

# Submission of the Office of the Ombudsman to the public consultation on contracts of care in long-term residential care services for older people

## Introduction

In August 2015 the jurisdiction of the Office of the Ombudsman was extended to allow for independent oversight of the private nursing home sector. The Ombudsman could already examine complaints about public nursing homes and HSE schemes such as the Nursing Homes Support Scheme ('Fair Deal'). However, from 24 August 2015 the Office of the Ombudsman could accept complaints from, or on behalf of, residents in private nursing homes, about actions that occurred on or after that date.

The legislation provides that the Ombudsman could examine complaints in relation to the administrative actions of private nursing homes in receipt of public funding. Almost all private nursing homes are in receipt of public funding either under subvention or through the Nursing Homes Support Scheme. The following submission to the public consultation on contracts of care in long-term residential care services for older people is based on the experience of this Office in dealing with complaints about private nursing homes from the public over the past two and a half years.

## Contracts of Care

Entry into a nursing home is not always the result of long term planning. Many residents enter a nursing home straight from an acute hospital setting where it has become clear that their care needs are such that they require long-term residential care. In some instances there may be considerable time pressure when planning to move a loved one from an acute setting into a residential setting. While in other cases the decision to move to long-term residential care is taken because adequate supports, which would allow the older person to remain in their home, are not available in the community.

Whatever the circumstances it can be an emotional and challenging experience for the older person and their family members and sometimes contracts are not fully read and/or understood. Yet a contract is an important legal agreement which should be available before admission to a nursing home. It includes the conditions of residence and fees to be paid. It is of the utmost importance that contracts are detailed yet clear.

- A contract should not be so legalistic and complex that a lay person would have difficulty in understanding it.
- Consideration should be given to having a plain English or an easy to read version of the contract available.

- Persons lacking in capacity should have independent support and advice made available to them before entering into a contract.

In this regard the Assisted Decision Making (Capacity) Act 2015, when fully enacted, will provide an added safeguard for intending nursing home residents.

## Security of Tenure

A number of cases brought to the attention of this Office concerned the termination, or threatened termination, of the contract of care for a resident by a proprietor due to the behaviour or actions of family members, rather than due to anything the resident themselves did. Yet evidence shows that moving a person with dementia can be harmful and debilitating. Indeed moving a person in the latter stages of dementia can lead to a downward progression. It is clear that often relatives can display challenging behaviours but the solution to this problem should not affect the resident themselves.

The terms and condition of a contract in this respect can be harsh and offers no security of tenure to the resident whatsoever. The following is an example of a termination clause which is included in most private nursing home contracts:

### ***"4. Termination of Contract***

- 4.1 *Either party may terminate this agreement by notice in writing to the other Party, within not less than two weeks prior to the date upon which such termination becomes affective.....*
- 4.2 *The Nursing home shall have the right to terminate this Agreement with immediate effect in the event that:*
- The resident becomes disruptive .....*
  - The proprietor forms the opinion that the resident's behaviour is a risk to the health and safety of any resident.....*
  - Any situation whatsoever arises whereby the Proprietor is seriously disrupted while operating in the nursing home.*

*The resident acknowledges that the nursing home shall have the right to exercise its right under this Clause at its sole discretion either with or without consultation with appropriate State authorities and/or the Resident's next of kin."*

The Ombudsman accepts the contractual right of the proprietor to terminate the contract for specific reasons. However he believes that if a clause is included that allows a proprietor to terminate a contract at its sole discretion without discussion or consultation, it fails to afford any protection to a resident. This leaves the resident in a vulnerable and exposed position.

This Office understands that difficulties in relation to the actions of relatives arise from time to time for proprietors but whatever solution is arrived at, the Ombudsman is firmly of the view that the resident should not be adversely affected by the actions of their relatives. Residents in nursing homes should enjoy proper security of tenure and for certain in dealing with problems relating to relatives a better balance needs to be struck.

## Additional Charges

Nursing Home providers are obliged to provide certain services that fall outside what is covered by the Nursing Homes Support Scheme and nursing homes may charge for these additional services.

The Ombudsman is of the view that there should be clarity, transparency and fairness around any additional charges levied. All additional charges must be laid out clearly in the contract of care and agreed upon when signing the contract. The additional services should also be separately itemised and costed. This is not always the case in practice.

Residents and their representatives need to be aware that the time to agree these additional charges is when the contract of care is being finalised.

However when a resident is already paying 80% of their pension towards their nursing home care, the remaining 20% of their income is then used to pay for social activities. These additional charges can effectively wipe out the resident's remaining income, leaving little for extras such as taxis for hospital visits or services such as hairdressing and chiropody. In some cases they can be an additional burden on families. For residents to be left with no disposable income is unacceptable.

Both the National Standards for Residential Care Settings for Older People in Ireland and the Regulations that underpin them acknowledge that residents in a nursing home should be allowed to exercise choice. Article 9 of the Regulations puts the onus on the registered provider to provide facilities for recreation, but also states that *'in so far as is reasonably practical ensure that residents may exercise choice in so far as such exercise does not interfere with the rights of other residents'*. Therefore choice, where reasonably practical, should be available to residents.

This Office is aware of the intricacies of organising a varied social programme of activities for residents of differing interests, tastes and abilities and accepts that aspects of the social programme would be administratively difficult to individualise. However the Ombudsman believes that where possible choice should be afforded within a social programme which reflects the resident's interests and ability to partake in the programme. Most nursing homes would say that a resident can exercise choice by physically attending or not attending activities. However, generally there is no option to financially opt out of any part of the social programme where the resident may have no inclination or may be physically unable to participate in.

Where possible it would be beneficial if the question of financial choice within the social programme could be addressed within the contract of care.

It is the experience of this Office that the social charge varies greatly from nursing home to nursing home. The Office of the Ombudsman would be of the view that guidelines should be in place against which additional charges can be set, for example the range and level of additional services to be provided and what could be considered to be a reasonable charge for such services.

## Conclusion

As can be seen, the areas of concern highlighted in this submission relate to the issue of the clarity of the contract itself, the security of tenure it affords the resident and finally the complex issue of transparency, fairness and standardisation of additional charges across the private nursing home sector.