



Business in Focus



# Fair trading for care homes

**A guide for registered managers and care home owners**

Making sure your business complies with consumer law



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This publication reproduces in part content from the latest Competition and Markets Authority (CMA) guidance, *UK care home providers for older people – advice on consumer law: helping care homes comply with their consumer law obligations*, which was first published in November 2018. This booklet also reproduces consumer law content from the Business Companion website. As well as including a broad overview of the CMA’s guidance, it also contains complementary training sheets to help care home owners and registered managers comply with the law. However, for a complete overview of all the requirements, care home owners and registered managers are advised to visit the CMA’s website ([www.gov.uk/government/publications/care-homes-consumer-law-advice-for-providers](http://www.gov.uk/government/publications/care-homes-consumer-law-advice-for-providers)) to read the full guidance.

# Foreword

## Leon Livermore, Chief Executive, Chartered Trading Standards Institute

Fairness sits right at the heart of what trading standards is about. It is in all of our interests to ensure that businesses are able to operate on a level playing field, and that consumers are protected from exploitation. The latter issue is particularly important when those consumers are likely to be in a vulnerable situation – as is so often the case when they find themselves having to use the services of a care home.

Anyone operating a care home in a responsible manner – or anyone running any kind of legitimate business for that matter – should already have some understanding of the basic principles of fair trading and consumer law. But it is important for care home owners, managers and staff to be aware of their specific legal responsibilities to residents and their representatives.

Getting this right is not just essential to staying within the law; it is also a fundamental part of treating people with fairness and dignity at a time when they are likely to need it most.

The Competition and Markets Authority (CMA) recently conducted a review into the care homes sector in order to identify areas where care homes can do a better job of treating their residents more fairly, with a view to putting a stop to things like the use of unfair terms, aggressive commercial practices, or misleading communications.

A broad overview of the consumer law guidance produced by the CMA following that review is given in this booklet, which is designed to provide practical, useful information to care home owners and managers that will help them stay on the right side of consumer law.

Entities such as the CMA, trading standards, Government and the care homes sector itself all have a duty to make sure people are treated fairly. We also all have role to play, as a society, in looking after the best interests of those most in need of care and protection. Hopefully the information contained on the following pages will help us do that better.

“Getting this right is a fundamental part of treating people with fairness and dignity at a time when they are likely to need it most.”

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## Guidance key

Throughout this booklet symbols are used to draw your attention to important information or where additional information can be found, to warn you against possible bad practice and to show examples of possible good practice.

-  **Warning**
-  **Important/additional information**
-  **Don't!**
-  **Do!**

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At the time of writing, significant reform of adult social care was ongoing across all four UK nations. For example, the publication of a green paper – which is expected to define the long-term reforms of the social care system in England – was still awaited as this guide was being produced. To read more about the green paper, visit: [www.gov.uk/government/news/government-to-set-out-proposals-to-reform-care-and-support](http://www.gov.uk/government/news/government-to-set-out-proposals-to-reform-care-and-support); [researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8002](http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8002)

## A guide to fair trading and fair terms

The care homes sector across the UK offers an invaluable service to older people aged over 65 and their families.

When a person chooses to move into care, it will inevitably be one of the biggest and most emotionally charged decisions they, their family, or other representative acting on their behalf make, which is often taken at a time of crisis, or when a person is in poor health. Decisions are likely to be made with urgency and under extremely distressing and pressurised circumstances. This means that people's capacity and time available to read and understand information about your care home may become limited. If this information isn't provided with this in mind, it can lead to people making the wrong care home choices for their own, or their relative's, needs.

### A new review of the market

Competition and consumer watchdog, the Competition and Markets Authority (CMA), considered these aspects when it conducted a review of the sector, which found that some residents were at risk of being treated unfairly. As a result, in November 2018, it issued new, in-depth guidance on a range of areas that have caused concern, to help care home owners and registered managers to comply with consumer law. Part of that guidance relates to how care homes should treat residents and their representatives fairly to comply with their obligations under consumer law and, in particular, ensuring that your contract terms are fair, clear to read and understand.

This guide intends to support you as a care home owner or registered manager in complying with this particular element of the CMA's guidance, and supplies a variety of practical staff training sheets and checklists to help you accomplish this.

### Consequences of breaking consumer law...

While this guidance is intended to support you, you should also consider what can happen should you be found to be infringing consumer law.

The consumer law discussed in this guide applies throughout the UK and sits alongside the sector-specific rules and guidance that apply to care homes in England and each of the devolved nations.

If you infringe consumer law, the CMA, local authority trading standards services, or the Department for the Economy in Northern Ireland may take enforcement action against you – either in the civil or criminal courts. Enforcers of consumer law can also seek redress for residents who have suffered a loss as a result of breaches of consumer law.

If you treat your residents unfairly, the sector regulators may also take action in respect of any breaches of the relevant rules and regulations they are responsible for enforcing.



To find out more in-depth information about consumer law and how it affects your business, you can visit the Business Companion website [[www.businesscompanion.info](http://www.businesscompanion.info)] or the Competition and Markets Authority's website [[www.gov.uk/government/organisations/competition-and-markets-authority](http://www.gov.uk/government/organisations/competition-and-markets-authority)].

# Consumer law: Treating residents fairly

## Consumer Contract Regulations 2013

As a care home owner or registered manager, it is important to understand the rights and principles set out in consumer law and your obligation to ensure that residents, potential residents and their representatives are treated fairly. You are responsible for practices carried out by your staff, and anyone acting on your behalf or in your name, so it is important to have clear processes in place to reduce the chances of infringing consumer law and to check that these processes are being followed. You should also ensure that your staff – and anyone acting for you or in your name – are properly trained in the key areas of consumer law.

An overview of the main consumer laws you need to be aware of, and how they may affect you and your care home, are outlined on the following pages.

The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (CCRs) apply to most on-premises, off-premises and distance contracts between traders and consumers. The regulations set out pre-contract information you should provide to consumers before they enter into a contract with you. This information should be clear and easy to understand. The CCRs also set out the cancellation periods for distance and off-premises contracts, as well as banning the use of premium-rate helplines for consumers contacting you in connection with a contract and negative option practices, such as the use of pre-ticked boxes to sell additional products.

### Types of contract

There are three types of contracts. The type of contract you enter into with a resident will determine the information you are required to give to them before they enter into a contract with you, and whether the resident has any mandatory cancellation rights.

The three types of contract are explored here.

**Off-premises contracts:** these are contracts that are concluded when you are with a resident away from your business premises, such as contracts entered into at a resident's home or in the hospital. They may also cover situations where a resident or their representatives make an offer to enter into a contract at any of these places, or if they enter into a contract on a trip organised by your business to promote your services. Contracts concluded by distance means or on your business premises immediately after you have negotiated with the resident away from your business premises are also covered. For example, if you visit the resident at their home and then drive them to the care home to sign the contract straight after the visit.

**Distance contracts:** these are contracts negotiated and agreed by one or more organised means of distance communication, such as over the telephone or email, and without any face-to-face negotiation with the resident.

**On-premises contracts:** these are contracts which are not a distance contract or off-premises contracts. This includes contracts entered into at a care home by a resident.

If you only enter into on-premise contracts, the *Care home communications* booklet on the Business Companion website [[www.businesscompanion.info/focus/care-homes-communications](http://www.businesscompanion.info/focus/care-homes-communications)] sets out the information requirements you need to comply with, and when this information should be given. If you enter into off-premises or distance contracts, additional information about your responsibilities can be found below.

### Off-premises and distance contracts

If you enter into contracts with your residents that are off-premises or distance contracts, you must ensure that the resident and their representatives are made aware of any right they have to cancel the contract before they are bound by it. The cancellation period will normally be 14 days, starting the day after the day on which the contract was made.

In particular, you must give the resident certain additional information before they are bound by the contract, which includes:

- Cancellation rights – including conditions, timings and methods of cancellation. Where a right to cancel exists, the resident and their representatives must be given the model cancellation form supplied in the CCRs
- The requirement to pay a reasonable amount for services supplied during the cancellation period, where they expressly request the service to start before the 14-day period ends



**Failure to provide this information to residents who have entered an off-premises contract could mean that you commit a criminal offence under the CCRs. Failure to provide any of the other information requirements for an off-premises contract, or any required information for a distance contract, is a breach of your contract with your resident.**

### Beginning a service within the cancellation period

Where a resident expressly requests that your service begins immediately, they must do this on a durable medium – such as in writing – if they have entered into an off-premises contract with you. For both

off-premises and distance contracts, residents and their representatives must have been made aware, before being bound by the contract with you, that they can cancel the contract within the 14-day period, but will have to pay a reasonable amount for any service that they have received up until the date of cancellation.



**You will not be able to charge a resident for any services received during the cancellation period if you do not tell them – before entering into a contract with them – that they will have to pay a reasonable price for any services received during this time, or if you did not get their express permission to start the service within the cancellation period.**

### **MORE INFORMATION**

For more advice relating to these types of contracts, read the following guides on the Business Companion website:

**Off-premises contracts:**

[www.businesscompanion.info/en/quick-guides/off-premises-sales/consumer-contracts-off-premises-sales](http://www.businesscompanion.info/en/quick-guides/off-premises-sales/consumer-contracts-off-premises-sales)

**Distance contracts:**

[www.businesscompanion.info/en/quick-guides/distance-sales/consumer-contracts-distance-sales](http://www.businesscompanion.info/en/quick-guides/distance-sales/consumer-contracts-distance-sales)



If a resident is not given pre-contract information about their cancellation rights, their right to cancel the contract can be extended by up to an additional 12 months.



A practical guide summarising key consumer law areas to consider when planning your procedures, processes and training of staff can be found on page 32 of this booklet.

## Unfair trading regulations 2008

The Consumer Protection from Unfair Trading Regulations 2008 (CPRs) prohibit traders from using unfair practices in their dealings with consumers. The CPRs apply to all care homes and your dealings with potential and existing residents, their family and other representatives.

The CPRs apply to any commercial practice you engage in with a resident either before, during or after they enter into a contract with you. They also apply if, for example, a potential resident makes enquiries with you and then decides that your care home isn't right for them and doesn't enter into a contract. The information you provide on your website, advertising materials and any information that is given to residents by phone, email or face to face, the way you enforce your terms and conditions and your complaints handling procedure are all considered commercial practices.

### Misleading actions and omissions

The CPRs prohibit unfair commercial practices, including misleading actions and misleading omissions. For a practice to infringe the CPRs, it must normally cause, or be likely to cause, the average consumer to take a different transactional decision as a result.

**Misleading actions:** these are where a practice contains false information about a wide range of things listed in the CPRs, or if its presentation is deceptive – even if the information is factually correct – and causes (or is likely to cause) the average resident, family member or representative to take a decision that they would not have taken otherwise. This includes information relating to your prices and how they are calculated, the main characteristics of your services – such as your accommodation and facilities – their need for a particular service, or your experience or qualifications.

**Misleading omissions:** these occur when your practice omits or hides 'material information' that the average resident or their representatives need to take an informed decision, or where you provide it in a way that is untimely, unclear, ambiguous or unintelligible. The practice must also cause, or be likely to cause, the average resident or their representatives to take a different transactional decision as a result. Material information must be provided to consumers when they need it – whether or not they have asked for it. See the *Care home communications* booklet on the Business Companion website [[www.businesscompanion.info/focus/care-homes-communications](http://www.businesscompanion.info/focus/care-homes-communications)].



**A term stating: 'Residents must always pay their fees in full, and must not withhold payment of fees under any circumstances,' may be an unfair term and, if so, would not be binding on a resident. However, if a resident believed they were bound to follow the term, it may affect their decision to pay their fees in full or not where, for example, they have an arguable claim against you and could therefore be considered a **misleading action**.**

### Aggressive commercial practices

These are practices that intimidate or exploit consumers through **harassment, coercion or undue influence**, significantly impairing the average consumer's ability to make free or informed choices, and which cause, or are likely to cause, them to take a different transactional decision as a result. Aggressive practices include physical and non-physical pressure, such as psychological pressure, use of threatening language, or taking advantage of the consumer's position or vulnerability – for example, by threatening to evict the resident or impose a visitors' ban unless they withdraw a complaint.

#### TRANSACTIONAL DECISIONS

Under consumer law, the concept of 'transactional decision' should be interpreted broadly. It covers a wide range of decisions that are open to potential residents and their representatives, including making a decision to:

- Browse your website
- Make initial enquiries about your services
- Visit your care home
- Pay for additional services
- Raise or pursue a complaint or concern
- Leave your care home

### Banned practices

The CPRs set out a list of 31 specific practices – sometimes referred to as 'banned practices' – that are considered unfair in all circumstances, whether or not they affect people's decision making. Examples of banned practices are likely to include:

- Falsely stating you are signed up to a trade body's code of conduct
- Advertising a room at a specific price where you either don't have any of those rooms available, or where you are using this price as 'bait', to then upsell a more expensive room to a resident, their family or representatives
- Falsely stating a room/service is only available for a very limited time, or only available at a certain price for a very limited time, to put pressure on the resident and their representatives to make a decision
- Describing any of your services as 'free,' 'gratis,' 'without charge' or similar if there is any cost to the resident, their family or representatives, other than any unavoidable cost of responding to the offer
- Making persistent and unwanted calls, faxes or emails, or visiting a resident's home or the homes of their family or representatives and refusing to leave, except in circumstances and to the extent justified to enforce a right under a contract.

### The average consumer test

Outside of the banned practices, for your practice to infringe the CPRs you must consider whether it causes, or is likely to cause, the 'average consumer' to take a different decision to the one they would otherwise have taken. For care homes, the 'average consumer' test is likely to require you to consider the effect of your practices on the average resident and their representatives.



**In assessing whether you are complying with consumer law, 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, who will likely be under time pressure and emotional stress, and the fact that they are unlikely to be familiar with the process of choosing a care home.**

## You have a general duty to trade fairly

The CPRs also set out a general duty to trade fairly. You must not breach the requirements of **professional diligence** and materially distort the economic behaviour of the resident or their representatives. This means impairing a potential resident or their representatives' ability to make an informed decision that causes them to make a different transactional decision.

## CPR remedies – actions open to a resident

The CPRs enable residents to take action for breaches of the CPRs in certain circumstances – namely misleading actions and aggressive commercial practices that cause a resident to enter into a contract or pay

money. The remedies available are:

- **The right to 'unwind' the contract within 90 days** from when the service began. A resident can only use this remedy if the service has not been fully completed and they can still reject some of the service. The resident cannot unwind the contract if they have already claimed a discount in price for the service due to a misleading action or aggressive practice. Unwinding the contract means 'undoing' the contract and putting you and the resident in the positions you were in before it was made. The resident may be entitled to receive all, or a percentage of, the amount they paid for the service. If the resident has received the service for over a month, they have to allow for the benefits they have received under the contract; or

- **The right to a discount** – this applies if the resident has lost their right to 'unwind' the contract because they are outside of the 90-day period, or the service has been fully performed, such as a short-term period of respite care. For services costing less than £5,000, the discounts range from 25 per cent for more minor issues to 100 per cent for serious cases. The behaviour of the person who engaged in the practice, its impact on the resident and the time that has elapsed must all be taken into account when deciding how serious it is.



**Professional diligence** means the standard of special skill and care that you may reasonably be expected to exercise towards your residents and their representatives, in line with honest market practice and good faith in your sector. Sector-specific laws, regulations and the standards or guidance published or enforced by sector regulators may inform the standard of professional diligence that you are expected to meet.

### CPR REMEDIES – THE CRITERIA

The remedies available to residents under the CPRs are only available if:

- An aggressive practice or misleading action has taken place. The remedies don't apply where there is a misleading omission or a breach of your general duty to trade fairly, for example:
- The resident has entered into a contract with you for your services, or makes a payment to you for your services, even if they haven't signed a contract with you. See 'Trading fairly – an introduction' on page 18 of this guidance for more information about taking payments before assessment, or offering the resident a place
- The misleading action or aggressive practice was a significant factor in the resident's decision to enter into a contract

### Consumer Rights Act 2015

#### When a resident can claim damages

A resident may also be able to claim damages where they have suffered financial losses as a result of your infringement of the CPRs. These damages may include compensation for any alarm, distress and physical inconvenience or discomfort, caused by a misleading or aggressive practice.

#### THE CMA SAYS...

When considering whether a practice infringes the CPRs, it is important – and relevant under the CPRs – to remember 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.

There are two main parts to the Consumer Rights Act 2015 (CRA). Part One sets out rules relating to the supply of goods, services and digital content to consumers, while Part Two deals with the law relating to unfair contract terms and notices. For example, the CRA sets out information such as:

- Your responsibilities to consumers, covering the services that you supply to them and also any goods that you may supply as part of your service
- Your residents' rights as a consumer
- Actions that a consumer can take if you infringe consumer law



**The CMA considers that running a care home with reasonable care and skill will require you to ensure that residents' needs are met in a caring environment. For example, there must not be carelessness or a lack of thoroughness on your part.**

#### CRA Part One: Resident's rights – service contracts

The CRA says that, when providing your service, you have a duty to make sure that:

- The service is carried out with **reasonable care and skill**. For example, you should treat residents with dignity and respect and involve residents and their representatives in decisions about their care and treatment
- Anything that is written or said to the resident or their representatives about you or your service by you or on your behalf becomes part of the contract when that information is relied on, either before or after entering into a contract
- Where the price for your goods and services has not been agreed, or information on the cost and how it will be calculated has not been included in the contract, the **price must be reasonable**
- The service is carried out within a **reasonable time**, where no timeframe has been agreed

## Remedies when service-contract rights are not met

If your responsibilities under consumer law for service contracts are not met, the CRA sets out remedies that a resident is entitled to, which can include – where relevant – repeating the service, or giving the resident a price reduction.



A price reduction can be up to 100 per cent of the price a resident paid for your service. A resident, their family or representatives may also have the right to claim damages to cover any financial losses they may have suffered instead of – or as well as – trying to obtain a price reduction or repeated service.

## Residents' rights – goods contracts

If you supply any goods to residents as part of the services you offer, such as meals, they will also have the right for those goods to be:

- **Of a satisfactory quality** – in law, goods must be of a standard that a 'reasonable person' would find satisfactory. Satisfactory quality takes into account factors such as the price paid and the safety and durability of goods. For example, any food served to residents must be safe and not be past their use-by date
- **Fit for a particular purpose** – goods must be suitable for being used in their normal way, or a way that the resident has indicated they want to use it for, such as making sure food served to a diabetic resident is fit for them to consume
- **Match any description, model or sample** – your food menu must match the food actually being served to residents
- **Installed correctly**

## Remedies available under goods contracts

If any goods supplied to your residents do not meet the requirements for goods contracts, they may be entitled to:

- Reject the goods and seek a full or partial refund
- Seek a repair or replacement
- Seek a reduction in the price they have paid

They may also be able to claim other remedies – such as damages – for any costs incurred that are not covered by the remedies set out in the CRA.

### THE CMA SAYS...

The regulatory requirements enforced by your sector regulator and their 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. However, compliance with these regulatory requirements is only an element of your obligation under consumer law to ensure that the services you provide to residents are performed with reasonable care and skill. It is not the only measure of whether you are meeting this consumer law obligation.

### CRA Part Two: Unfair contract terms

Part Two of the CRA sets out the law on unfair consumer contract terms and notices. You must ensure that your consumer contract terms and notices are fair and are not weighted too much in your favour. If this were to occur, it could cause a 'significant imbalance', to the resident's detriment.

#### The fairness test

The CRA applies a test of fairness to contract terms and notices between you and your residents, which takes account of what the contract is about, all the circumstances existing when a contract was agreed, all the other terms of that contract and any other relevant contract.

#### FOR MORE INFORMATION

To help you comply with your consumer law obligations when writing terms and conditions, there is a practical checklist on page 34 of this booklet. It is also important to train your members of staff who may deal with enquiries from a potential resident, their family or representative, to ensure they understand the terms, can explain them clearly and answer any questions. Page 32 of this guide gives an overview of consumer law to assist with training your staff.

#### The 'grey list'

The CRA contains a list of terms that may be regarded as **unfair** – known as '**the grey list**'. This also applies to terms that have the same purpose or effect as terms on the grey list. However, these terms are not *automatically* unfair, as all the circumstances have to be taken into account. Also, terms that do not appear on the grey list can still be unfair if they fail the fairness test. The grey listed terms cover issues such as:

- Residents being denied full redress if things go wrong. This includes terms that restrict some of the rights and remedies covered in this guidance
- Residents unfairly losing prepayments after the contract comes to an end
- Terms that allow you to arbitrarily vary terms of the contract, such as raising your fees without a valid reason which is specified in the contract
- Terms that allow disproportionate financial sanctions against residents for terminating their contract with you



Any term that gives you as a care home owner or registered manager the freedom to make significant changes at your sole discretion, or on very short notice, is likely to be unfair under consumer law. All terms and notices you use **must be fair**.

#### CONSUMER NOTICES

For ease, this booklet refers to your consumer contract terms throughout, but the fairness requirements of the CRA also apply to your consumer notices. A consumer notice is wording that does not necessarily form part of your contract with a resident, but sets out rights and obligations between you, or which attempts to restrict your liability to a resident. Notices can include statements made in writing or orally, such as information published on your website, placed in residents' rooms and information in welcome packs and brochures, or even what a staff member might say to a potential resident before they agree to move into your home. These statements are treated in the same way as if they were a term in your contract with residents.



The wording used in your terms should be simple, clear and informative, so that residents and their representatives can genuinely understand and assess their rights, obligations and the financial consequences for them, before making decisions.

## User-friendly, clear and unambiguous terms

Having clear terms and conditions that can easily be understood by your residents will make it easier for them to decide if your care home is right for them and will save you time, by reducing the amount of questions that potential residents need to ask. Giving a potential resident and their representative all the important information they need to make an informed choice will also help them to understand what their rights and obligations are under the contract, and also what your rights and obligations are, too. This should reduce the likelihood of disputes.

## Blacklisted terms

Terms that allow you to **exclude or restrict your liability** to residents when you are at fault are **likely to be considered unfair**. Residents have rights under consumer law, such as the right to receive a service that is provided with reasonable care and skill. In law, if these rights are breached, the resident is entitled to a suitable remedy. Remedies can include the right to seek damages, or to have a reduction in the price the resident has paid for their service.

In addition to the grey list, the CRA says terms that take away or reduce certain consumer rights under the Act, or which try to prevent them from seeking a remedy they are entitled to in law, are not binding on consumers ('blacklisted'). Blacklisted

terms are considered automatically unfair and you cannot rely on them or enforce them against your residents. For example, you cannot restrict your liability for death or personal injury caused by the negligence of you or your staff.

### THE CMA SAYS

A term that is potentially surprising or particularly difficult to understand is likely to require greater prominence in the upfront information that you provide to potential residents and their representatives, compared to terms that are easier to understand.



A term is likely to be considered unfair if it puts the resident or their representatives at an unfair disadvantage. The law applies a 'fairness test' that starts by asking whether the wording used tilts the rights and responsibilities between the resident and you too much in your favour. An important question to ask is whether you think a resident who is properly advised, and whose interests you are taking into account, would actually agree to the term.



If your terms and conditions are not transparent, this does not automatically make them unfair. However, transparency of written terms is a requirement of the CRA and if your terms have more than one meaning, the courts will apply the meaning most favourable to the resident.



Terms that specify the main subject matter of your contract, or set the price of your services, cannot be assessed for fairness – provided that they are **transparent** and **prominent**. Where they are not, they can be assessed for fairness. Terms that must be included because they reflect mandatory legal provisions cannot be assessed for fairness either.

### FOR MORE INFORMATION

To help you avoid terms that exclude or restrict your liability to residents when you are at fault, a practical checklist and an example of a term more likely to be fair can be found on pages 34 and 35 of this booklet.

## Trading fairly: an introduction

You must ensure that your standard terms and conditions are brought to the attention of a potential resident and their representative **in good time** before you make them an offer of a place – this means that they should be provided, at the latest, by the time they agree to have a care needs assessment. This gives them a real opportunity to read and understand their rights and responsibilities under the contract, before being bound by it, so that they can make an informed decision about whether or not your home is right for them. Your terms should therefore be easy for people to find –

for example, your standard contract for self-funded residents should be clearly signposted on your website and included in information packs you send to enquirers.

You should consider where, how and when the information about your home and its services is provided to a potential resident and their representatives, to make it as easy as possible for them to read and understand the terms they are agreeing to. The *Care home communications* booklet on the Business Companion website [[www.businesscompanion.info/focus/care-homes-communications](http://www.businesscompanion.info/focus/care-homes-communications)] sets out what

information should be supplied and when it should be given.

It is important that potential residents and their representatives have the chance to read and understand any terms that apply to them in good time before you make them an offer of a place in your home. Terms that bind residents to contract terms they have not had a reasonable opportunity to become familiar with or understand are likely to be unfair under consumer law, and may not even form part of the contract.

Some scenarios that could be considered unfair are explored on the following pages.

Before you make a potential resident and their representatives an offer of a place at your home, it's worth bearing in mind what steps they will take along their 'care home journey'.



### **STEP 1** **Creating a shortlist**

Typically, a person's first step in finding a care home involves researching and shortlisting available homes in a particular place.



### **STEP 2:** **Visiting your home**

If someone likes what they've learnt about your home so far, they will usually arrange a visit to follow up on their initial interest, before making a final decision about whether or not to commit.

**IN 'GOOD TIME'**

Providing important, additional information in 'good time' means that it must be provided – at the latest – by the time a potential resident, family member or representative agrees to have a care needs assessment. This is because, whilst a person's commitment to a home will grow during the course of their dealings with the home, starting with their first contact, once they have agreed to a care needs assessment, they are likely (for all practical purposes) to be fully committed to securing a place in your particular care home.

“Your terms should be easy for people to find.”



**STEP 3:**  
**Agreement to have a care needs assessment**

The first two steps may culminate in an agreement to have a care needs assessment, by which time the potential resident will, for all practical purposes, have become fully committed to your home.



**STEP 4:**  
**Confirmation of final offer**

Once the prospective resident has decided to go ahead with a particular home, they will have a care needs assessment and select the particular services they want to receive. Following this, and provided you're happy your home can cater for a person's needs and that your costs can be met, you confirm the offer of a place to the resident or their representatives – including the final, total amount that the resident will need to pay.



**STEP 5:**  
**Resident accepts final offer**

If the resident is happy with everything you've discussed, they will accept your final offer and sign a contract.

### Where terms may be 'hidden' in different documents

Where your terms are deemed to be accepted by a resident signing a contract, but linked terms are not all contained in one document - instead being located in several documents that are in different places, or are given to a potential resident or their representatives at different times (making them difficult to find and review) - this is likely to be considered unfair. The terms that are not actually presented to the consumer might not be incorporated into the contract at all.

### When you ask for payments before an assessment or a place is offered

⚠ Where you require a potential resident or their representatives to make a payment to you before their care needs assessment is completed, or before you have clearly offered them a place which is then accepted, this is **likely to be considered unfair**. In these circumstances they will not be aware of key terms of the contract, such as the cost of their residential fees, and they will not have had a reasonable opportunity to consider these other terms.



The CMA says it would consider a requirement for a potential resident or their representatives to make a payment before a care needs assessment is done or a place has been offered and accepted as unfair – even if the money is refundable – because it is likely to restrict the potential resident's ability to shop around, and creates a disproportionate sense of obligation on them to proceed with the transaction. The CMA also fails to see the business need for taking such sums at this stage. See the CMA's advice for more detail about its concerns around upfront payments.

### When you declare terms binding before a contract has been signed

⚠ Where terms are said to be binding on a resident even if a contract has not been signed, this is also **unlikely to be considered fair**.

#### GETTING IT WRONG

The following are examples of terms that are **likely to be considered unfair** under consumer law:

⊗ *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.*

## Trading fairly: changing your terms

One area that is referred to in the 'grey list' (see page 14), is unilateral changes made to contracts (after a resident has become bound by the terms). It is important that your contracts are fair and balanced, and clearly set out what services a resident is entitled to and the circumstances where the terms of your contract may change. The clearer the terms of a contract are, the easier it will be for a potential resident, family member or representative to understand their rights once a resident moves in.

Terms that enable you to make changes after a contract has been signed are generally known as variation clauses.

### What are variation clauses?

Your contract should clearly set out the specific circumstances in which your terms may be amended (which should be narrow) and give enough information for a potential resident and their representatives to foresee and understand what, when and how these changes may be made – before they accept an offer of a place. These terms are called 'variation clauses'. This will help them to make an informed decision about whether your care home is right for them.

⚠ Using terms that say things such as 'only reasonable changes will be made', are unlikely to be considered fair as they are too vague and give you too much discretion to make changes to the resident's detriment. They would also not help potential residents and their representatives to foresee what changes could be made and the impact these may have.



Giving notice of a change and the right for a resident to end their contract without penalty before it takes effect is **unlikely ever to be enough to offer sufficient protection** in this sector. 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.

### FOR MORE INFORMATION

It is important that you ensure any variation terms within your contract comply with consumer law. To help you, there is an example of how to write a variation term on page 36 of this booklet.

In summary, variation clauses should:

- Be accurate and unambiguous
- Set out the specific circumstances when your terms (or service) may be changed, such as making minor changes, changes that are necessary to give effect to new laws or changes that benefit residents – that is, valid reasons. Where the price to be paid under the contract may be changed, the variation should be linked to a relevant, objective and verifiable price index, so that it is clear that you cannot change the price arbitrarily



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 considered fair** under consumer law.

- Be clear and transparent
- Confirm that advance written notice will be given to residents and their representatives of any changes
- Give a resident and their representatives enough time – that is, at least 28 days – for them to give notice and leave your home before the changes come into effect
- Set out the rights of residents if they do not wish to accept the variation, which should include a right to pro-rata refunds of any pre-payments for use of their room or services not yet provided, and a full refund of any deposit if they decide to move out before the variation takes effect

The narrower in scope and effect a variation clause is, the more likely it is to be fair.

### Major unexpected changes

Variation clauses should allow you to make only foreseeable changes, such as annual increases in fees in line with inflation or improvements in working practices. However, there may be exceptional circumstances that are outside your control when a major, unexpected change is required, which has not been foreseen, or has not been covered in the contract. In these situations, particularly where the change may reduce the resident's benefits or be disadvantageous to them, you should:

- Give extensive notice to the resident and their representatives about the proposed change
- Engage in meaningful consultation with the resident and their representatives
- Get their consent to make the changes



Meaningful consultation means that you should give residents reasonable time to consider the proposed changes and listen to their views before making any final decisions. Merely telling a resident about the changes, or consulting with them when you have already made a decision, is unlikely to be meaningful. It is a good idea to explain clearly what the consultation process is and how any decisions will be made.

**GETTING IT WRONG**

The following terms are likely to be considered unfair under consumer law:

✘ *We reserve the right to make changes to our terms or service at any time by serving seven 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.*

**GETTING IT RIGHT**

✔ The following terms are more likely to be considered fair under consumer law:

*You must observe the resident rules and regulations, which shall be made available for you to inspect in our 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 supply to you. In all cases, we will consult with you and your representatives about proposed changes and give you six weeks' notice before any modification takes effect. If you object to any modifications you have the right to terminate this agreement without penalty.*



Major unexpected changes are likely to require a fundamental change to a contract, and so should not be made without consultation with a resident and their representatives, and should only be made in exceptional circumstances and with their consent. If you change the terms of a contract without the resident's consent, you may have to pay damages to them for breaching the terms of your contract. You may also infringe other consumer law, such as the CPRs.



Terms that give you a lot of discretion or allow you to make changes at short notice – especially if the resident has no say – **are likely to be considered unfair**. These types of terms can cause an imbalance in the contract – that is, they can give you more rights than a resident – as they can be used to force residents to accept unexpected costs or a lower quality service, even if the term was not meant to be used in that way.



Residents should receive the service agreed and not something that is significantly different from what was agreed and set out in the contract.

# Trading fairly: changing your fees for residents who fund their own care

A potential resident and their representatives must be clear about the agreed price and the services they will receive for that price. As with general variation clauses, it is important that they can foresee any changes in fees and understand the implications for them of any fee variation clause, before deciding whether to enter into a contract with you.

## Fee variation terms

Where you have a fee variation term in your contract, it should:

- Clearly set out the circumstances in which the resident's fees may change
- Link any changes to clear and objective criteria that do not allow you discretion to set the level of the change
- Set out how the change of fees will be calculated – that is, the method

⚠ The CPRs require you to ensure that any information that a potential resident and their representatives need to make an informed decision is **not omitted, hidden or provided in a way that is unclear, unintelligible, ambiguous or untimely.**

## Increasing fees using a 'cap' or 'floor'

**Fee 'caps'** that set a limit on the maximum amount you can increase existing residents' fees by, but which still give you a wide discretion to increase your fees or which don't clearly explain the circumstances in which fees might increase, are likely to be unfair – for example: 'Your fees will not increase by more than 15 per cent annually, other than in exceptional circumstances.'

There are likely to be fairness concerns around terms that 'cap' or 'floor' fee increases, because increases are likely to be an amount based on your judgement or discretion alone, and not reflective of genuine cost increases.



Using wording that is unclear or vague is likely to make your terms unfair, as residents are unlikely to be able to clearly foresee and understand in what circumstances their fees may change.

Such terms are also likely to give you a wide discretion to decide when, or by how much, your fees will increase, which is likely to be considered unfair.

## Calculating your annual fee increases

The clearer and more transparent your terms are for calculating any fees increases, the more likely they are to be fair. Put yourself in the potential resident's position, or that of their family or representatives, and think about the information they would need to foresee any future increases. It is important that your terms are transparent and clear about how a resident's fee may change during their stay, and that increases reflect genuine cost increases as far as possible.



The CMA considers that care homes are more likely to comply with the law where they review existing residents' fees on an annual basis by referencing a relevant, objective and verifiable published price index. This should be clearly specified and explained in the contract.

That is not to say that linking increases to a published price index is the only way to ensure compliance with consumer law. For example, you could, in theory, fix a resident's fees for the duration of their stay, or specify the precise level and timing of any future increases in price, so that they effectively form part of the agreed price. The details would have to be clearly and prominently drawn to the resident's attention before entering into a contract, in a way that allows them to foresee the practical implications and evaluate them.

#### THE CMA SAYS...

To present a price variation term fairly and transparently in your contract, it is likely to be necessary to show a worked example of how your fees could change in the future, and a description of how they have changed in the past.

#### **i** More information

An illustration of how to write a worked example can be seen in the practical guidance sheet, entitled 'How to write a variation clause', on page 36 of this booklet.

### Using 'objective and verifiable' calculation methods

One example of how to calculate fee increases could be to link your fee increases for existing residents to the Consumer Prices Index including housing costs (CPIH), which can be found on the website of the Office of National Statistics [[www.ons.gov.uk/economy/inflationandpriceindices/timeseries/155o/mm23](http://www.ons.gov.uk/economy/inflationandpriceindices/timeseries/155o/mm23)].

The CMA suggests that this index is likely to be more appropriate than using the Consumer Prices Index (without housing costs), as care home fees contain an element of housing provision. The CPIH is published monthly and is one example of a relevant, objective and verifiable pricing index that you could use.



**The use of fee 'caps' or 'floors' are likely to be arbitrary and do not reflect your genuine cost increases and may therefore be considered unfair. Similarly, terms that are too vague, or which do not explain the method of calculating changes in fees, for example, are likely to be unfair. These types of terms do not enable a potential resident to see how the fees may change over time, and so do not give them the information they need to make an informed decision about your care home.**

### Using the CPIH

For example, you could link your fee increases for existing residents to:

- The percentage increase in the CPIH over the previous year
- The average of (i) the percentage increase in the CPIH over the previous year, and (ii) the percentage increase in the National Living Wage (NLW) rate compared to the previous year. For example, if CPIH increased by two per cent and NLW by four per cent, an average of three per cent could potentially be applied
- A weighted averaging, presented and explained in a way that potential residents and their representatives are likely to understand. For example, where 65 per cent of the cost of a resident's care is attributable to staff costs and 35 per cent is attributable to non-staff costs, 65 per cent of the resident's overall fees could be increased by reference to NLW and the remaining 35 per cent by reference to CPIH. Weightings may vary depending on, for example, whether the home is nursing or residential
- An index developed or required by legislation or sector regulations for the purpose of reflecting the costs of care provision.

Whether you decide to use one of these calculation methods – or any other method – it is important to ensure the calculation method is clearly and transparently explained in your terms. It should enable potential residents to understand the impact a fee variation term is likely to have on them during their stay. If it is too complex for an average resident and their representatives to understand, it **may be considered unfair** because of its lack of transparency.

### THE CMA SAYS...

We consider that information about how a resident's fees may increase during their stay should be actively and prominently drawn to the attention of potential residents and their representatives as early as possible – for example, on your website, in written materials you give to a potential resident (such as a 'key facts' sheet in information packs and when they arrive for initial visits) alongside other prominent 'key information'.

#### **More information**

To learn more about what details are considered 'key information', read the *Care home communications* booklet on the Business Companion website [[www.businesscompanion.info/focus/care-homes-communications](http://www.businesscompanion.info/focus/care-homes-communications)]

### Significant increases in costs

On rare occasions, major changes in the law or sector regulations may significantly increase the costs of providing your service – for example, if the sector regulator changed minimum staffing requirements for specific types of care.

The CMA has said that, where such changes directly result in a significant and demonstrable increase in your costs, it would be less likely to prioritise enforcement action where residents' 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 any price index you use. In such exceptional circumstances, you should ensure that:



Guidance on **how and when to give a resident, family member or representative information relating to your initial fees, deposits and other financial details** can be found in the *Care home communications* on the Business Companion website [[www.businesscompanion.info/focus/care-homes-communications](http://www.businesscompanion.info/focus/care-homes-communications)]

- 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. For example, if you wish to incorporate increases in NLW into your annual fee reviews, we would expect these increases to be taken into account through your chosen price index.



**Residents and their representatives must be given advance written notice of a change in their fees – and given the option to leave without penalty – before the change takes effect.** Notice periods of less than 28 days are unlikely to be fair under consumer law. In Northern Ireland, sector regulations expressly require that residents of registered care homes are given at least 28 days' notice before a fee increase comes into effect. If a resident exercises their right to leave your home before a change in their fees is implemented, they should be given a pro-rata refund of any prepaid residential fees that they may have made.

- Your terms clearly set out and explain the limited circumstances in which you may increase fees for this reason

These additional increases should only be made in truly exceptional circumstances and cover only costs that are directly imposed on your care home by a major change to legislation or regulations which are outside of your control. They cannot be used, for example, to address poor planning or the unavoidable risks of running a business – such as local staff shortages. Whether your terms and practices are fair will ultimately be determined by reference to the law.



Terms that allow you an unlimited right to increase the price of a service after it has been agreed are **likely to be unfair**.

### GETTING IT WRONG

It will **likely be considered unfair** under consumer law if you use the following types of terms to determine future fee increases:

- ✘ 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.
- ✘ 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.
- ✘ Your fees will increase if we are subject to any increased costs in providing this service to you.
- ✘ Fees will increase in line with local market conditions.
- ✘ Fee increases will be limited to a reasonable amount.
- ✘ An annual fee increase will take place on 1 January every year and will reflect our actual cost increases.
- ✘ Fee increases will only take place where there is an increase in staffing or business costs.

### GETTING IT WRONG

The following terms using fee 'caps' or 'floors' are likely to be **considered unfair**:

- ✘ We will review your fees annually. As a result of the review, your fees will not increase by more than 15 per cent, other than in exceptional circumstances.
- ✘ Your fees will be reviewed annually and will be increased by 10 per cent or the Consumer Prices Index, whichever is higher.
- ✘ 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.



The CMA considers that general fee reviews should be limited to once a year – for example, 1 January.

# Trading fairly: other fee changes

More frequent changes in a resident's fees – that is, those not linked to an index – are less likely to be open to objections from the CMA in the following situations.

- **You provide a resident with an optional enhanced service or better room in response to their request.** If an existing resident and their representatives request and receive an enhanced service or a better room, you can increase their fees to reflect this without the need to link the increase to an index, provided that:
  - What makes it an enhanced service is clearly defined
  - The enhanced service is demonstrably different from the service already covered within the standard weekly residential fees
  - The resident or their representatives retain the choice as to whether they want to pay – for example, if someone no longer wishes, or cannot afford – to pay for a better room, they should be able to move back to a standard room when one becomes available

- **There are changes in a resident's care needs:** this could occur if they require increased levels of care, which means you incur additional costs in meeting their needs. In these situations, you should:
  - Only increase the resident's fees where there is a **significant and demonstrable change** in the resident's care needs to justify a price increase
  - Where changes are assessed by reference to care 'bands', these should be limited and clearly defined according to significant steps in increasing care needs
  - Give residents a reduction in fees if their care needs reduce

To ensure that you are more likely to comply with the law, you should be able to evidence and justify the decision to increase the resident's fees due to a change in their care needs (for example, through the use of recognised accredited dependency tools), and any increase must also be reasonable and proportionate to the resident's needs. In England, for example, the Care Quality Commission's guidance on the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014, says that decisions relating to designing, delivering and reviewing care needs should be based on nationally recognised evidence-based guidance.

## Consultation and notice periods

Where you anticipate or assess that a resident's needs have changed – for example, through informal or responsive monitoring – you should engage in meaningful and transparent consultation with the resident and their representatives and give them advance written notice (for example, 28 days) before changing the resident's fees – including the reasons – so they can challenge the increase or avoid it if they don't want to pay it.

Where there are disputes, or you anticipate a dispute, you should liaise with relevant independent professionals, such as a multidisciplinary team, to support your decision. Any change in a resident's fees should not take effect until the consultation process and notice period have ended – the new fee rate should not be backdated.

To achieve fairness, the CMA considers that you should pause the notice period if a resident or their representatives have raised a dispute, and start time running again only when the relevant independent professional has given their view of the appropriate level of care and fees. This will ensure that a resident and their representatives still have time to make alternative arrangements for their care, if the revised price is too high for them.

## Unforeseeable decline in a resident's health

Where a **resident suffers an unforeseeable decline in health that requires significant extra care to be given at short notice**, you are more likely to comply with the law where you give reasonable notice of the price increase – for example, seven days' notice – so that residents and their representatives have sufficient time to consider their position. You should provide them with the opportunity to have your assessment reviewed by relevant independent professionals. You should also offer the resident the opportunity to leave your home without penalty before the increase takes effect, if they or their representatives feel the increased level of care is unaffordable.



The CMA has issued specific guidance covering fees charged after the death of a resident and how their possessions should be treated. This can be found in *UK care home providers for older people – advice on consumer law*, which is available on the CMA's website [[www.gov.uk/government/publications/care-homes-consumer-law-advice-for-providers](http://www.gov.uk/government/publications/care-homes-consumer-law-advice-for-providers)].

Where a **resident requires additional care immediately and it would be harmful to the resident not to provide it**, it is clearly in the resident's interests for the additional care to be given straight away. You should give immediate notice of any fee increase related to the additional care required, and where residents or their representatives dispute your decision, you should liaise with relevant independent professionals to support it. The resident should also be given the opportunity to leave without penalty when the fee increase takes effect. You should not increase the resident's fees until any dispute has been resolved.

### THE CMA SAYS...

Where you need to provide additional care immediately, you should not apply a fee increase until any dispute is resolved, but where your decision is supported by an independent assessment and the resident does not decide to leave the home, we would be unlikely to prioritise enforcement action where the increased fees were backdated to the date on which you began providing the extra care.

### THE CMA SAYS...

Meaningful and transparent consultation could involve having a conversation with the resident and their representatives – which may include a statutory advocate appointed to act on the resident's behalf – about their changing needs, how this will affect the type of care they are likely to require in future (by referring to an accredited dependency tool) and how this is likely to affect their fees.

⚠ Any increase in fees caused by a change in care needs must be reasonable and proportionate. The CRA says that, where a price has not been paid for a service and a price is not expressly fixed by the contract, the consumer must pay a 'reasonable price' for the service, and no more.

# Trading fairly: other unfair terms

Other areas where terms can be unfair, which are covered in the CMA's guidance to help care home owners and registered managers treat residents fairly, include residents' visiting rights, temporary absences from your home, and terms dealing with situations where the resident breaches their contract with you.

These circumstances are explored here.



**Where your terms give you wide discretion to ban visitors, this is likely to be considered unfair under consumer law, because it may dissuade residents from seeking redress or complaining when your service does not meet expected standards, for fear of being denied visits.**

## Visiting rights

It is important that you do not impose unreasonable restrictions on your residents' rights to have visits from family and friends, as this could infringe consumer law. You may also infringe sector-specific legislation. In England, for example, the Care Quality Commission has given guidance on the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014, stating that residents' relationships with friends, family and other relevant people should be respected.

For your terms to be considered fair, you must ensure that:

- Circumstances where visitors' access to your 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, in extreme cases such as where visitors have abused, physically assaulted or posed a real and significant danger to your residents, staff or other visitors
- Circumstances in which a resident's visitors may be banned are transparent. This means that they are clearly and unambiguously

set out and explained in the contract

- The decision to ban a visitor is made only after a thorough risk assessment and appropriate consultation with the individuals concerned – including the resident, their representatives and the visitor whose access may be restricted – and is subject to an appeal process, whereby the affected parties can dispute your decision
- 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 – for example, in England and Wales, the Mental Capacity Act 2005
- Any restriction or ban is kept under regular review and removed as soon as practicably possible



**Using the threat of restricting or banning visitors in response to a resident's complaint is likely to be considered an aggressive practice under the CPRs.**

## Temporary absences

When a resident is temporarily away from your care home, such as for a planned holiday or unplanned hospital visit, a term that requires residents always to pay full fees is **unlikely to be considered fair** as it does not take into account whether allowances could be made by you for savings during this time, on things such as food and medication or personal care. A term that is more likely to be fair is one in which the full fees are only payable for a limited amount of time, after which a discount is applied, reflecting a reasonable estimate of the savings you are likely to make during the resident's absence.

### THE CMA SAYS...

We have particular concerns that terms allowing you to impose disproportionately high charges on residents who breach their contracts may:

- Mislead residents into thinking you are entitled to more compensation than you lawfully are
- In this particular context, restrict their ability to make free or informed choices through intimidation or exploitation

## Financial penalties when a resident breaches their contract

There will be times when a resident breaches their obligations to you in law and, as a care home owner, you may be entitled to take action against them to compensate you for your losses.

Having terms that are clear and fair is very important, particularly when your residents and their representatives may be vulnerable; in some cases residents may lack full mental capacity. Terms that allow you to charge disproportionately high amounts to residents who may have breached their contract with you are likely to be considered unfair in

consumer law – for example, where you require the resident to pay more in compensation than any loss you are likely to suffer as a result of the resident's actions.

### GETTING IT RIGHT

Examples of terms explaining your temporary absences that are more likely to be considered fair:

- ✔ *If you are away from our care home – for example, 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 per cent.*
- ✔ *If you are absent from our home for a continuous period of six weeks, we will consult with you and your nominated representative to seek agreement regarding the further retention of your room.*



“It is important that you do not impose unreasonable restrictions on your residents’ rights to have visits from family and friends.”



Additional advice and guidance on consumer law can be found on the Business Companion website [[www.businesscompanion.info](http://www.businesscompanion.info)], and the CMA's latest detailed guidance, *UK care home providers for older people – advice on consumer law*, can be read on their website [[www.gov.uk/government/publications/care-homes-consumer-law-advice-for-providers](http://www.gov.uk/government/publications/care-homes-consumer-law-advice-for-providers)].

You can also seek advice from your local authority trading standards service.

### GETTING IT RIGHT

When your contracts include terms dealing with residents who have breached their responsibilities under the contract with you, you are unlikely to comply with the law where you:

- ✗ *Require residents to compensate you for losses that are not a direct result of their default*
- ✗ *Require residents to pay interest on outstanding fees at a rate above your bank's base interest rate, since it makes the resident pay much more than the cost of making up their default – for example, having a term that allows you to charge residents interest at 10 per cent above your bank's base rate where they are late paying their fees*
- ✗ *Allow your home excessive discretion to decide how much is charged when the resident breaches their contract with you*
- ✗ *Impose a fixed, arbitrary fee for any breach of contract, which is out of all proportion to your expected losses*
- ✗ *Allow your home to claim 'all costs and expenses' resulting from the resident's breach, instead of just your net costs directly resulting from it*
- ✗ *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 a resident is unlikely to understand*

- ✗ *Make a profit from any breach of contract*

When your contracts include terms dealing with residents who have breached their responsibilities under a contract with you, you are more likely to comply with the law where you:

- ✔ *Use clear, unambiguous and plain language*
- ✔ *Explain that you will require the resident to pay a stated sum, which represents a genuine pre-estimate of the limited administrative costs that you are likely to incur as a result of the resident's default*
- ✔ *Do not make a profit from the resident's breach*
- ✔ *Alternatively, state in the contract that the resident can be expected to pay reasonable compensation, or compensation according to the law. In this case you should take all reasonable steps to reduce your losses, such as promptly informing a resident and their representatives of any breaches of contract they may have made, consulting with them to find out why it has happened, and discussing ways to prevent it happening again in the future*

# Consumer law – processes, procedures and staff training

There are consequences for failing to follow your obligations under consumer law. This practical guide is designed to help you identify some of the key areas of consumer law you need to consider when writing your processes, procedures and training your staff. You must also comply with any sector-specific rules and regulations that apply.

## Key consumer law checklist

Use the tick boxes below to check if you have considered the following points raised under consumer law when preparing information materials about your home and its services, when writing your policies and procedures and when training your staff:

### Consumer Protection from Unfair Trading Regulations 2008:

- Banned practices
- Misleading actions
- Misleading omissions
- Aggressive practices
- General duty to trade fairly

### Consumer Rights Act 2015:

- Consumer rights and remedies
- Unfair contract terms and notices

### Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013:

- Pre-contract information requirements
- Cancellation rights (where it is a distance or off-premises contract)
- Other provisions – premium rate telephone numbers and use of negative options, such as pre-ticked boxes

## Additional consumer law checklist

- Provision of Services Regulations 2009** – sets out requirements for service providers to make certain information available to service recipients (including where they can send a complaint) and how they must deal with complaints (for example, responding to complaints as quickly as possible and making best efforts to find a satisfactory solution)
- The Electronic Commerce (EC Directive) Regulations 2002** – sets out some of the requirements to make certain information available where you sell or advertise services online
- Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015** – sets out the information you must provide regarding ADR

## REMEMBER!

You can reduce your chances of infringing consumer law by trading fairly, using fair terms and notices and providing important information about your services to residents and their representatives at the right time so that they can take informed decisions, particularly on first contact with you.

See the *Care home communications* booklet on the Business Companion website [[www.businesscompanion.info/focus/care-homes-communications](http://www.businesscompanion.info/focus/care-homes-communications)] for practical guides to help train your staff on what, and when, information should be given to a potential resident and their representatives. Complying with consumer law will also demonstrate to potential residents that treating residents fairly and respecting their rights is important to you.

## HAVE YOU DONE YOUR DUE DILIGENCE?

You can be held responsible for any practices carried out by your staff, and anyone acting on your behalf or in your name, so it is important to have clear processes in place to reduce the chances of infringing consumer law, and to check that these processes are being followed by all employees. You may also wish to ensure that employees, and anyone acting for you or in your name, are sufficiently trained in the key areas of consumer law, and that accurate and up-to-date training records are maintained.



You should ensure that your promotional material also complies with the Advertising Standards Authority's Codes of Practice, such as the UK Code of Non-broadcast advertising and Direct & Promotional Marketing. Further guidance relating to consumer law can be found on the Business Companion website [[www.businesscompanion.info](http://www.businesscompanion.info)].

# Fair terms

This practical checklist is designed to help you assess whether your terms and conditions are likely to be fair under the Consumer Rights Act (CRA) and in line with the guidance issued by the Competition and Markets Authority (CMA).

## Terms and conditions don'ts...

Ensure your terms **do not contain:**

- Any 'blacklisted' terms
- Terms that are in the CRA's 'grey list', or which have the same object or effect as a term in the grey list

## ... and dos

Ensure your terms **do...**

- Set out all the rights and obligations that you want to include in the contract
- Include upfront 'key facts' sections or executive summaries, highlighting particularly surprising or important terms at the beginning
- Set out all the price information clearly and prominently, so that residents know from the outset how much they will have to pay
- Explain clearly and prominently what services residents will get for their money
- Use plain and simple language so that an ordinary person would understand. Legal jargon, such as 'implied terms', 'indemnify', or 'joint and severally liable' should be avoided

- Explain any terminology used, such as what is meant by a 'top-up fee', 'guarantor' or 'funded nursing care.' Do not presume that your residents will understand terms that may be familiar to you
- Are clear about their meaning that cannot be interpreted in more than one way
- Use headings that are easy to understand, to help residents find their way through the sections
- Use short sentences that are easy to read
- Cater for the needs of your residents or potential residents. For example, this may mean having contracts in larger font for the visually impaired. You should also consider the font style, size, colour and background colour and ensure that printed terms are clear and can be read with ease



### Important Information

To find out more about the grey list and blacklisted terms, see page 14 of the Fair trading for care homes booklet on the Business Companion website [[www.businesscompanion.info/focus/care-homes-fair-trading](http://www.businesscompanion.info/focus/care-homes-fair-trading)]

# Avoiding terms that unfairly exclude or restrict your liability to your residents

To help you comply with your consumer law obligations, you should ensure that you do not include any terms in your contracts that allow you to exclude or restrict your liability to residents when you are at fault. This includes terms that prevent or hinder residents from seeking compensation, or take away or reduce a resident's legal rights. This checklist is designed to help you to identify if any of your terms and conditions exclude or restrict your liability to residents under the CRA and/or are highlighted in the Competition and Market's Authority (CMA) guidance as likely to be unfair under consumer law.

Use the tick boxes below to check your terms **do not**:

- 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 administer medicines safely
- Say that 'residents use facilities at their own risk', as this could be relied on to exclude or limit your liability for death or personal injury, or where you lose or damage residents' property
- 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
- 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
- Attempt to exclude or restrict your liability to residents where their belongings are lost, damaged or stolen because of your failure to keep them safe or take reasonable security precautions at your home
- Attempt to exclude or restrict a resident's right to withhold or deduct the amount of any arguable claim they have against you from anything they must pay
- Deny residents the right to a refund or compensation in all circumstances, even where you have breached the terms of the contract



To find out more about the grey list and blacklisted terms, see page 14 of the Fair trading for care homes booklet on the Business Companion website [[www.businesscompanion.info/focus/care-homes-fair-trading](http://www.businesscompanion.info/focus/care-homes-fair-trading)]

## GETTING IT RIGHT

The CMA has suggested the following example of a contract term which is more likely to be considered 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.*

## Writing a fee variation clause

This practical guide contains an example from the Competition and Markets Authority's guidance showing how you could write a fee variation term in a way that is more likely to be considered fair under consumer law. It is for guidance only, as linking annual increases in your existing residents' fees to a relevant, objective and verifiable published price index is not the only way to comply with consumer law. You should always seek your own independent legal advice to ensure your terms are more likely to comply with consumer and sector-specific laws.



### Getting it right

The following is an example of a fee variation clause that is more likely to be considered fair:

*Your fees will be reviewed on an annual basis (on 1 January each year) 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 at least 28 days' notice in writing (including the amount of any increase). The increase will take effect on the date notified unless, before that date, you give us*

*28 days' notice to end this agreement. For example, where your weekly fee rate is £1,000 and the CPIH 12-month inflation rate for January is 2 per cent, your new fee rate will be £1,020 a week. In order of most recent, our annual fee increases for the last three years have been 2.6 per cent, 1.0 per cent and 0.4 per cent, respectively. Your fees may increase or decrease at other times where there has been a significant change in your care needs, as assessed by qualified staff. We will consult with you and your representatives and involve you in any decision to provide additional care. Following this consultation, we will give you 28 days' notice in writing*

*before implementing a change in your fees for this reason, unless your care needs have increased significantly and unexpectedly. Where your care needs increase significantly and unexpectedly, meaning that we need to provide you with additional care or facilities at short notice, we will consult with you and provide you with at least seven days' notice in writing of any increase.*

*Where we give you notice to increase your fees for this reason you may either:*

- *Do nothing, in which case the fee increase will take effect on the date notified; or*



“Write a fee variation term in a way that is more likely to be considered fair under consumer law.”

- Give us notice that you wish to leave. In this case you will have 28 days (or seven days where we have given you seven days’ notice of a fee increase) from the date you notify us, to move out before the fee increase applies; or
- Ask for an independent review of our assessment of your care needs, revised fee level, or both. In this case, we will suspend our notice period until the independent review is completed. If you are unhappy with the outcome of the review, you can still tell us you wish to leave, as above.

*You will be entitled to see the details of the assessments we have relied upon as part of the consultation and decision 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.*



To find out more about how to write fee variation terms, see pages 19-27 of the *Fair trading for care homes* booklet on the Business Companion website [[www.businesscompanion.info/focus/care-homes-fair-trading](http://www.businesscompanion.info/focus/care-homes-fair-trading)] or, for more detailed guidance, see UK care home providers for older people – advice on consumer law, which is published on the CMA’s website [[www.gov.uk/government/publications/care-homes-consumer-law-advice-for-providers](http://www.gov.uk/government/publications/care-homes-consumer-law-advice-for-providers)].

# More information on care homes

## Other guides in this Business in Focus series:



### CARE HOME COMMUNICATIONS

A guide to communicating with prospective residents and their representatives.

[www.businesscompanion.info/focus/care-homes-communications](http://www.businesscompanion.info/focus/care-homes-communications)



### WEBSITE LAYOUT FOR CARE HOMES

An introductory guide for care homes to presenting key information and important, additional information online.

[www.businesscompanion.info/focus/care-homes-web-layout](http://www.businesscompanion.info/focus/care-homes-web-layout)

## Other Resources

### UK CARE HOME PROVIDERS FOR OLDER PEOPLE – ADVICE ON CONSUMER LAW: HELPING CARE HOMES COMPLY WITH THEIR CONSUMER LAW OBLIGATIONS

This publication is available from: [www.gov.uk/government/publications/care-homes-consumer-law-advice-for-providers](http://www.gov.uk/government/publications/care-homes-consumer-law-advice-for-providers)

### BUSINESS COMPANION WEBSITE

The guides from this series and other resources are available from the Business Companion: [www.businesscompanion.info](http://www.businesscompanion.info)



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