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1. Introduction

Around 175,000 people in England pay their care home fees themselves, while 143,000 - those with few assets and/or low incomes - have their care home place paid for them by their local authority\(^1\). Councils have a legal duty to pay in full for a basic or 'standard' level of care for these individuals - and this basic level may vary with each individual, taking into account his or her physical, social and psychological needs as assessed by the council.

However a further 56,000 people are somewhere in-between these two positions: they have their care home fees paid by the council only in part\(^2\). In addition, their relatives pay so-called 'third party top-up fees' to supplement the amount the council pays. Top-up fees are intended to allow relatives to pay a little extra for a care home place that is above and beyond the 'standard' level of care available from the council - perhaps to ensure a much-loved parent has a room with a view or one that is larger than the norm in a particular home.

However, Independent Age regularly receives calls from relatives who are concerned that they are being asked to pay top-up fees because a council has told them it is required for any care\(^3\), not because they have requested a higher standard of care. Often these relatives are told that the council will only pay a 'standard rate', when they explore potential local care homes, they discover that none has a suitable and available place that is within this standard rate and that a top-up is therefore required. Even when told by Independent Age that the council is not allowed to do this, some will choose to pay a top-up rather than complain, particularly since they are often already facing the enormous stress of having to help an ailing parent to move into a care home in the first place. But others do complain and many find that the council changes its mind and agrees to pay the full cost when challenged.

This report attempts to shed some light on the grey area of ‘top-up’ fees. Are the calls to the Independent Age Advice Service merely isolated problems in a general picture of best practice or do they represent thousands of similar instances all over the country?

In addition to data and case studies from the Independent Age Advice Service, the report draws upon two completely new pieces of research:

- a Freedom of Information request to all 152 local authorities in England, asking them about the extent and level of top-up fees in their area and their policies and practices for handling them
- a survey of care homes in England, kindly facilitated by the English Community Care Association (ECCA), asking homes for their experience of top-up fees.

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\(^1\) Note, the local council pays their standard rate, less the care home residents’ assessed contribution: Care home residents with under £23,250 in savings have to contribute all of their weekly income towards the fees and pay a tariff income on their savings between £23,250 and £14,250, except for £23.50 per week, which they can keep to spend on personal items.

\(^2\) A further 29,000 people have their care home place paid for from NHS funding. All figures from Laing & Buisson Care of Elderly People UK Market Survey 2012/2013 p.200-201.

\(^3\) It is not just Independent Age. Age UK’s Michelle Mitchell says, "Age UK hears from its advice line that in practice people are all too often given no choice but to pay a top up as there are simply no suitable places available at the local authority’s agreed baseline fee rate."
The results are surprising and concerning, not least because of what they do not tell us. Six key findings have emerged.

1. Most councils are failing to properly record, monitor and regulate the number and level of top-up fees paid in their area. Many top-up fee contracts are in fact negotiated without the knowledge of the council so no one knows the true extent of top-up fee payments in England.

2. Since many top-up fee contracts are negotiated without the involvement of councils, they are in no position to fulfil their legal responsibility to ensure that relatives are ‘able and willing’ to pay them.

3. Since councils are financially responsible for top-up arrangements - whether they are a party to them or not - many councils are unaware of their financial liability, a particular concern since most care homes in our survey reported at least one instance where a relative had struggled to pay a top-up fee.

4. There are large variations between councils - and even within councils - in their approach to top-up fees, with some minimising their use and yet others regarding them as normal and routine. In some cases councils appear to have moved between these positions, causing concern and confusion to care homes.

5. Few councils are signposting relatives to independent advice and independent financial advice (when relevant) before they sign top-up fee contracts.

6. There is a clear belief from care homes that the incidence of top-up fees is increasing because the rates that councils pay for care home places are simply too low.

Together, this evidence suggests to us that top-up fees have become a ‘secret subsidy’ paid in many areas by families of the poorest care home residents to support the low level of care home funding that councils are willing or able to provide.

‘Secret’ because few people know their legal rights about top-up fees and most local authorities do not keep full records of the top-up fees being paid in their area. And a ‘subsidy’ because there is evidence from care homes in particular that top-up fees are increasing as the rates that councils pay for care are decreasing.
2. Background to third party top-ups

The extent of top-up fees

Care industry experts Laing & Buisson estimate that 56,000 families in England are currently paying a top-up towards their relative’s care\(^4\). This is just over a quarter (28%) of people funded by their local authority or 14% of all care and nursing home residents.

Laing & Buisson estimates that between 2011 and 2012 there was a 4% rise in the number of council-funded residents relying on a top-up\(^5\).

These figures are drawn from annual postal and online surveys of 1,700 care homes and comparative data collected between 2009 and 2012. The research indicates a steady year-on-year average of 28% of council-funded residents whose care is partially funded through top-ups\(^6\).

Prior to 2012, available research on top-ups presented a more varied picture: 2008 information from the seven largest care home operators suggested that the true figure was “not much over 10 per cent” of council-funded residents\(^7\).

However, Laing & Buisson’s most recent report also concluded that the combined total of ‘pure’ private and what they term ‘quasi’-private care home residents (council-funded residents with a relative paying a top-up) are now in the majority nationally, and account for “57.4 per cent of all older and physically disabled residents of independent sector care homes in 2012.”\(^8\)


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\(^4\) Laing & Buisson Care of Elderly People UK Market Survey 2012/2013 p.20.
\(^6\) Laing & Buisson Care of Elderly People UK Market Survey 2012/2013 p.201.
\(^8\) Laing & Buisson Care of Elderly People UK Market Survey 2012/2013 p.2.
There is also some evidence of the high degree of regional variation in the number of top-up fees. A 2012 ‘Think Local, Act Personal’ project analysing data from four local authorities, care providers and people who pay for their care, emphasised the impact of area, local policy and practice on the existence and amount of third party top-ups. It found “a wide variation in the proportion of people in care homes with third party top-ups: from 1% in Hartlepool to 21% in Bradford.”

**The law**

Currently, there are two pieces of guidance that enable family and friends to contribute towards the cost of a person’s care. This guidance has legal power: councils are expected to follow it under normal circumstances. Both of these are summarised below and, in section 3, we compare this guidance to council practice as reported in our research survey. In due course, both will be superseded by new regulations and guidance published as part of the Care Bill.

**LAC(2004)20: Choice of Accommodation Directions**

The Local Authority Circular **LAC (2004)20: Guidance on National Assistance Act 1948 (Choice of Accommodation) Directions 1992** was introduced to ensure that when local authorities make placements in care homes or care homes providing nursing care, within reason, individuals are able to exercise genuine choice over where they live.

The guidance requires that councils set a ‘usual cost’ for purchasing care that has due regard to the actual cost of providing care locally and that these costs are ‘sufficient’ to meet the assessed needs of people living in care homes. Furthermore, the guidance prevents councils from setting ‘arbitrary ceilings’ on the amount they expect to pay for an individual’s residential care, or routinely requiring a top-up be made.

The guidance is explicit that, should there be no suitable care home placement available that meets the individual’s care needs, with a vacancy at the rate the council usually pays at the time the person needs to move into care, the council should increase its rate to secure a suitable placement rather than ask a family member for a top-up. Where no placements at the usual rate are available, the council “should not leave individuals to make their own arrangements” but should “make suitable alternative arrangements and seek no contribution from the individual”.

LAC is clear that “only when an individual has expressed a preference for more expensive accommodation” can a relative be asked for a top-up. If this is being considered, LAC is explicit that relatives must be “able and willing” to pay the top-up.

To ensure that relatives are ‘able and willing’ to pay a top-up, LAC requires that councils provide ‘fair and balanced information with which to make the best choice of accommodation for them’ including Directions (such as LAC) and guidance, and requires councils to explain to relatives their rights with regard to top-up fees. They should also “make it clear to residents and third parties, in writing [our italics], the basis on which arrangements are to be made when they seek to exercise their right to more expensive preferred accommodation”.

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9 Think Local Act Personal Partnership, Older people who pay for care: final report, January 2012.
15 Local Authority Circular, LAC(2004)20. Section 3.2 and 3.5.3.
The council also has a responsibility at the outset to “assure themselves” of the sustainability of the proposed, voluntary top-up arrangement and judge whether the relative is able to keep up the payments for as long as the resident is in the care home. Guidance also recommends that councils agree a regular review schedule with residents or third parties should the fee requirement change. Finally, “when a council places someone in more expensive accommodation, it must contract to pay the accommodation’s fees in full”. To “ensure that they are able to exercise proper control over the use of their funds”, LAC says that councils need to ensure that top-up fee contracts contain conditions broadly the same as others similar contracts.

**CRAG**

The government guidance, *Charging for Residential Accommodation Guide* (CRAG), functions as a national framework to help local authorities understand their duties under the *National Assistance (Assessment of Resources) Regulations 1992*.

CRAG effectively provides a shortened version of the key points from LAC (2004) and states that the council, the care home and the individual resident and their family together must agree if a resident and a family member are to pay their contributions directly to the care home. If the individual resident and the family member do not agree to this arrangement, the council should meet the full cost of the care home fees and invoice the resident for their assessed contribution and the family member for any top-up separately:

“The third party can, by agreement with all parties, pay the top-up direct to the accommodation on behalf of the resident but even where there is such an agreement the council continues to be liable to pay the full costs of the accommodation should either the resident or the third party fail to pay the required amount.”

**The effects of austerity on council rates for care**

In general councils decide each year on a ‘standard’ (or ‘usual’) rate at which they will purchase residential and nursing care for local residents. This rate is influenced by both the market rate for care and the council’s available budget. It is important to note that, though the notion of a ‘standard rate’ may be important to local authorities for budgeting, councils in fact have a clear legal responsibility to meet the care needs of individuals who have been assessed, whatever the cost of that care.

In practice, however, there is a concern from care homes and others (discussed fully in section 4) that low standard rates from councils are a major reason for top-up fee payments. This might be seen as related to the long-standing practice whereby homes charge higher fees to self-funding residents than to council-funded residents in order to maintain their viability. The level of ‘standard’ rates is increasingly under pressure as councils try to cope with cuts in their grant from central government. The cost of providing care will typically be the single largest expense of a local council and, despite efforts to protect frontline services, the Association of Directors of Adult Social Services (ADASS) estimates that local authorities have made 20% cuts to their social care budget since 2010.

This ‘crisis’ in social care funding has led to a trend in local authorities paying only minimal annual increases in the rates they will offer to purchase care from providers. ADASS found that for 2013-14, 45% of councils gave no inflationary increase to rates they paid for residents.

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18 Local Authority Circular, LAC(2004)20. Section 3.5.4 - 3.5.7.
19 Local Authority Circular, LAC(2004)20. Section 2.5.16 - 2.5.17.
21 Charging for Residential Accommodation Guide (CRAG), Department of Health, June 2013 Section 11.010.
22 ADASS Annual survey of social care budgets 2013.
in older people’s care homes and 48% of councils [59 councils] reported that, as a result of savings they had to make, providers are facing financial difficulty.

Looking ahead at the next two years, nearly 60% of councils indicated that providers may face financial difficulties as a result of their cost-saving measures, and half predicted fewer people would be able to access adult social care services.\(^{23}\)

While Laing & Buisson reported that average fee rates for both 2012 and 2013 rose against prediction, the rise was still below inflation. Recent data, however, shows that the gap has since narrowed “marking an end to a three-year period which saw baseline fee rates fall significantly in real terms each successive year from 2010/11.\(^{24}\) In the preceding period, in real terms, fees for council-funded older residents fell by a cumulative 4.8% (after allowing for care home cost inflation).\(^{25}\)

For the present year (2013-14), in light of recent trends, Laing & Buisson concluded that with continued reductions in local authority funding it will be unlikely that the financial pressure in the system will relent. This is supported by the prediction that most local authorities will continue “as expected”\(^{26}\) to make below inflation increases to the standard rate at which they are prepared to purchase care. At best, they conclude the result will be standard rates set at a “standstill in real terms”.\(^{27}\)

**Top-up fee legal challenges**

The relationship between how a council sets the standard rate it is willing to pay for care, top-ups and the actual market rate for care was highlighted in the example of one case publicised by the Local Government Ombudsman in late 2012.

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**Case study: Southampton**

The Local Government Ombudsman, Dr Jane Martin, found Southampton council guilty of maladministration causing injustice in the situation of an older woman who was residing in a care home in the local area. The woman’s daughter was unable to find a place at a home at the council’s ‘usual rate’, then £454 a week, which met her mother’s assessed needs for dementia and nursing care. The family were forced to choose a care home which was more expensive and charged fees of £750 a week. The family lodged a complaint when the council billed them for top-up fees of £187.56 per week.

Dr Jane Martin stated that, “Because no accommodation was available at the council’s ‘usual rate’, (under government guidelines) the council should have paid to accommodate the woman elsewhere and should not have sought additional fees beyond the assessed contribution.”

Southampton accepted the Ombudsman’s findings and agreed to pay the full cost of the woman’s care, less her assessed contribution of £149, to refund the top-up fees with interest and pay £500 compensation for the ‘time, trouble and distress’ caused to the family. As a consequence, the council also agreed to review its own procedures and fee levels.

It is important to note that the Ombudsman confirmed that she had decided to publish the report as she considered it was in the public interest because councils across the country are faced with similar situations.\(^{28}\)

\(^{23}\) ADASS Annual survey of social care budgets 2013.
\(^{24}\) Laing & Buisson, *Annual survey of UK Local Authority Baseline Fee Rates 2013/14* p.4.
\(^{25}\) Laing & Buisson, *Annual survey of UK Local Authority Baseline Fee Rates 2012/13* p.4.
\(^{27}\) Laing & Buisson, *Annual survey of UK Local Authority Baseline Fee Rates 2013/14* p.4.
\(^{28}\) www.lgo.org.uk/news/2012/oct/southampton-council-criticised-care-home-top-up-fees
3. Ignoring the law: what councils told us in response to our Freedom of Information requests

What we asked councils
During the period of January - February 2013, we requested information from 152 English local councils with social services responsibilities under the Freedom of Information Act on the subject of third party top-up fees for council-funded care home residents.

We requested data from councils on the following areas for the years 2009-12*

- the percentage of total care home placements in the council area when a third party top-up is being paid
- the number of third party top-ups that were arranged between the council, the home and the third party (the relative)
- the number of third party top-ups that were arranged purely between the care home provider and the third party (the relative)
- the average/minimum/maximum levels of third party top-up paid in the council area
- whether councils signposted individuals to independent advice prior to entering into agreements
- whether councils included checks at Annual Review of all residential service users to establish whether or not the relative can continue to fund the top-up.

*We did ask councils for information about the year 2012-13 but the data provided was incomplete at the time requested.

What we should have found
As discussed in section 1, Guidance on National Assistance Act 1948 (Choice of Accommodation) Directions 1992 and Local Authority Circular LAC(2004)20 make it clear that it is acceptable for a relative or other third party to contribute to the cost of a care home place. However a number of conditions must apply for this to take place:

- the relative or resident must have ‘expressed a preference’ for more expensive accommodation
- the relative should have been given ‘fair and balanced’ information about his or her rights with regards to top-ups
- the council should have ‘assured themselves’ that the relative was financially able to continue paying the top-up, and have ensured that the top-up contract was similar to other contracts
- the council should have contracted to pay the fees in full, with the council remaining liable for the full amount of the placement.

LAC allows councils to set up top-up fee contracts in two ways. The first, which we would expect to be the norm, we refer to throughout the rest of this report as ‘council-home contracts’. These contracts would be established between the council and the home with the council paying the full fees to the home and then invoicing the relative directly for the top-up contribution.

The guidance does allow councils - with the agreement of the care home and the relative - to make arrangements in which the third party makes payments directly to the care home (we refer to these throughout the rest of this report as ‘relative-home contracts’). However, it is
nonetheless clear that the council remains liable for the whole contract. The guidance does not allow councils to agree a blanket policy to allow all third party top-ups in their area to be arranged between the home and the individual only. Instead, it should be established on an individual basis, depending on specific circumstances, and the council should agree this alternative set-up directly with the resident, relative and the home.

However they are set up, we would expect councils - as a minimum - to be aware of all top-up fee contracts in their area. If they are not aware of all contracts, it would not be possible for them to fulfil the requirements of LAC with regard to ensuring that relatives are ‘willing and able’ to pay them and - since they are financially responsible for all contracts, no matter how they are established - would have no idea of their full liability.

What we found in practice
We received a high number of responses from councils, with 85% of the 152 councils with adult social services responsibilities submitting a reply.

However, the data provided by 129 English councils establishes only a partial picture of policy and practice on top-ups. Some councils provide a complete view of the frequency and level of top-ups in their local area, while others submit an incomplete picture or no record at all. The type of data provided by councils also outlines how far councils’ policy and practice on contracts conforms to the national guidance.

Overall monitoring of top-up fees
The chart below illustrates the extent to which the data supplied by councils varies in its comprehensiveness and choice of policy and practice. The councils’ provision of data ranges from full data (data provided on all types of top-up contracts in the council area), to partial data (some data provided on the different types of top-up contracts available in the council area), right through to no data provided at all. The types of contract include both those between the council and the home and those between the individual relative and the home.

A full list of all councils and the category into which we have placed them is available at www.independentage.org.
As the chart shows of the 129 councils:

- only 36 (28%) councils (the ‘good’) provided complete data
- a further 36 (28%) councils (the ‘bad’) did not provide any data whatsoever
- 57 (44%) (the ‘ugly’) provided only incomplete data or provided data that suggested they were not compliant with regulations.

**The good…**

‘Good’ councils in our terminology are those whose evidence suggests they are following national guidance in their overall monitoring of top-ups fees. A precondition for following guidance is that they have information about all the top-up fee contracts in their area.

**Of the 36 councils that had all information, the great majority (31 councils) said that all top-up fee contracts were between the council and home** and they had full information on these.

**Two councils did have some contracts directly between the home and relative** and could provide full information on these as well as the council-home contracts (Hounslow and Lancashire).

**Three councils reported they were sure they had no top-ups in their area** (Isles of Scilly, Tameside and Tower Hamlets).

Councils who articulated their policy on top-ups directly in response to our questions confirmed that:

**Devon:**
“As all Local Authority placements are through a contract, the gross agreement is between Devon County Council and the residential home following agreement between the Council and the 3rd party.”

**Sheffield:**
“Care Home Providers are contractually not allowed to introduce new third party top-ups where one has not already been agreed between the Council and the Third Party payer at the start of the placement.”

Some councils who provided full data on the top-ups in their area have a policy which specifically prevents homes from contracting directly with the relative.

**Camden:**
“Where the local authority has contractual responsibility and funds, third party top up can only be arranged between the council and the third party. In such cases it would be unlawful for a care home provider to arrange a separate top up.”

**Norfolk:**
“We are only reporting on the third party top-ups we arrange. The provider should not be charging third party top-ups directly as this puts them in breach of the terms in the pre-placement agreement.”

**Worcestershire:**
“In line with WCC’s contracts and procedures, 100% of the above were arranged between WCC and the third party and none between the provider and a third party. WCC’s contract with care home providers does not allow providers to make additional arrangements.”

**The bad…**

‘Bad’ councils are those that provided no information on top-ups in their area. These councils cannot be following guidance to ensure relatives are ‘able and willing’ to sign top-up fee contracts since they are unaware of the relatives who have signed them.
Just under 30% of councils (36) said that they did not hold or collect information about
top-up fees in their area.

Of these, one council (City of London) said they did not have care homes and therefore
provided us with no data. However even though the council does not have homes itself it is
almost certain that it has residents who are using residential care homes in other areas. In
this case, it would be responsible for the residents’ contracts and therefore any top-up fees
being paid. Since this council did not give us any information on these, we have included
them in the ‘bad’ category.

Some councils that provided no data made it clear they did not believe they had any legal
obligation to do so:

Bury:
“As a Council we’ve never had any involvement in top-up care home fees. ... The Council
does not know how many top-ups are in place, in any financial year; ... No top-ups have
ever been arranged between the Council & the third party [the relative]. So all top-ups will
inevitably fall into the ‘care home provider & third party’ category, although we do not
know how many these are.”

Cheshire West and Chester:
“I can inform you that Cheshire West and Chester Council do not record the information
you request. Third Party Top Ups are negotiated by individuals and care providers.”

These council statements are in direct contradiction to the national guidance on top-ups
which states that if the local council places someone in ‘more expensive accommodation
it must contract to pay the accommodation fees in full’. There is flexibility in specific
circumstances for the relative to contract separately with the home but the council should
continue to monitor such arrangements.

This section includes six councils that told us it would take them a disproportionate
amount of time to collate the information on top-ups that they did hold. If this is the case
and the information was not readily to hand, we think it reasonable to conclude that the
councils are not routinely monitoring top-up fees in their area, nor are they likely to be aware
of their potential financial liability should they need to take responsibility for the top-up.

Staffordshire:
“We have estimated that it would take Staffordshire County Council in the region of 66
hours to locate, extract and retrieve the information you have requested as the information
is contained within 4000+ individual records. Staffordshire County Council is therefore
unable to answer your request as extracting the information will exceed the appropriate
threshold and therefore the information is exempt from section 1(1)(b) of the Freedom of
Information Act 2000 by virtue of section 12.”

The ugly...
‘Ugly’ councils are those which had either incomplete information or appeared to have a blanket
policy of leaving contracts to be negotiated directly between the relative and the care home.

Most of the ‘ugly’ councils (29 in total) had at least partial information on contracts that
they themselves held with care homes but they acknowledged that there could be other
contracts established directly between the home and the relative, on which they did not have
information. Nine councils could supply some information on top-ups but no clarification
on the type of contract set-up in their area.

Bradford:
“We recognise that this is an issue for us and are taking steps to address this through our
commissioning and contract arrangements. Currently we are only aware of third party top
ups if the care home puts them in the contract (section 8) that we have with the service user. As not all care homes do this we do not have comprehensive figures for the percentage of total care home placement in our area when a third party top-up is being paid."

Durham:
“All 3rd Party Top Ups held on Durham County Council systems are arranged between Council and 3rd Party. Arrangements between 3rd Party and Care Home are not recorded.”

Manchester:
“Above is the number of top-ups between the Council and the third party. There may be private arrangements but we are not aware of any and we have no liability for them.”

Of these ‘ugly’ councils, 19 were particularly ‘ugly’ as they reported that they could only provide information - whether full or partial - on top-up arrangements set up between the home and the relative and said they did not have any contracts between the council and the home. This suggests that these councils have a blanket policy, which would be contrary to national guidance, of leaving residents to arrange top-up fee contracts themselves.

Dudley:
“In DMBC all third party top up arrangements are subject to arrangement between the provider and the third party. This has been the arrangement since 1993.”

Peterborough:
“The Council can only record details of third party top ups where we know of them, and in some cases, we are not advised if a third party top up is made between the family and the home. Former IT systems for recording service user information were not able to record this information. Therefore, data can only be provided for the current year from our new software.”

Wokingham:
“In Wokingham we regard third party top-ups to be an arrangement between the care home provider and the third party and not between the council and the third party. We do ask for Care Home providers to advise us if they intend to ask for a third party top-up and we make a record of this when disclosed but this is not in a reportable format where we can aggregate the numbers or amounts without going through each individual record. The information would be included in the individual’s case notes and/or financial records.”

Finally, four councils have recently changed their policy on top-ups: two have made an improvement to their current level of practice (North Yorkshire and Windsor and Maidenhead) and two have introduced a poorer level of practice for the first time (Gateshead and Oldham):

While North Yorkshire refused to provide full data on top-ups in its area for the years requested, it did acknowledge the following:

“The only third party arrangements that we are aware of are those where the third party, the Council and the provider are in agreement. We have introduced a new procedure and contract process to ensure agreement is reached between all three parties.”

Windsor and Maidenhead provided partial data in their response but was able to confirm that in the last year they have started recording both third party payments made to the care home provider in their local area as well as third party payments paid to the council.

At the other end of the scale, Gateshead introduced for the first time top-ups arranged solely by the care home provider and Oldham moved from more centralised oversight of council-home contracts to a position where they have decided to ignore their statutory responsibilities:
Gateshead:
“3rd party top-ups are controlled by each individual care home provider and they can charge according to their own costing systems. Third party top-ups have been an infrequent occurrence until the last year when new care home providers have introduced them.”

Oldham:
“From April 2012 new placements contract direct with the home and we do not hold this information.”

Overall, the lack of complete information, with so many councils failing to monitor top-ups in their area, it is impossible to obtain an accurate national picture of how many families are subsidising care costs on top of the amount paid by the council or how much these families are paying. We did ask councils for data about the lowest, highest and average top-up fees being paid in their areas, but this was only provided by the councils that monitor contracts. Without data from the councils that do not monitor, it is likely that any estimates would be inaccurate.

**Good practice 1: monitoring existing top-ups**

As we have seen, the council remains legally responsible for the care home places of older people with low incomes and low savings and has to pick up the bill if families cannot afford to continue to pay a top-up. The LAC requires that councils assure themselves of the sustainability of top-up contracts and suggests that councils agree a regular review with relatives. This is even though the council is legally responsible for the care home places of older people with low incomes and low savings and has to pick up the bill if families cannot afford to continue. Additionally, councils have a clear responsibility in guidance to monitor top-ups in order to manage their own budgets effectively.

However there is little evidence that this best practice is being followed.

**Annual checks of top-up agreements**

As the chart above confirms:

- **Despite guidance recommending that top-ups be regularly reviewed, almost 80% of councils (103) who responded routinely did not check up on the health of top-ups on an annual basis as part of the Annual Review of residents.**
In terms of an annual review or check up on the third party top-up arrangement, the vast majority of councils do not provide a formal question at review. The onus is very much on the relative of the family member to raise the issue if there are any problems, and as is stated below, reviewing staff are often not aware that a third party top-up arrangement is in existence.

**Warwickshire:**
“There is no formal question at review or in our ‘My Review’ tool relating to the financial circumstances of a Third Party payer, and in many instances the person carrying out the review may not even be aware that there is a third party contribution. The details of the third party contribution are on the Individual Placement Agreement (IPA), and we would not expect reviewing staff to check these prior to review. It may be the case that a relative who is the third party contributor will volunteer information about their financial circumstances, and in these instances we will follow up and try to resolve the issues.”

The lack of follow-up or review is seems to be based on the policy position taken by the council that they have no legal responsibility to oversee or monitor such top-up arrangements.

**Sheffield:**
“Reviews in residential homes do not specifically address the third party’s ability to continue to make the payments and there is no requirement in our procedures that staff do so as this is a private arrangement between the home and the third party. Those agreeing to make third party payments are required to complete and sign proforma that clearly states they understand and accept the commitment they are making. However if the third party stopped paying and we became aware of this at review or otherwise we would take action to secure the placement.”

This is despite the councils’ financial liabilities to fund the full cost of the accommodation if the arrangements should fail. Without monitoring third party top-ups in their area it is difficult to see how councils will have a complete awareness of their financial liabilities.

However, Shropshire was able to state that:

“We now include in the review process a form which contains a question: ‘Is a contributor able and willing to continue making this contribution.’

Another council, while not arranging any top-up contracts directly with the home, did check with care home providers on an annual basis:

**Blackburn:**
“We check annually which homes are charging a top up and what it’s for and that they have an agreement in place with any Service Users’ relatives for it to be paid.”

Others did check with families to see whether they consider if they could continue payment of the top-up, but did not record the numbers in a formal way:

**Sunderland** City Council do ask individuals to consider if they could maintain this arrangement on a long term basis, however, this information is not currently recorded.”

**Durham:**
“As part of the care plan review process, family/clients are encouraged to voice any concerns/issues they may have in relation to their care. This may include discussions around personal finances.”

**Good practice 2: Getting independent advice**

Due to the low number of councils who reported adhering to the national guidance on collecting data on top-ups, the importance of relatives accessing independent advice on top-ups becomes even more relevant in order to offer some level of protection against inappropriate top-up requests.
Guidance does not specify that councils must direct people to independent advice, but clearly states that people need “information on the options open to them if they are able to exercise genuine choice”. Callers to our advice service with concerns about whether or not to sign a top-up agreement are always advised to first consider why they are being asked to pay a top-up and whether it is legitimate for them to do so. Independent financial advice may also be appropriate if they have established that they do not have grounds to challenge the top-up in order to ensure that they can afford to continue to pay it on a long-term basis.

However, once again, there is little evidence that good practice is being followed. 

• **75% of councils (98) did not signpost families of care home residents to independent advice prior to entering into third party top-up agreements.**

### Signposting to independent advice

![Graph showing signposting to independent advice](image)

Nonetheless, there were some examples of good practice reported. 

One council provides an information leaflet prior to the financial assessment process:

**“Durham County Council sends out a leaflet prior to the client’s financial assessment. This advises people to consider legal advice and also provides them with useful contacts.”**

**Camden:**

“In all cases third party’s sign a legal contract with the council and this advises them to seek legal advice before signing.”

**Shropshire** council was able to confirm plans to strengthen the independent advice provided to individuals who were considering a care home move:

“... we are in the process of developing some supportive written advice to all individuals who are, or who may in the future be considering residential care. The document will provide individuals and families with information on the various aspects of the process. We will include information relating to them seeking independent advice.”

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29 Local Authority Circular, LAC(2004)20. Section 7.1
One council was able to suggest that while records weren’t kept, there was a possibility that this could be happening as part of conversations with residents and their families about finances. However, no formal confirmation of this could be provided:

**Warwickshire:**
“We do not keep a record of people who we may have referred on to financial advice/independent advice including for advice on third party contributions. That said, this does not imply that discussions would not have occurred within the wider discussions about finances.”
As well as requesting information from councils under the Freedom of Information Act, Independent Age also asked care homes for their views on top-up fees through a joint survey with the English Community Care Association (ECCA), the largest representative body for community care in England, which represents many care homes. The results show:

- strong reinforcement of our FOI findings that many councils - despite their legal requirements - leave homes and relatives to organise top-up fee contracts themselves, and a belief that this is becoming even more common
- an overwhelming sense from care homes that top-ups are increasing in most places because the rates that councils pay for care home places are too low
- despite this overall trend, a striking degree of variation between councils (and indeed care homes), with a minority refusing to allow top-up fees to be charged but many others encouraging them
- a majority of care homes have had at least one instance where a relative has struggled to pay the top-up fee.

68 care homes or care home groups responded to our survey. Of these, 79% said they had at least one resident of their care home(s) for whom a third party top-up was being paid by a resident’s family member or friend.

As with the Freedom of Information request, care home providers revealed very large variation across England in councils’ attitude towards, and management of, third party top-ups. 20% of homes reported that they only had top-ups where the contract was between the home and the local authority. We believe this situation should be the norm. The statutory guidance in the Choice of Accommodation Directions 2004 says:

“When making arrangements for residential care for an individual under the National Assistance Act 1948, a council is responsible for the full cost of that accommodation. Therefore, where a council places someone in more expensive accommodation, it must contract to pay the accommodation’s fees in full.”

Worryingly, however, 42% of care homes responding to our survey said that all their top-ups were arranged directly between the care home and the family member. This is a concern because it suggests that many councils are ignoring their responsibility to relatives. (See question 1 graph).

This is further supported by the 36% of homes who reported that they had both types of top-ups. They said that the most common arrangement (39%) was for the contract to be made directly between the care home and the relative, rather than with the council.

Our survey also provides some evidence that this tendency is increasing. Of the 18 homes that had both types of top-up fees, two thirds (67%) agreed that top-ups were increasingly likely to be arranged in this way. (See question 2 graph).

In our FOI research we found that only one in four councils signposts relatives to independent advice before they sign top-up agreements, and only one in five checks as part of the annual review whether the relative is still in a position to pay. It is, therefore, perhaps not surprising that most care homes said they had had at least one instance where a relative had experienced difficulty in continuing to pay a third party top-up. (See question 3 graph).
Question 1: Who signs the contract for top-up fees?

- Care home - council: 20%
- Care home - relative: 40%
- Both types: 30%
- Don't know: 10%

% care homes with top-ups

Question 2: Are top-ups increasingly being arranged between your home and the relative, rather than the council?

- Agree very much: 50%
- Agree somewhat: 20%
- Disagree somewhat: 10%
- Disagree very much: 10%
- Don't know: 0%

% care homes agreeing

Question 3: Have you ever had an instance where an individual experienced difficulty in continuing to pay the third party top-up?

- Yes: 60%
- No: 20%
- Not sure: 20%

% of care homes
Many care homes took the time to give us their views about third party top-ups. The majority told us spontaneously that they expected an increase in third party top-ups as an inevitable consequence of the low rates paid by local authorities for care home places. One home told us:

“There will be an ongoing increase in the number of friend/family topping up fees as local authorities continue to freeze fees (at best) and new placements [are] at unrealistic levels when dependencies are getting higher. The interesting thing about all the political parties rhetoric about social care is that they never mention fees local authorities are paying as they know it’s an insult to expect quality care in a quality environment to be sustainable when average fees from LAs are £450!”

Another said:

“Top-ups are increasingly being required because the local authority is either decreasing the fee rate or giving a zero percent increase year on year. However, every other cost is increasing and quality is an essential part of the delivery of care. Local authorities pay lip service to the need for increases, but then do not follow up with any actual resources.”

And yet another said:

“Our main LA has suppressed fees for three years - a four percent cut and then two years with no increase... The whole situation is a mess.”

Other similar comments included:

“These top-ups should always be included in the council contract so that the real fees for buying care in any location can be tested. If every placement in an area funded by a council requires a top-up then this is clearly demonstrates that the fee the council are offering is too low to really buy care.”

“It would be an impossibility to deliver a high quality of care to our residents on the current fee levels we receive from local authorities. Staffing levels, staff training and development, nutritionally balanced diet, recreation, social and community activities - to name but a few - are all an essential in providing the benefits to the health and wellbeing amongst our residents.”

“In our home we have never asked for top-ups. However, the [council] fee level is way below the actual cost of care. This situation is unacceptable and some homes have been forced to close through higher and higher demands made by the CQC.”

“My agency is not for profit but cannot afford to lose £350 a week against our cost price and has no option but to ask family to contribute in order to keep our homes open.”

“Without top ups the majority of care homes who operate with bank borrowings would fail. Council fees in (council area) for 2013/14 are 0.7% higher than in 2008!”

“The local authorities are not increasing their payments year on year and care costs are rising. Legally top ups are allowed and we would not accept residents at the local authority rate (particularly from [council name]).”

However, as with our FOI research, there is evidence of big differences between councils in their attitudes towards top-ups. Some homes reported that councils remained hostile to third party top-ups, whether in policy or practice:

“Our local authority, despite 10 years of signing off third party top ups, has told providers that third party top ups are illegal and terminated the contract of the one care home that stood up to them on this. Legal advice demonstrates to them that they were wrong but they have now removed the provision for third party top ups from contracts. Given the low level of fees paid by the council, this is likely to drive quality even further down in the area.”
“Some councils are still reluctant to accept that top-ups are required if a resident wants to choose a care home with more space/better facilities/higher standards of ‘fitout’. LA fees remain ‘lowest common denominator’ in most locations, meaning that if families want something better for their relatives they have to fund it themselves.”

“[Council name] tells the residents/relatives not to pay (top-ups) and we are not allowed to approach the relatives to discuss top ups. We have a letter saying we can’t discuss anything with the relatives except through them... We used to ask the family if they could afford some top up but now have had to stop this.”

One home even said that while its council allowed top-ups, it reduced the rate it paid to the home to reflect the fact that a top-up was being paid.

Some homes felt that top-ups were discouraged not by council policy but by the attitudes of individual members of council staff:

“[The council] says it will encourage front line staff to agree to top-ups but front line staff are often left of centre and try to prevent families from topping up.”

“[Top-ups are] very difficult to set up, due the prejudices of care managers.”

Some homes also had very strong negative feelings about top-up fees:

“We don’t charge third party top ups on any of our 1,951 residential and dementia care beds. We hold the stance that they are morally wrong, especially as no capital disregard or assessment of financial resources is in place for the third parties.”

Others accept top-ups as an inevitability:

“We would like to see them recognised as a normal part of the system. Some seem to think that top-ups are unfair whereas we believe that they are a necessary co-payment recognising that the state is unlikely ever to pay the true cost of care in good facilities and appropriate staffing.”

Other homes point out that if councils pay below the real cost of care but don’t allow top-ups it inevitably leads to residents who are self-funded having to pay more:

“Where the family doesn’t pay a top up, this leads to higher cost - cross subsidy - charged to the self funded client in the next bed, which by my book smacks of financial abuse.”
Independent Age’s advice service receives just under 3,000 calls a year from older people and their families who have concerns about the complex care and support system and are having difficulty in getting good quality information and advice about their rights and entitlements.

Second-tier advisers will deal with approximately 4,800 issues a year during these calls, such as how to pay for care, housing options in retirement, what to consider during a hospital stay to worries about a relative’s mental health, access to NHS continuing healthcare funding and claiming welfare benefits.

In 2012, the top five issues affecting callers to our advice service were:

• care home funding (28% of total issues - 1,363)
• third party top-ups (18% of total care home funding issues - 246 of 1,363)
• social care information (just over 30% of total issues - 1,458)
• NHS Continuing healthcare (8% of total issues -384)
• mental health (7% of total issues - 340)

Care home funding, and its associated topics, including third party top-ups, makes up just under 30% of all issues discussed by callers with advisers.

Difficulties in getting information about social care options also contribute to the issues discussed in a further 30% of calls.

As well as providing advice by telephone and email, Independent Age also produces a range of guides that users can download or order directly from us. The three most popular guides, which were downloaded in January-May 2013, all cover to some extent the issue of top-up fees:

• Care home fees: Paying them in England (guide 16)
• Assessments and services from your local council in England (guide 12)
• Care home fees: Third party top-ups in England (guide 17)

The total number of downloads for the top five guides was 4,701. This is 35% of the total guide downloads: 13,255 for January-May 2013.
Of the top five guides downloaded:
- care home fees guide accounts for 35% of total (1,625 of 4,701)
- assessments and services guide makes up 20% (958 of 4,701)
- and third party top-ups guide for 16% (754 of 4,701).
- the other two guides are on NHS funding (14% 660 of 4,701) and treatment of capital in a care home (15% 704 of 4,701).

These results correspond closely with the top five issues the public asks our advice service about and highlight how common it is for people to worry about paying for care.

**Case studies of third party top-ups**

On average, a quarter of all care home funding issues dealt with by our advice service focused on worries from relatives who had been asked by councils to pay a top-up fee. In many cases, they had been asked to pay a substantial sum.

Individual callers raised a range of concerns about third party top-ups, including:
- low and inflexible local council standard rates
- arbitrary requests for top-ups from councils or providers
- a lack of information provided by the council or care home about their rights and entitlements
- no signposting to independent financial advice
- problems for self-funders when requesting local council funding
- lack of choice on how the contract should be set up.

**Case study 1**

“I contacted the Independent Age Advice Service after I was asked by the local council to sign a third party top-up agreement for my 86-year-old mum who was due to move from a respite dementia care unit to a permanent stay in a care home. I was asked to sign an agreement to pay £75 a week (or £300 a month) towards her care as the council told me they would only pay a standard rate £75 lower than the care home fees (£655 a week).

The advice worker I spoke to suggested I ask the council whether they could confirm if there were any other homes in my mum’s local area that could meet her assessed needs, had a current vacancy and charged fees at the council’s standard rate. I spoke to my mum’s social worker who said there was no other local home currently available that could meet all her assessed needs and charged fees at the local council standard rate. The social worker wasn’t aware of the top-up guidance but, with my new information, she informed the funding panel who as a result withdrew their demand for a top-up and instead agreed to increase the council’s standard rate to meet the full cost of my mum’s care.”

*Ms A, north of England*

Other enquirers contact our advice service much further along the line, after having paid out a considerable sum of money towards their relative’s care. One caller got in touch after having paid out tens of thousands of pounds in top-up fees from his retirement savings to ensure his wife remained in a particular care home. The council in question had offered an arbitrary rate for his wife’s care in another council area from the beginning, without first checking that other care home places were available at the standard rate that could meet her needs.
Case study 2

“I contacted the Independent Age advice team due to my concerns about my wife’s care. I had been paying a substantial third party top-up for a few years. In my view and those of her GP and social worker, the council should have been paying more to meet her care needs. However, the council disagreed.

The advice worker stated (and confirmed in writing with the relevant guidance) that based on the specific circumstances of our case it appeared that the council should have increased their standard rate for the care home placement instead of asking for a top-up. Acting on that advice as well as legal advice, we contacted the council to inform them that we would seek a Judicial Review of the case. The council responded quickly, agreeing to increase their standard rate and also to reimburse more than £20,000 in top-up fees paid to date as well as reimburse our legal expenses.”

Mr B, south of England

Many callers report a lack of information from councils about their rights and entitlements before signing an agreement. This is particularly true for people paying for their own care whose savings then run down to the assets threshold for council support.

Case study 3

“My father had moved to two different care homes in the past two years due to developing dementia. His savings then dropped down to below the assets threshold for council support. I approached his council for support, but they insisted that either I pay a weekly top-up towards his care costs, or that he had to move again, this time to a cheaper home.

I contacted Independent Age for advice when the council refused to give any details of what they would usually pay for my father’s care and also wouldn’t give a list of alternative homes at that rate that would be suitable for my father to move into. The council also wouldn’t provide me with a copy of my father’s needs assessment for me to use to check what other care homes might be suitable.

The adviser suggested that I might want to make a formal complaint to the council regarding the lack of information about my father’s care, how it should be paid for and details of the local council’s standard rate. As a result, I was aware of my father’s rights and entitlements to ensure that he could receive the best possible care in the future.”

Mr C, south of England

People paying for their own care are often not made aware of what might happen if their savings run low and they aren’t aware that the local councils’ rates are often much lower than full private rates. So families face pressure when this happens to prevent relatives from having to move from care homes which they are familiar with and settled into. In particular, there is a lack of detail about residents’ and councils’ rights and responsibilities should family members fail to be able to pay the top-up in future. Family members are often left with no choice but to pay the top-up to ensure that their relative gets care even if no other cheaper home is available.
Case study 4

“My father was unhappy at his current care home and needed to move urgently. The council offered two care homes but they were both 15 miles from where I lived. I found an alternative care home closer to me that charged fees of £700 a week. The council standard rate was £512 a week, but they didn’t offer any care homes nearby that charged fees at that rate.

With information and help from the Independent Age adviser, I contacted Social Services and quoted the national guidance. I also stated that the room must be suitable for my father’s needs, within reasonable access of friends and family and no need for dementia care. There are only two such homes locally. As a result, the social worker came back to me to say that funding had been agreed.

We moved Dad into the new home yesterday. His first words on seeing his room were, ‘I’ve died and gone to Heaven.’ He has met another resident who he knew from way back and they hit it off straight away. The smile on his face said it all...”

Mrs D, Midlands
In July 2012, the government published a draft care and support bill outlining a complete modernisation of current social care legislation. The Care Bill was subsequently introduced to Parliament in May 2013, following a period of pre-legislative scrutiny undertaken by a joint committee of both Houses of Parliament. It is presently being debated in the House of Lords and is due in the House of Commons in autumn 2013.

The bill retains the right of individuals to make top-up fees. Clause 30 of the Care Bill confirms the right to choice of accommodation and the ability for an adult moving into a care home to request a third party pay top-up where they express preference for particular accommodation. Crucially, this clause refers to the ‘additional cost’ that may arise in the adult’s choice of accommodation: the top-up that will need to be paid by a family member or friend.

However, a number of other clauses in the bill also have the potential to impact on the prevalence of top-up fees and the extent to which good practice is followed by councils in managing them. Some of these also relate to the introduction in the bill of the measures to implement the so-called ‘cap’ on care costs that was recommended by the Dilnot commission.

The two key issues are:

- personal budgets for care homes/council standard rates
- advice, information and independent financial advice.

Personal Budgets for care homes/council standard rates

The bill is clear that, in future, personal budgets will be the normal way for a council to fund an individual to pay for care home fees. In practice this means that if an individual is assessed as having sufficiently high needs and low enough income/savings to qualify for council-funded care, he or she will be given an amount of money that the council believes is enough to buy the care they need. A personal budget that needs to cover fees for residential care will typically be significantly higher than one that only needs to pay for care at home.

This is the extension of a widespread trend towards ‘personalisation’ in care.

Clause 26 says that the level of Personal Budget set should relate specifically to a person’s assessed needs.

However, the bill takes personal budgets even further by introducing in Clause 28 the concept of an ‘Independent Personal Budget’ (IPB) for individuals who do not yet qualify for council-funded care (because their assets and/or income mean they do not meet the criteria) and are paying their own costs up to the level of the care funding ‘cap’. At this point the council - in theory - will take over responsibility for payments.

The IPB is the nominal amount that the council would have paid for the individual’s care, and it is this figure which will count towards payment of the cap not the actual amount being paid by the individual. So if someone is assessed and given an IPB of £360 a week, they will hit the £72,000 cap in 200 weeks, even if they are in fact living in a care home which charges, say, £460 a week.

Following scrutiny of the draft bill by a committee of both Houses of Parliament, the government has accepted the committee’s recommendation that the amount of a personal
budget should be “equivalent to the reasonable cost of securing the provision of the service concerned in the local area”.\textsuperscript{30}

This is an important concession. However the bill currently provides no specific mechanism for an individual to challenge the rate of a personal budget or IPB on the grounds that it does not represent the ‘reasonable cost’ of buying a care home place (or any other care service) in the local area. The only current mechanisms available are to complain through the council’s existing complaints procedures (which are not designed for issues of this nature) or go to the Local Government Ombudsman. The government rejected calls during the consultation on the draft bill for the bill to establish a care tribunal which would adjudicate in disputes between individuals and councils about care issues. We hope that this will be considered by the complaints review, under Ann Clywd MP, which is due to report in autumn 2013.

Likewise, the bill fails to acknowledge the potential difference between the cost at which local authorities may purchase care and the rate at which individuals are able to do so, stating: “clause 26 now makes clear that the personal budget is the cost to the local authority of meeting the needs it is required or decided to meet”.\textsuperscript{31} In many cases, however, this will not be the case since councils have far greater purchasing power than individuals and, as has been noted in chapter 2, many care homes charge private residents more than council-funded residents.

The Chair of the Joint Committee, Rt Hon Paul Burstow MP, emphasised in a Commons Debate on the Queen’s Speech that government legislation must address the need for actual costs to be a relevant factor in determining fees for care, adding: “that is not covered adequately in the Care Bill at present”.\textsuperscript{32}

### Advice, information and independent financial advice

The Care Bill offers a unique opportunity for the government to address some of the concerns raised about top-up fees in this report. However, as yet this opportunity has not been taken.

Clause 4 outlines a local authority’s general duty to make available information and advice relating to care and support. This includes how the local care system operates, and access to independent financial advice for people who may require it (specifically when entering into a deferred payment agreement).

Explanatory notes accompanying the bill state that, “local authorities must provide sufficient information and advice to enable adults to consider the financial aspects of meeting their care and support needs and to make plans for how they might meet any future needs for care and support”.\textsuperscript{33}

However, the wording here implies that local authorities themselves will provide the necessary advice and information - effectively continuing the present \textit{status quo}. This does not make any provision for independent advice to individuals, which is essential if they are to be able to query and if necessary challenge decisions made by councils on care issues such as top-up fees.

The bill also fails to specifically address information and advice about top-ups. It specifies the need for independent \textit{financial} advice for those individuals entering into ‘deferred payment’ arrangements for care home but not for families making a decision to pay - in some cases - hundreds of pounds a week as top-up fees. It is possible that some of these concerns may be addressed in the regulations and guidance to the bill, which are due to be published later in 2013.

\textsuperscript{30} Secretary of State. The Care Bill Explained. CM8627 p.24.
\textsuperscript{31} Ibid p.24.
\textsuperscript{32} Paul Burstow; 13 May 2013: Column 370.
\textsuperscript{33} Care Bill (2013) Explanatory Notes p.7.
7. Policy issues and recommendations

The evidence indicates that third party top-up fees have become a ‘secret subsidy’ paid in many areas of England by families of the poorest care home residents to support the low level of care home funding that councils are willing or able to provide.

This is a vital issue for families, residents and care homes themselves.

Vital for the 56,000 families who are paying top-up fees since no one can honestly say how many of these are paying them because they have genuinely chosen to - and how many are paying because they have been given no information, no support - and no choice. Not only is this unfair but for many families the costs they are paying - often without the benefit of any legal or financial advice - may be unsustainable.

It is also vital to residents of care homes. If a family initially agrees to pay a top-up fee but is then unable to continue - perhaps because of ill health, redundancy or other changing circumstances - the resident’s care home place is at risk. Then, the care home may continue to provide a place at a reduced rate or the council may agree to fund the top-up previously paid by the family. But if neither of these happens, the resident has to move to a new, cheaper home - at best a huge disruption and at worst a severe risk to health.

And the issue of top-up fees matters to care homes. As this report shows, it is a troubling issue, with some care homes deeply concerned at having to ask relatives to pay them and concerned that top-ups may be increasing as the level that local authorities pay for care places fails to keep pace with the increase in care costs. Leveraging top-up fees from hard-pressed relatives is not a sustainable answer to the more fundamental issue of care home profitability and does little to promote the high quality, person-centred care that we need.

Finally, it matters to councils because it suggests a fundamental failing in overseeing the extent of top-ups in their areas. Not only does this impact on their residents but it also creates financial liabilities for councils of which they are largely unaware.

To address these issues, action must be taken now from all sectors of society, including individuals and their families, councils, providers, charities and the government.

Issues to address

This report has identified that:

1. Councils are breaking existing national guidance on top-up fees. Most do not know the full extent of top-ups in their area and so cannot be ensuring that all relatives are ‘willing and able’ to pay them. Nor can they have a true picture of their full liability.

2. Councils are not following good practice by signposting individuals to independent advice before they sign top-up fee contracts and ensuring that top-ups are regularly reviewed.

3. The government has so far missed the opportunity to address these problems through its new Care Bill.

Actions for councils

We recommend that:

• all councils review policy and practice on top-ups to ensure they are following national guidance. This could include a review of ways councils currently collect such data, a series
of spot checks to investigate current practice and how they monitor existing agreements to establish their financial liabilities

- all councils should signpost relatives to independent advice on top-ups prior to signing up to a top-up agreement. This should include a section of the contract which requires the family member to confirm that signposting to independent advice has occurred. It should also include a clear link on its website to an advice agency such as Independent Age in the section dealing with care home funding and top-up fees
- all councils to provide and maintain an up-to-date list of care homes at their standard rate on their website
- councils should consider offering training to all relevant social care professionals involved in supporting older people to move into residential care in order to ensure that they are aware of national guidance and can communicate it to individuals and families.

**Actions for care home providers**

We recommend that:

- all care home providers review their policy and practice to make sure they are following national guidance
- all care home providers be transparent with individuals and families and provide details of their fee levels on their website
- care home providers should signpost to independent advice any relative considering a top-up fee payment
- care home providers share information and act collectively with other providers to understand the prevalence of top-up fees in their area, the relationships to the standard rate for care and to raise issues of concern with the council.

**Actions for government**

We recommend that:

- the Department of Health should be tasked with monitoring the usage of top-ups by local councils and producing this information annually
- the Care Bill be amended to ensure that local councils must provide written information and signposting to sources of independent advice for individuals and families prior to considering entering into a third party top-up agreement. It should also include referral to independent financial advice if appropriate prior to sign-up
- the new top-up guidance should state clearly that the local authority has a duty to provide to the older person or their carer a current list of care homes that are:
  - of the type needed (ie residential or nursing care)
  - meet the older person’s needs in full
  - have a vacancy at the time that care is needed
  - charge fees within the standard rate, or amount that they will pay.

Guidance should also strengthen councils responsibilities in regard to reviewing top-ups on an ongoing basis and implement a duty to annually review any top up arrangements. Reviews of top-ups should specifically look at whether the top-up continues to be affordable
- regulations should also contain clear rules on how a local authority should decide what is an appropriate budget to meet a person’s needs for specific types of accommodation in a manner that is transparent and fair to all local people using care services.

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34 Independent Age’s response to the draft Care and Support Bill. October 2012. p.42.
• a care tribunal should be established, either in the Care Bill or as a result of the complaints review led by Ann Clywd MP, which would hear and make judgements on issues concerning care, including top-up fees
• more broadly, top-up fees are a further indicator that social care faces a funding crisis.

There is significant evidence from our report that the low rates that local authorities pay for care home places contributes to the existence of top-up fees. The government has to ensure that local authorities are sufficiently funded so that they are able to properly fund their social care responsibilities.

**Actions for individuals and families**

We recommend that:
• families facing the option of paying a third party top-up for a loved one in a care home access independent advice prior to sign-up to establish their rights and entitlements
• if families choose to challenge the cost of the third party top-up they are paying on behalf of a loved one in a care home, they are aware that they can approach the Local Government Ombudsman or seek judicial review.

**Actions for charities and other organisations**

We recommend that:
• each local Healthwatch should examine the evidence in this report in relation to their own council and decide whether they need to monitor top-up policies in their area
• Healthwatch England - the national body which gathers and presents evidence of shortfalls and issues in health and social care services to regulators, other arms-length bodies, and government departments - should support each local Healthwatch to monitor top-up policies and should collate the findings of those that do
• charities provide up-to-date and independent advice to individuals and families on first entering into a care home make sure that they are fully aware of their rights and entitlements
• charities support families to review and challenge the third party top-up where appropriate
• charities refer family members looking to challenge whether or not they should be paying a top-up to options of further support, such as independent advocacy, judicial review or the Local Government Ombudsman, as appropriate.