

7th May 2019

Re: Response to the recent Guidelines for Contracts of Care in Nursing Homes published by the Competition and Consumer Protection Commission

In December 2016 Sage Advocacy published a discussion document on Nursing Home Charges and in October 2017 it published a further discussion document on Nursing Home Contracts. Following this, and a considerable level of media coverage and public concern, the CCPC engaged with the issue of nursing home contracts and organised a public consultation process. Sage Advocacy made a detailed submission to the CCPC in February 2018.

Sage Advocacy welcomes the publication of these Guidelines for Contracts of Care in Nursing Homes. It is a long-awaited response by one agency of state but other responses are required. Sage Advocacy is disappointed with certain aspects of the guidelines document.

1. The guidelines suggest that in drafting fair contracts the nursing home should 'Consider the consumer and their situation'. It recognises that the nursing home may be dealing with a vulnerable person but it makes absolutely no mention of the issue of consent, of the need to be aware of the guiding principles of the Assisted Decision Making (Capacity) Act 2015 due to be commenced in late 2020.
2. In our submission to the CCPC in February 2018 Sage Advocacy drew attention to the difficulties identified with the process of agreeing contracts for care in nursing homes. These included:

Signing of Contracts

The Sage experience indicates that contracts are sometimes signed by a relative on behalf of a nursing home resident, even when the latter clearly does not lack capacity or where lack of capacity is assumed without any proper functional capacity assessment. The practice of people signing contracts on behalf of people who actually have capacity and on behalf of those whose lack of capacity has not been appropriately determined is wrong under contract law. In such circumstances the contracts are illegal and not valid.

This is a matter of serious concern particularly in the context of the provisions of the Assisted Decision-Making (Capacity) Act 2015 (ADM Act). Safeguards are required to ensure that a person is not deprived of his/her liberty and that decision-making in relation to signing of a contract of care is done in accordance with the ADM Act and any Deprivation of Liberty Safeguards legislation. Nursing home contracts seen by Sage typically state that before signing the contract, the resident and/or his/her representative(s) should ensure that s/he has read and understood its provisions and terms and conditions. However, there is no indication or guidance contained in the Contract as to how this is to be provided for in practice in the case of a person who cannot do so for reasons of cognitive impairment, literacy or ability to understand the technical nature of the contractual provisions and requirements.

The assumption appears to be that all residents would either be able to do so themselves or would have the necessary support structures to do so. This clearly is not the case in many instances.

Resident's right to sign Contract

No person has legal authority to sign a contract "on behalf of" a resident except an attorney or attorneys appointed under a registered Enduring Power of Attorney where that document includes the right of the Attorneys to make personal care decisions. Next of kin of a resident have no legal entitlement to do so.

Resident's ability to understand and sign Contract

Any assessment of the capacity of a resident to sign a contract must be carried out functionally, which means that the assessment must relate specifically to the single issue of their ability to understand the contract. The assessment should be done in accordance with the provisions of Section 3 of the Assisted Decision Making (Capacity) Act 2015 (ADM Act), which requires that the resident be facilitated to understand the contract by having it explained to them in a manner which is appropriate to them and to their particular circumstances.

Protocol for signature by others

A protocol should exist of the procedure to be followed if the resident is considered not to be able to understand the provisions of the contract for him/herself. This could, for example, allow for calling in an independent advocate to act on a non-instructed human rights basis or, post the coming into force of the ADM Act, giving the resident an opportunity to appoint a Decision Making Assistant or Co-Decision Maker.

After the coming into force of the ADM Act an advocate or other interested person will be able to, if necessary, refer the matter to the Decision Support Service for advice or make an application to the Circuit Court for the appointment of a Decision Representative to sign the contract.

Where a resident has, however, completed an Enduring Power of Attorney (EPA), the protocol should provide for a copy of it to be produced to ensure that it contains the necessary authority for the attorney/s to sign the contract as well as evidence that the EPA has been registered.

Sage Advocacy notes that some nursing homes were unwilling to respond to the CCPC requests for information on their contracts for care. It also notes that the CCPC state that as part of the process of developing the guidelines 'Submissions highlighted concerns around a number of areas including language used in contracts of care, additional charges and transparency'. They do not reference any of the clear concerns about assumptions of lack of capacity and the lack of legal authority of some family members or others to sign a contract 'on behalf of' a resident and these difficult issues are effectively avoided in these guidelines.