6.1 Issues to consider for the person making the third party top-up – including subsequent price increases

Anyone considering taking on the responsibility of providing a third party top-up will need to be mindful of the following:

- Any subsequent increases in the accommodation and/or personal care fees will not automatically be apportioned equally between the local authority and the third party. Therefore, if the fees increase more quickly than the local authority's usual amount, a larger top-up payment may be required. The Welsh Government's guidance confirms this point, stating that local authorities must, in writing:

Advise that “there is no guarantee that [any] increased costs will automatically be shared evenly should the provider's costs rise more quickly than the amount the local authority would have increased its funding for the care home placement. A local authority may wish to negotiate any future cost increases with the provider at the time of entering into a contract. This can help provide clarity to individuals and providers and help ensure [that the] additional cost remains affordable”¹⁰.

- Failure to meet the top-up payment obligations during the course of the agreement – or if changes in circumstances mean that it is no longer tenable for the third party to continue the payments and it is agreed to bring the arrangement to an end – may well result in the resident needing to move to alternative accommodation (within the local authority's usual cost). Section 6.3 below has some further information on this issue.

¹⁰ Ibid

6.2 Responsibilities on the local authority when agreeing to a third party top-up arrangement

The Welsh Government's Code of Practice guidance advises that:

- Local authorities must make sure it is clear from the outset that the person who will be paying the third party contribution “is willing and able to meet this for the likely duration of the arrangement, recognising this may be for some time into the future. To confirm this it would be good practice for a local authority to ask the person who is to pay the additional cost to provide proof of their financial means to do this, such as evidence of their salary or savings”¹¹.

The authority should also ensure that the points discussed in section 6.1 above are made known to the prospective third party contributor.

- The local authority remains ultimately responsible for the full amount of the care home's fees when it arranges the placement, **including** the additional cost.

“In securing the funds needed to meet the total cost of the more expensive accommodation, including the additional cost payment, a local authority has two options...[either] agree with the person paying the additional cost, and the provider of the accommodation, that payment of this will be made directly to the provider by that person with the local authority paying the remainder separately...or the person paying the additional cost pays this to the local authority. The local authority then pays the full amount for the accommodation to the provider”¹².

6.3 If a third party top-up arrangement is unable to be continued?

The Welsh Government's Code of Practice guidance addresses this issue as follows:

¹¹ Ibid

¹² Ibid

“The local authority **must** make clear in writing [that they] may seek to recover any outstanding debt from the person responsible for paying the additional cost”, should they fail to make the payments.

If the authority is unable to make an arrangement to receive the additional cost payment on a regular ongoing basis in the future, “it may have to make arrangements to meet the person’s needs in **alternative accommodation**”¹³ (emphasis added).

Note: However, the guidance does also state that “as with any change of circumstance, a local authority **must** undertake a new needs assessment before considering this course of action”.

This would need to include “**consideration of the impact on the person’s well-being that a change in accommodation may have**”¹⁴.

This is potentially significant, as in some cases an authority may agree not to move the care home resident if it was going to be particularly detrimental to their health and, in order to meet their needs, could agree to pay more than their usual cost to allow the resident to remain where they are – see section 7 below for further information on situations where either a local authority should agree to pay more than the usual cost for someone’s accommodation, *or* should at least consider exercising their discretion to do so.

6.4 ‘First party’ additional cost payments (‘self top-ups’) made by the care home resident

Generally speaking, residents are **not** allowed to make their own top-up payments and it has to be another person, such as a relative. *However*, there are a couple of exceptions to this:

- where the resident and the authority have entered into a ‘deferred payment agreement’; or
- where the resident is subject to the 12 weeks property disregard (received during the first 12 weeks of permanent care).

¹³ Ibid

¹⁴ Ibid

Residents in these scenarios **can** make up the cost of more expensive accommodation themselves, from disregarded capital or income.

An exception is made to the usual rule for people in those specific circumstances as they are considered to have enough resources themselves to pay for more expensive accommodation once the value of their home is realised.

Note: Age Cymru's Factsheet 38w *Treatment of property in the means test for permanent care home provision in Wales* has further information on deferred payment agreements and the 12 week property disregard, referred to in the bullet points above.

6.5 'Enforced' or 'informal' top-ups

Care homes should **only** ask for top-up payments where this has been pre-agreed with you as part of the local authority's contract with the home.

If the care home asks for an extra payment of some kind – that is not specified in the contract – you should query this with your local authority (also see section 6.7 below which has information on Competition and Markets Authority (CMA) advice in relation to this topic).

Extra items

Top-up payments should be distinguished, however, from charges made for *extra items* not covered by the home's basic fees and which are over and above the essential services or facilities that are required to meet someone's assessed care needs. Extra charges **are** permitted for any services of this type. If you are unsure about any request for payment, check your contract, which should set out what the basic fees cover.

6.6 Top-up reviews

The Welsh Government's Code of Practice confirms that there will be reviews of any top-up payments:

“The level of the additional cost will need to be reviewed from time to time, for example in response to any changes in:

- the needs of the person whose [care] needs are being met;
- in the level of the local authority’s commissioning of the person’s placement; [or]
- in provider costs”.

As indicated in section 6.1 above, however, “these changes may not occur together and a local authority must set out in writing in its agreement with the person to meet the additional cost how these changes will be dealt with”.

Authorities must review top-up arrangements at “least annually and in line with wider reviews of the financial assessment”¹⁵.

6.7 Advice by the Competition and Markets Authority (CMA) – ‘UK care home providers for older people: advice on consumer law’

The CMA is an independent, UK-wide, non-ministerial department. Their role includes investigating markets where there may be “competition or consumer problems” and protecting consumers “from unfair trading practices”¹⁶.

In November 2018 they published *‘UK care home providers for older people – advice on consumer law: Helping care homes comply with their consumer law obligations’*

The CMA states the 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”.

In relation to third party ‘top up’ payments the CMA’s advice document states:

¹⁵ Ibid

¹⁶ ‘CMA – About us’, GOV.UK website: www.gov.uk/government/organisations/competition-and-markets-authority/about (last accessed 16 December 2020)

If care homes “do not tell the resident and their representatives (and the third party, if this is someone else) about the option of covering [a funding] shortfall through an arrangement with the local authority, but simply ask them to cover the extra costs themselves in a private arrangement...then this is likely to infringe consumer law, as it exploits [a person’s potential] unfamiliarity with the legislation and statutory guidance relating to top-ups”.

The CMA further advises that “in order to comply with [their] consumer law obligations, [care homes] should ensure that prospective residents (or existing residents who have become eligible for local authority funding) and their representatives are fully aware that top-ups should be arranged through the local authority”. This is important as “it means that the local authority can ensure that robust contractual arrangements are in place that clearly set out where responsibilities for costs lie and ensure that the person paying the top-up understands those arrangements. It also means that the local authority can ensure the sustainability of the arrangements for the resident if there are any changes in the financial circumstances of the resident or the person paying the top-up” (as touched upon in some of the sections above).

Furthermore, the CMA advise that if a care home tells the “local authority that [they] are willing to accept the resident at the rate it has offered to pay [them], but then privately ask the resident, their representative or the third party to make additional top-up payments to cover a ‘shortfall’ as a condition of moving into the home (or in order to remain in the home), then this is likely to infringe consumer law and be inconsistent with the legislation in...Wales [and England]”. A care home is “likely to infringe consumer law where [they] 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 [for example, staff or agency costs]”.

7 When should the local authority pay more than its usual cost?

7.1 Has the service user made an active choice to move somewhere more expensive?

Only when an individual has expressed a preference for more expensive accommodation than a local authority would usually expect to pay towards, can a third party be asked for a top-up (or in certain situations, the resident themselves – see section 6.4 above).

The local authority should not request a top-up payment unless you *choose* to enter a more expensive home when:

- it can be shown that care homes suitable to meet your assessed needs are available in the area at the local authority's usual cost; and
- that there are vacancies at those relevant homes.

Note: In terms of the number of homes that the authority should be able to demonstrate are available, the Welsh Government's guidance advises that for a service user to have a "genuine choice" of suitable homes that fall within the local authority's usual cost, an authority "**must** have more than one option available for a person to choose from within its standard amount for residential care"¹⁷.

If, due to the factors outlined in the above bullet points, the authority is unable to make an arrangement for a place in a suitable home at its usual cost (and you are only entering that particular home because you couldn't find any that were cheaper), **the authority should agree to pay any extra amount necessary to secure the required care (i.e. that meets your assessed needs) and should not try to pass the extra costs on to a third party or the resident.**

This is confirmed in the Welsh Government's guidance, as follows:

¹⁷ Social Services and Well-being (Wales) Act 2014: Part 4 and 5 Code of Practice (Charging and Financial Assessment), Welsh Government (version 5 – April 2020)

“Where a person is placed in a more expensive care home solely because the local authority has been unable to make arrangements at its usual cost for such accommodation, the local authority **must** meet the difference in cost itself. The person would then contribute towards this according to the outcome of their financial assessment. The additional cost [top-up] arrangement must **not** apply in such circumstances.

Where no suitable accommodation is available at its standard amount to meet a person’s assessed needs in full, the local authority **must** arrange a placement in a suitable more expensive setting and adjust its funding accordingly to ensure that needs are met”¹⁸.

7.2 Usual costs set at unrealistically low levels / arbitrary cost ceilings

Connected to the above issue discussed in section 7.1, are arbitrary cost ceilings. Local authorities should not set arbitrary amounts or ceilings for particular types of accommodation that do not reflect a fair cost for the care. The Welsh Government’s guidance confirms this:

“When considering the cost of care in its area, the local authority is likely to have identified a range of costs which apply to different circumstances and settings [and] **it should not automatically default to the cheapest rate or to any other arbitrary figure**” when assessing whether a top-up may be required (emphasis added)¹⁹.

The local authority must be able to show that it is possible to find at least a certain amount of suitable care homes in the area at, or below, the designated price and that there are available vacancies – in other words, that the usual cost is not set so low that in reality there are no, or very few, homes that actually cost that much (the specific wording in the Code of Practice is as highlighted in section 7.1 above – that the authority “**must** have more than one option available for a person to choose from”).

¹⁸ Ibid

¹⁹ Ibid

Local authorities should not request top-ups from either residents or their families simply because they have failed to agree fees that reflect the actual cost of care provision in their area and/or market pressures mean that there are no homes in the area currently accepting residents at the local authority's usual rate (meaning, as discussed above, that you have no other option but to choose a place in a home costing more).

The market rates for care homes and a local authority's usual costs can vary from area to area.

7.3 The particular nature of someone's needs

In some situations people may need to enter a home costing more than the usual cost because of the particular nature of their needs. Examples might include:

- A specialist element to part of someone's care which some homes couldn't meet.
- Special diets and extra facilities required for cultural or medical reasons.
- Psychological and/or social needs – for example, to be in a particular geographical location where your spouse or other relatives and close friends will be able to visit easily.

Local authorities must have regard to the particular circumstances of each case. Therefore, if needs such as the above are identified the local authority should meet the extra expense, even if there are places available at the usual cost in other homes that – although they may be able to meet quite a lot of your needs – cannot meet **all** of them.

Note: If you feel that the local authority has missed or underestimated the importance of certain needs when carrying out their care assessment you could ask them to reconsider these issues – see section 9.

7.4 What will happen if a resident has previously been self funding?

As indicated earlier in this factsheet, if a care home resident has previously been self funding, but now needs local authority help towards the fees, the local authority may suggest that they will need to move to a less expensive home if the current one is above their usual cost.

However, it should be noted that when the local authority is approached for help, it should carry out a *care needs assessment* (see section 3 above) for the care home resident. This assessment should examine **all** of someone's needs, including your physical or psychological well-being and your social and cultural needs. Importantly, as part of this rounded assessment, the authority should examine **any risks involved** in moving someone who may be settled in a particular care home (for example, this could affect someone negatively who is in very poor physical health already and carry undue medical risk. Also, for someone who has dementia or another mental health issue, a move could be very unsettling to them).

If someone's existing care home is found to be the only one that can adequately meet all their assessed needs, then the cost should be met by the local authority and a top-up cannot be requested.

7.5 Existing residents where a care home becomes too expensive

Sometimes top-ups start to be required from existing residents because the local authority's usual costs have increased at a slower rate than the fees of the care home.

In such cases the resident has not *chosen* to move into more expensive accommodation; instead the home has become more expensive than the local authority is prepared to pay.

Such residents appear to be entitled to rely on the same arguments as are outlined above in section 7.4 – namely there should be a proper risk assessment regarding any proposed move, with the possible detrimental effects of moving the person fully taken into account by the authority. The local authority would also need to show that there actually was suitable alternative accommodation available **and** that this could adequately meet all care needs at their usual cost.

7.6 Human rights issues and top-ups

An individual's rights under the **Human Rights Act 1998** may also be relevant in cases involving choice of care home and whether a local authority should agree to pay more than its usual cost.

For example, there is the qualified **Article 8** right *to respect for private, family and home life* that a public authority must observe to carry out its duties legally (a qualified right means that, under certain circumstances, an interference with the right can be justified).

If an older person has been living in a care home for a significant period of time, it may be considered to be their 'home' in relation to the right to respect for your home element of Article 8. Therefore, any decision to move an older person to a different care home needs to take this into account.

The right to respect for private life also needs to be considered, "since moving an older person from a care home...where they have been resident for a long time is likely to have a serious impact on their way of life, and may mean they lose the company of friends among staff and residents"²⁰.

8 Availability of accommodation

Your preferred care home may not have any current vacancies. If it doesn't, the local authority should place you on the waiting list for your preferred home and make any necessary arrangements to meet your needs in the **interim period**.

Any interim arrangements should be in a setting suitable to meet your assessed needs, such as another care home or in your own home with an enhanced care package. If you are a hospital in-patient, it is very unlikely that remaining in hospital would be considered a suitable setting once you have been assessed as being ready for discharge.

The local authority should explain how the waiting list works and inform you of any progress. They should aim to move you into your preferred accommodation as soon as a place becomes available.

²⁰ Older People and Human Rights: A reference guide for professionals working with older people, Age UK and the British Institute of Human Rights (BIHR), March 2011

Note: “If any interim arrangements exceed 12 weeks, the [care home resident] must be reassessed to ensure that both the interim arrangement and the preferred option are still able to meet [their needs] and that [this] remains their choice”²¹.

The authority may also check whether you might at this stage prefer to remain in the interim accommodation and opt to make this a permanent arrangement.

Interim accommodation and top-ups

While you are staying in interim accommodation, and if you subsequently choose to remain there on a long-term basis, the rules on top-up payments are the same as those set out above in section 7.

9 Making a complaint to the local authority – disputes around choice of accommodation or top-ups

If you are not satisfied with any aspect of the service that you receive from a local authority, you can make a complaint. This will include in regard to the main topics covered within this factsheet – for example, if you believed the local authority was not offering you adequate choice in care home accommodation or was unjustly asking for a top-up.

Further information on the local authority’s complaints procedure can be found in Age Cymru’s Factsheet 59w *How to resolve problems and make a complaint about social care in Wales*.

²¹ Social Services and Well-being (Wales) Act 2014: Part 4 and 5 Code of Practice (Charging and Financial Assessment), Welsh Government (version 5 – April 2020)

10 Useful organisations

Age Cymru Advice

Free and confidential information and advice on matters affecting the over 50s in Wales.

Tel: 0300 303 44 98

E-mail: advice@agecymru.org.uk

Website: www.agecymru.org.uk/advice

Age Cymru organisations (local)

Your local Age Cymru may be able to provide advice and support on a range of issues. **Age Cymru Advice** can provide details of your local Age Cymru (see above), or visit the Age Cymru website at:

www.agecymru.org.uk/local

Care Inspectorate Wales (CIW)

CIW inspects and regulates care and social services in Wales.

Tel: 0300 7900 126

E-mail: ciw@gov.wales

Website: www.careinspectorate.wales

Carers UK

A national charity providing information and advice for carers.

Advice Line: 0808 808 7777

Website: www.carerswales.org

Citizens Advice Bureaus (CABs)

National network of free advice centres offering confidential and independent advice, face to face or by telephone.

Tel: 0800 702 2020

Details of your nearest CAB can be found at:

www.citizensadvice.org.uk/wales

Elderly Accommodation Counsel (EAC)

Provides information on all forms of accommodation, support and care for older people.

EAC FirstStop Advice: 0800 377 7070

E-mail: info@firststopcareadvice.org

Website: www.eac.org.uk

Equality Advisory & Support Service

A helpline that can advise people on equality and human rights issues.

Tel: 0808 800 0082

Website: www.equalityadvisoryservice.com

Older People's Commissioner for Wales

Independent champion for older people across Wales.

Tel: 03442 640 670

E-mail: ask@olderpeoplewales.com

Website: www.olderpeoplewales.com

Public Services Ombudsman for Wales

The Ombudsman looks to see whether people have been treated unfairly or have received a bad service from a public body, such as the local authority social services department, or the NHS.

Tel: 0300 790 0203

E-mail: ask@ombudsman.wales

Website: www.ombudsman.wales

Relatives & Residents Association (The)

The Relatives & Residents Association gives advice and support to older people in care homes, their relatives and friends.

Tel: 020 7359 8136

Website: www.relres.org

Welsh Government

The devolved government for Wales.

Tel: 0300 060 4400

E-mail: customerhelp@gov.wales

Website: www.gov.wales

11 Further information about Age Cymru

Age Cymru is the national charity for older people in Wales.

We campaign, we research and we fundraise to make sure we build a better life for all older people. We ensure older people's voices are heard, we challenge and change attitudes and we fight discrimination wherever we find it.

We provide a range of national and local services and programmes directly to older people in the community and we ensure the highest standards so you can be assured of consistency and quality wherever you see the Age Cymru name and logo.

Our family includes local Age Cymru partners and national partners, Age NI, Age Scotland and Age UK.

Our information materials

Age Cymru and Age UK publish a large number of free Information Guides and Factsheets on a range of subjects, including money and benefits, health, social care and housing. Some resources, such as this factsheet, are produced 'in-house' by Age Cymru, whilst others are branded Age UK and – depending on the subject matter – contain either information which is applicable in England and Wales, or for the whole of the UK.

Contact details

Age Cymru Advice

Tel: 0300 303 44 98 (9am to 4pm, Monday – Friday)²²

E-mail: advice@agecymru.org.uk

Website: www.agecymru.org.uk/advice



www.facebook.com/agecymru



www.twitter.com/agecymru



www.youtube.com/agecymru

Contact us if you would like:

- To order copies of any factsheets or information guides.
- Further advice if you cannot find the information you need in this factsheet.
- Details of your nearest local Age Cymru organisation.

²² 0300 numbers are reserved exclusively for charities and not-for-profits. Calls made to an 0300 number are charged the same as a call to a standard 01 or 02 number. They are also automatically included in any landline or mobile inclusive minutes package.

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