

Helping Care Homes comply with their Consumer Law Obligations

Response from the
Commissioner for Older People
for Northern Ireland

July 2018

Role of the Commissioner

The Office of the Commissioner for Older People for Northern Ireland is an independent public body established under the Commissioner for Older People Act (Northern Ireland) 2011 (“the COPNI Act”).

The Commissioner has an extensive range of general powers and duties which provide the statutory remit for the exercise of the functions of the office. In addition the Commissioner may provide advice or information on any matter concerning the interests of older people. The wide ranging legal powers and duties include amongst others:

- To promote and safeguard the interests of older people (defined as being those aged over 60 years and in exceptional cases, those aged over 50 years);
- To keep under review the adequacy and effectiveness of law and practice relating to the interests of older people;
- To keep under review the adequacy and effectiveness of services provided for older persons by relevant authorities (defined as being local councils and organisations including health and social care trusts, education boards and private and public residential care homes);
- To promote the provision of opportunities for and the elimination of discrimination against older persons;
- To review and where appropriate, investigate advocacy, complaint, inspection and whistle-blowing arrangements of relevant authorities;
- To assist with complaints to and against relevant authorities;
- The power to bring, intervene in or assist in legal proceedings in respect of relevant authorities;
- To issue guidance and make representations about any matter concerning the interests of older people.

The Commissioner’s powers and duties are underpinned by the United Nations Principles for Older Persons (1991) which include Independence, Participation, Care, Self-fulfilment and Dignity.

Under s.3(2) and (3) of the COPNI Act, the Commissioner has a duty to keep under review the adequacy and effectiveness of law, practice and services as these relate to the interests of older persons.

The Commissioner welcomes the CMA’s draft advice for providers of residential care homes and nursing home services and the opportunity to advise on same. The

Commissioner has set out his advice below to correspond with the sections of the draft guidance and consultation document.

Context & Introduction

- 1.1 The Commissioner for Older People for Northern Ireland (COPNI) welcomes this draft consumer law advice and hopes that it will provide clarity to care homes in terms of complying with their consumer law obligations and will help to avoid some of the issues that is brought to the attention of his office on a regular basis.
- 1.2 The Commissioner is aware that the majority of people who enter nursing homes do so at a point of crisis in their lives. Family members are often provided with a list of nursing homes with current vacancies by the relevant Health and Social Care Trusts (HSCT) social worker (which can be limited if the older person has specific assessed care needs i.e. dementia) and therefore has little 'real' choice in the selection of a suitable placement.
- 1.3 It is important to note at the outset that in Northern Ireland there are very few 'self-funding' placements within the sector. The majority of placements in Northern Ireland are through the five HSCTs, meaning that a social worker and/or care manager will be involved in the process.

2.0 Policy context

- 2.1 Northern Ireland, like the rest of the UK and Europe has an ageing population. People are living longer than ever before and according to the NI Statistics and Research Agency (NISRA), Northern Ireland has the fastest-growing population of any country within the UK. NISRA has projected that the number of adults aged 65 and over is to increase by 12.1%, between 2013 and 2018, and by 63.3% between 2013 and 2033. Between 2013 and 2018, the very elderly population (those aged 85 and over) is projected to increase by 22.2% and more than double between 2013 and 2033 from 1.8% to 4%.¹
- 2.2 Whilst increased longevity is a positive public health message, the consequence of living longer is that older people are living longer with complicated health and social care needs which means increased pressure on funding for care for older people. The introduction of the 'Transforming Your Care' (TYC) public health strategic framework in 2011 represented a policy shift towards more use of community and home-based services so the need for hospital based interventions could be reduced. This means that people with

¹ OFMDFM/NISRA - A Profile of Older People in Northern Ireland: Annual Update (2015)

increasingly complex co- morbidities like dementia, diabetes, cardiac diseases, pulmonary diseases etc. are supported to live in their homes with the help of primary and community care provision.

- 2.3 'Health and Wellbeing 2026 - Delivering Together', recently published by the Department of Health, in response to the recommendations from the review led by Professor Rafael Bengoa, (who was tasked with ways of responding to the many challenges in Northern Ireland's Health and Social Care System) is also very relevant as a policy context. At the heart of Delivering Together is a call for partnership working, co-production and co-design with service users, patients, families and care providers.²
- 2.4 The current structure of adult social care stems from the system introduced in Great Britain in 1948. Unlike healthcare which is free in primary and secondary settings, in England adult social care is fully means tested and social care services are resourced separately from the NHS with service commissioning and delivery being the responsibility of Local Authorities.
- 2.5 The position is distinctly different in Northern Ireland. Since 1973, an integrated structure of health and social care has been in place in Northern Ireland and currently five Health and Social Care Trusts have responsibility for hospital, community and social services. According to the ARK Programme³ (a research programme run by the Ulster University and Queen's University Belfast), the funding of social care has not kept pace with health care funding, nor has it increased in line with demographic changes resulting in greater demand for services.
- 2.6 It is clear that there has been a shifting of responsibility (and cost) between health care, social security and social care with substantive aspects of long term care now being categorised as social care rather than health care provision. This can be viewed as an attempt to limit the cost of health care due to certain key elements of social care being means tested. There has also been a significant shift towards individuals contributing towards their own care on the basis of a means test with successive governments suggesting that people needed to be encouraged to make provision for the cost of their long term care.
- 2.7 The Commissioner would wish to point out that as a UK wide body, the information, issues and statistics available to and utilised by the CMA may not always be relevant to the NI care home landscape. Careful consideration should be given to the Health and Personal Social Services (NI) Order 1972 (as

² Duffy et al - Modernising Adult Social Care in Northern Ireland - KESS Policy Briefing (2017)

³ ARK – Attitudes to Social Care for Older People in Northern Ireland (2012)

amended) and implications of it for this guidance. In particular, the Commissioner would highlight the use of third party top-ups in Northern Ireland.

- 2.8 The 1972 Order does not permit a resident to use their own resources to pay for more expensive accommodation than a Trust would be prepared to pay for. Should a resident enter a more expensive accommodation with the agreement of the Trust, the cost difference may only be met by a third party such as a relative or friend of the resident.⁴
- 2.9 However, as stated above, the Commissioner welcomes the draft advice on consumer law for care home providers and considers it will be useful for the small percentage of self-funders in Northern Ireland.

3.0 “The Care Home Market”

- 3.1 According to the Department of Health statistics at 30th June 2016 12,368 residential and nursing home care packages were in effect in Northern Ireland, which is an increase of 1% from 30th June 2015. Of the 12,368 care packages in effect, over two thirds (70%) were nursing home care packages and under one third (30%) were residential care packages. Over four fifths (81%) of care packages are provided from the ‘Elderly Programme of Care’. This means that the majority of care packages were provided to people aged 65 and over.
- 3.2 In relation to the amount of beds available, there were more than twice as many nursing care beds available in Northern Ireland than residential places (10,692 compared to 5,180). Of the 5,180 residential places available, almost three in five (58%) were in independent residential homes while just over one in five were in the statutory residential homes and dual registered nursing homes (22% and 21%) respectively. Of the 10,692 nursing care beds available almost all (99.8%) were in the independent sector, 45% of which were in dual registered homes, and only a small proportion (0.2%) were in the statutory sector.⁵
- 3.3 The vast majority (90%) of residential and nursing home care packages were provided by the private sector. The voluntary and statutory sectors provided much smaller proportions of residential and nursing home care packages (6% and 4% respectively). However market competition is virtually non-existent in Northern Ireland due to the fact that only 5% of placements are privately

⁴ Charging for Residential Accommodation Guide (CRAG), DoH, <https://www.health-ni.gov.uk/sites/default/files/publications/dhssps/charging-for-residential-accommodation-guide-crag-2015.pdf>

⁵ Department of Health statistics on Community Care for Adults in Northern Ireland - <https://www.health-ni.gov.uk/sites/default/files/publications/health/cc-adults-ni-15-16.pdf>

arranged and all placements into care homes are facilitated by HSCTs.

- 3.4 The Regulation and Inspection Authority (RQIA) recorded that there were 15,897 nursing and residential places registered as of 12th May 2017. The DOH reported that as of 30th June 2016 there were 12,368 nursing and residential care packages in effect across the five HSCTs. This means that potentially, 3,529 nursing and residential care packages could be privately funded in Northern Ireland. However, the reality is that market competition is non-existent in Northern Ireland due to only approximately 5% of placements being privately arranged and the fact that all placements into care homes are facilitated by HSCTs based on a geographical remit/responsibility.
- 3.5 The Health and Social Care Board (HSCB) sets the regional tariff for care home (both residential and nursing) placements and that is used as a critical element of the cost which each HSCT commissions care at, leaving no room for competition between care providers. This creates a 'cost control' situation in Northern Ireland due to commissioning arrangements and the fact that demand for places in certain geographies outstrips supply.

4.0 Questions for Consideration

4.1 SCOPE

The Commissioner agrees that the scope of the advice is appropriate and should be applicable regardless of whether the residents in the home are;-

- (a) Self-funded
- (b) Part-funded
- (c) State-funded – (in the N. Ireland context this is HSC Trust funded).

The Commissioner further agrees that the 4 key areas of the draft guidance are appropriate.

4.2 PROVIDING UPFRONT INFORMATION

- 4.2.2 The Commissioner feels it is important that any guidance reinforces the need for equal protection for residents regardless of their funding circumstances. As such, the Commissioner would wish to see paragraph 3.8 strengthened in respect of the information to be provided to state-funded residents so that this is on a more equal level with that provided to self-funded residents. In respect of Northern Ireland, around 95% of care home residents are state-funded and so it is vital that they are afforded the same level of protection as their self-funded peers.
- 4.2.3 The Commissioner considers that all of the information provided at paragraph 3.15 could inform a person's initial decision regarding the home and therefore should remain in the guidance. The Commissioner believes that prospective residents and their representatives should have access to as much relevant information as possible so that they may make an informed decision.
- 4.2.4 The Commissioner's casework experience would highlight the fact that in a great deal of cases it is not the older person who is making the decision / choice to enter a nursing or residential home. It would be the Commissioner's view that choice and control are less often in the hands of the older person and more frequently a matter for the HSC Trust social worker and the older person's Next of Kin (NOK). For this reason the Commissioner would recommend that the role of information provision should also be borne by the Social Worker or Care Manager (the statutory employee) who is liaising with the NOK on behalf of the HSC Trust and the care home.

- 4.2.5 The Commissioner would welcome clarification as to whether the “latest inspection rating” referred to in the table on page 22 and at a paragraph 3.15(e) will detail the current status of the home, i.e. whether it is in Failure to Comply. The Commissioner considers the provision of such information to be imperative to prospective residents and their representatives so they can make a fully informed decision on such an important matter.
- 4.2.6 Regarding ‘important, additional information’, the Commissioner feels this section could be strengthened by clarifying at paragraphs 3.16 – 3.18 that this information should be provided whether or not it is requested by the prospective resident and/or their representative, as is the case with the ‘key information.’
- 4.2.7 The issue of termination and care home evictions is dealt with in more detail below, however for this section the Commissioner considers it important to highlight at paragraph 3.23 that private care contracts should clearly specify:
- The reasons for termination / eviction;
 - The process which will be followed;
 - The notice period;
 - How notice will be given; and
 - Support which will be provided with regards to finding alternative accommodation.
- 4.2.8 Paragraph 3.23(g) should also require the home to provide the contact details for the regulator, including information as to how their inspection reports can be accessed.
- 4.2.9 Information and contact details for organisations which can provide information, advice or advocacy services should be provided to the prospective resident and their representatives. It is vital that older people are aware of where they can access such support services so that their rights are realised.
- 4.2.11 Turning to the provision of information, signposting to online sites provides instant and easy access to information. However, some older people and their representatives are not computer literate and so all information should also be provided in a physical form and with “easy-read” or Key Information leaflets which summarise the important parts of the information. Where the information is only available online, for example inspection reports, the older person and their representatives should be provided with written documentation providing details as to how such information can be accessed, for example the contact details for the regulator so that they may request copies of such reports.
- 4.2.12 The cost of the resident’s accommodation, or larger portion of same, will be met by the Trust. It is also the Trust who will provide information on the homes and their availability. The Commissioner therefore considers that the Trust must

have a role in the provision of information or the direction to same as the statutory provider.

4.2.13 The Commissioner appreciates that there is a balance to be struck between providing all relevant information and at the same time, not overwhelming the residents or their representatives to the point that the information is lost. COPNI would suggest that all relevant information is provided and that a follow-up meeting is offered so that the prospective resident and/or their representative can have a meaningful discussion once they have had time to digest the information.

4.2.14 The Commissioner would not wish for the provision of information and / or scheduling of the required meeting to result in any delay in the hospital discharge or placement of an older person. In practice, it is the family or NOK who make the decision regarding accommodation. So that they may have the time to properly consider the information prior a meaningful discussion at the meeting, the Commissioner suggests an initial period of placement is funded wholly by the Trust and that the older person is placed under not any contractual obligation until the meeting is held with the family / NOK and a final decision made. With respect to the duration of this initial period, the Commissioner suggests this should be in line with the re-enablement period of 6 weeks.

4.3 TREATING RESIDENTS FAIRLY: CONTRACT TERMS AND BUSINESS PRACTICES

4.3.1 In respect of resident's fees, the Commissioner has no objections to the CMA's 3 proposed approaches. Regarding the review of resident's fees on an annual basis by reference to a relevant published price index, the Commissioner agrees that the Consumer Prices Index is an appropriate reference.

4.3.2 COPNI understands that there will of course be situations when a home can no longer meet the assessed care needs of a resident and we see this in our casework. When this happens the critical point from our perspective is how this is communicated and managed and the timeframe afforded for a suitable alternative care setting to be found.

4.3.3 The Commissioner believes it would be helpful to provide some advice on what constitutes a serious breach of a resident's obligations as referred to at paragraph 4.78 so that there is transparency and consistency on this important issue.

4.3.4 The Commissioner is concerned by the issue of care home evictions and in particular the fact that there is no statistical data currently available in relation

to the number of care home evictions in NI. The Commissioner considers this issue to have important human rights implications of which providers of care homes need to be particularly mindful.

- 4.3.5 The guidance should remind care home providers of their obligations under the European Convention on Human Rights (ECHR) as incorporated into domestic law by the Human Rights Act 1998. Following the case of *YL v Birmingham City Council and Others* a legislative amendment was made, namely s.145 of the Health and Social Care Act 2008. S.145 provides that private care homes providing care under public arrangements are deemed to be carrying out public functions for the purposes of s.6 of the ECHR (the right to a fair hearing). This provision also applies to NI and consequently private care homes in NI must be aware of their Article 6 obligations.
- 4.3.6 Regarding termination, Article 6 affords residents the right to have their civil rights determined through a fair hearing “by an independent and impartial tribunal established by law.” As such, any decision by a public authority to evict an older person from their care home must follow proper procedure and no decision should be foisted onto the older person or made without their views being fully articulated and fully considered. Ensuring that the process of termination is clear and transparent as well as ensuring access to advocacy and support is relevant in this regard.
- 4.3.7 The Commissioner would further advise that private care homes are also made aware of other important human rights under the ECHR which could affect their work, in particular Articles 2 (right to life), 3 (freedom from torture, inhuman and degrading treatment or punishment), 5 (right to liberty and security) and 8 (right to private and family life).
- 4.3.8 The Commissioner would suggest that the transfer, termination and eviction of an elderly resident from a care home could give rise to potential breaches of Articles 2, 3 and 8 and so it is important providers are aware of their responsibilities under human rights law. Indeed in respect of Article 2, in the case of *Watts v UK*, the European Court of Human Rights found that a badly managed transfer of elderly residents from a care home involved the application of Article 2 ECHR because it could have a negative impact on the life expectancy of the elderly persons affected, due to their general fragility and resistance to change.

4.4 COMPLAINTS HANDLING

4.4.1 As stated above, the Commissioner is concerned by the issue of care home evictions and the reasons for these. The Commissioner's legal department has received a number of cases on this issue. In all such cases, the service of notice has been prefaced by the relationship issues with the resident and/or a breakdown of the relations between the family of the elderly person and the care home management. It has been indicated to the Commissioner's legal department that families frequently do not wish to make a formal complaint because of fear of reprisals against the resident. Furthermore, the Cherry Tree House Review contained an example of a resident being transferred to another home following a family complaint of neglect.

4.4.2 The Commissioner recommends that the CMA consult section 4.8 of his 'Home Truths' report which sets out a number of recommendations relating to complaints and communication. Of particular relevance to this section of the guidance is recommendation 49 which could be incorporated into this guidance by advising providers to:

- Introduce an open and transparent complaints management system and welcome the early involvement of families and relative in complaints resolution;
- Keep families informed at all times of the next steps in the complaints process;
- Provide families with meeting dates well in advance rather than having to request a meeting themselves;
- If a meeting is cancelled this should be communicated to the families promptly.

5.0 Conclusion

- 5.1 The Commissioner is pleased to note the CMA's intention to provide accessible information and advice for prospective residents and their representatives on their rights under consumer law. We hope this can be done as soon as possible.
- 5.2 The Commissioner further welcomes the CMA's intention undertake a follow-up compliance review across the care homes sector after publication of its final advice on what progress has been made.
- 5.3 The UK position and the context for this guidance is limited in Northern Ireland. Careful consideration should be given to both the Health and Personal Social Services (NI) Order 1972 (as amended) and the Charging for Residential Accommodation Guide (CRAG) and their implications for this guidance. Furthermore, the CMA should be cognisant of the use of third party top-ups in Northern Ireland.
- 5.4 Finally, the Commissioner reiterates that he welcomes the CMA's draft guidance on this important matter and looks forward to the publication of the final advice in autumn 2018.