

DRAFT GUIDANCE NOTE ON CONSUMER LAW

The ISBA is grateful to Farrer & Co LLP for the following information:

Consumer law is changing in October – a summary of what schools need to know

[This note is a general summary of the law. It should not replace legal advice tailored to your specific circumstances.]

1. Introduction

- 1.1 On 1 October 2015, the [Consumer Rights Act 2015](#) (the **Act**) comes into force, which consolidates and updates the law on unfair terms in contracts with consumers. The Act applies to all contracts entered into on or after 1 October 2015. As schools will be aware, parents are **consumers** when they enter into contracts with schools (who are **traders** under the Act) for the provision of educational services and so this legislation is relevant to schools when forming and entering into the contractual relationships with parents, a relationship that typically crystallises in the form of the parent contract.
- 1.2 The Act, actually, represents the final piece of the jigsaw in terms of the UK's implementation of a series of European Directives on consumer rights. Indeed it follows the [Consumer Contracts \(Info, Cancellation & Additional Charges\) Regulations 2013](#) (the **CCRs**, in force since June 2014) and the [Consumer Protection from Unfair Trading Regulations 2008](#) (the **CPRs**). It is therefore timely to take stock of this overall new landscape of consumer law in the UK as it represents the backdrop against which schools are operating when it comes to establishing the relationships it has with its parents.
- 1.3 The purpose of this therefore is to provide an overview survey of the consumer law landscape and look at what schools need to know about it as it applies to their dealings with parents – the important obligations, key risks and practical tips. Do be aware that as some of the law in this area is quite new and the language in the legislation is somewhat untested – that means that we have tried to apply the law directly to the schools context as best as our experience can anticipate.

2. The main things schools need to be aware of – (i) information provision and (ii) enhanced remedies

- 2.1 We have prepared a detailed overview of the law under each of the three key pieces of consumer protection legislation and how it affects schools in the **table attached in section 5**. Before turning to that and in this section, we have summarised the key things that schools need to be aware of now, not least as these mark some of the relatively major developments.
- 2.2 **The good news though is that the law does not fundamentally change on 1 October 2015.** The Act builds on existing consumer law and consolidates it. This means that schools that have been complying with consumer law to date should not suddenly find themselves in breach. That being so and as noted above, some aspects of the law are changing, and taken with the introduction of the CPRs and CCRs over the last decade, this is an appropriate time for schools to review the most up to date consumer law advice alongside marketing materials and parent contracts and to keep on top of the law in this area.

- 2.3 In our experience and by way of some reassurance, the independent schools sector has a good 'track record' of compliance with both the spirit and letter of the law in this area, and dealings with parents tend to be pragmatic, transparent and fair.
- 2.4 Many schools will have adopted the ISBA's Model Parent Contract. This is currently being reviewed in light of the Act and a new version is expected to be issued ahead of 1 October and therefore in advance of the start (of most schools') 2016 admissions processes. However, we do not anticipate the need for wholesale changes to the parent contract, and the amendments are likely to be small in number. If schools adopt the ISBA's Model Parent Contract, then much of the work in seeking to ensure compliance with the law on unfair terms in consumer contracts is 'ticked off' via adoption of the model contract. As a result, this note focusses on the things schools themselves need to be aware of in terms of how to go about contracting with parents (as opposed to the contractual terms on which schools contract with parents), on the assumption that the ISBA Model Parent Contract and associated guidance is adopted and complied with 'on the ground'.

3. Information provision during the application process

- 3.1 **Background.** The Competition and Markets Authority (the **CMA** which has taken over responsibility for consumer law and enforcement of it from the Office of Fair Trading) recently published some specific guidance on consumer law for universities. Whilst many of the features of the university sector are completely different to the independent schools sector, some of the guidance on how consumer law applies to the application process for universities does seem relevant to schools.
- 3.2 **The CPRs apply when parents research and apply for places at schools.** The CPRs (outlined in detail in the table in section 5) apply when parents and children are researching and investigating different schools and making applications for places at them. This means that schools are required to provide all **material information** to parents in a clear, intelligible, unambiguous and timely manner. Material information is the information parents need to make informed decisions about whether to apply to the school, and would include information on school fees and other important information about the school's 'offer' (e.g. curriculum information).
- 3.3 Under the CPRs, it is unlawful for schools to mislead parents by failing to give them the information they need to make decisions if that failure causes parents to make decisions they wouldn't otherwise have made – e.g. they apply to a school which clearly isn't right for their child. Schools will generally comply with this requirement without giving it much thought, as information on websites and in prospectuses will often contain the right material information. It seems to us that extra care may be required where:
- 3.3.1 Schools target particular types of children or parents (e.g. international students), because material information has to take into account the 'average consumer' in that group – i.e. the characteristics of the groups being targeted and the factors that may be relevant to their decision making (e.g. any language entry requirements).
- 3.3.2 Schools use third party marketing agents to attract parents and children to the school – because schools then have less control over what information is given by those third parties.

- 3.3.3 Material information is provided in different formats, on the school's website, in a prospectus and via marketing materials. It is advisable to ensure that material information is easy to find and that all materials available to parents provide the required material information consistently.
- 3.3.4 Material information changes – e.g. in the period between when parents research different schools and when they come to apply (such as if a school changes from single-sex to co-ed).
- 3.3.5 Information is provided verbally e.g. during meetings, interviews or at open/assessment days. Be careful to ensure that the information being relayed to parents by school staff is accurate, as if not, this could constitute a misleading action under the CPRs.
- 3.4 **Action points for schools under the CPRs.** Think about what baseline level of information about your school and the education it provides is "material information" under the CPRs. Is the information accurate, clear and accessible? Does the school speak with 'one voice' when engaging with prospective parents?
- 3.5 **The CCRs additionally apply when schools make offers to parents and those offers are accepted.** When moving from the research/application stage to the period when schools make offers to parents, the CCRs will additionally apply (because if the offer is accepted, a contract is formed between the school and the parent). The CCRs require schools to provide parents with specific **pre-contract information**, which then becomes legally binding as part of the contract. The CCRs contain in its schedules detailed lists of the requisite pre-contract information including the characteristics of the service (i.e. the conditions on which a place is accepted, information about the school – co-ed or single-sex, boarding or day school, etc.), the duration of the contracts, so far as possible the total price and details of extra costs, the identity of the school and the complaint handling policy.
- 3.6 The key things that schools need to know about pre-contract information are:
 - 3.6.1 The information which must be provided as pre-contract information depends on whether the contract is either: (i) a distance contract; (ii) an off-premises contract; or (iii) an on-premises contract. We expect that, where schools customarily meet the parents and/or interview or otherwise meet/assess the pupil (even if there are occasional exceptions where no face-to-face meeting happens), the contracts subsequently entered into are generally going to be 'on premises' contracts under the CCRs – but this may depend: see Farrer & Co note [The School-Parent Contract: 'Distance Contracts' & Cancellation Rights...?](#) As with the CPRs, the sort of pre-contract information to be disclosed is of the kind that schools are likely to be providing in any event (although reviewing the requirements and checking this would be a sensible thing to do).
 - 3.6.2 Pre-contract information should be made available to prospective parents before they accept the offer of a place (this reflects the CMA's guidance on the higher education sector).
 - 3.6.3 Because pre-contract information is binding, any changes need the express consent of parents. This applies to changes which take place between making the information available and parents accepting the offer. Schools who market places some time in advance of making offers

should take extra care to ensure that pre-contract information is up to date. (Though this doesn't prevent you from clarifying or providing more information about the school or the place in between time). Schools typically do this already when it is communicating with its prospective parents. Once the offer is accepted and the pre-contract information is part of it (and binding), schools can refer to the terms of the parent contract for the relevant clauses on making changes.

- 3.7 **Action points for schools under the CCRs.** Schools should think about whether their parent contracts are on-premises contracts or distance contracts, and seek specialist advice if in any doubt. Schools should also analyse the relevant schedules to the CCRs to check the pre-contract information requirements (use them as a check list) – it is likely that most schools will be providing almost all of the required information but there may be small gaps which can be easily plugged. Finally, think carefully about obligations to prospective parents when making significant changes to the school.

4. **New remedies**

- 4.1 Under the Act, if services do not confirm to the terms of the contract, parents will have new remedies of "**repeat performance**" and, if that is impossible or the school fails to do it in a reasonable timeframe, then "**price reduction**". The level of remedy will depend on the extent the remedy is necessary to complete the school's performance of the contract, i.e. the level of non-compliance will be relevant to the appropriate remedy. For example, if the school fails to provide educational services with "reasonable care and skill" or fails to comply with promises (in pre-contract information) made about the services being provided, parents may be entitled to repeat performance or a price reduction.
- 4.2 These new statutory remedies do not prevent parents from seeking other remedies for breach of contract, such as a claim for monetary damages or a request for "specific performance" – parents will have a choice about how to claim against the school, though they will not be able to claim twice for the same type of loss. In practice, parents – if challenging a school and the quality of educational provision – have always maintaining similar claims based on 'non-statutory' remedies (e.g. negligence or breach of contract). The fact therefore that the statutory remedies are at their disposal too, whilst seemingly a further headache for schools, actually may have questionable (or minimal) impact for schools.

5. Key provisions – a brief snapshot and overview of the current state of consumer protection law as it applies in the schools sector

	THE CPRs Consumer Protection from Unfair Trading Regulations 2008 in force since May 2008	THE CCRs Consumer Contracts (Info. Cancellation & Additional Charges) Regulations 2013 in force since June 2014	THE ACT Consumer Rights Act 2015 in force from 1 October 2015 (but many of the provisions already in force under existing legislation)
What the law says	<ul style="list-style-type: none"> The CPRs contain a general prohibition on unfair commercial practices. A commercial practice will be unfair if: <ul style="list-style-type: none"> it is not professionally diligent (an objective standard reflecting what's common in schools sector); and it materially distorts the average parent's economic behaviour (i.e. as a result of the practice, the parent does something they would not otherwise have done). The following practices are unfair, but only if they cause parents to take a <i>different</i> decision about their contract with their child's school (including cancellation): <ul style="list-style-type: none"> Misleading actions, i.e. giving false information or deceiving parents about the sorts of things parents would typically take into account when making decisions (Reg 5 CPRs contains a list), creating confusion with competitors' products or failing to honour commitments in applicable codes of conduct. Misleading omissions, i.e. failing to provide the information needed for parents to make an informed choice by failing to provide material information, or providing it late or in an unclear manner. Aggressive practices – harassment, coercion or undue influence impairing the parent's freedom of choice. None of these typically are practices adopted by independent schools. Finally, 31 specified banned practices are always unfair and are therefore banned in all circumstances (regardless of whether it causes the parent to take a different transactional decision). 	<ul style="list-style-type: none"> As noted above, the CCRs distinguish between (i) a <i>distance</i> contract; (ii) an <i>off-premises</i> contract; or (iii) an <i>on-premises</i> contract, and the information schools need to provide and the position on cancellation rights are slightly different, depending on the type of contract. Specific pre-contract information must be provided to parents in a clear and comprehensible manner. This pre-contract information is then legally binding as a term of the parent contract: <ul style="list-style-type: none"> Schedule 1 to the CCRs lists the pre-contract information for on-premises contracts; and Schedule 2 to the CCRs lists the pre-contract information for off-premises and distance contracts. Under the CCRs, change to any pre-contract information is not effective unless expressly agreed between the school and the parent. This makes making changes during the contract term much more difficult – if schools envisage the need to make changes to terms during the contract, this should itself be made clear in the pre-contract information (e.g. we reserve the right not to run a particular optional subject dependant on take up or sufficient numbers). Parents get special protections for off-premises and distance contracts: <ul style="list-style-type: none"> a statutory 14 day cooling off period for parents to cancel without having to give a reason and with a full refund of monies paid; and a requirement that off-premises and distance contracts are confirmed to the parent in a durable medium. 	<ul style="list-style-type: none"> All contract terms in parent contracts are subject to a test of fairness i.e. if, contrary to the requirements of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer. If so, the term is unfair. The Act says that fairness involves taking into account all the circumstances existing when the term/contract was agreed. Fairness is illustrated by specific examples in the Act - some terms are listed as being <u>potentially</u> unfair – they are 'greylisted': <ul style="list-style-type: none"> Part 1 of Schedule 2 of the Act contains a 'Grey List' of terms which <i>may</i> be considered unfair. Examples include price variation terms, entire agreement clauses, and terms imposing disproportionate financial sanctions. Note has always been taken of these in providing/updating the ISBA Model Parent Contract. The CMA Guidance discusses other terms which may be unfair. The CMA has also refreshed the OFT's (its predecessor's) extensive examples of good and bad standard terms, drawn from OFT case files in Annex A to the CMA Guidance. Again, we have typically always referred to these when drafting the ISBA Model Parent Contract. Some terms are <u>always unfair and unenforceable</u> – they are 'blacklisted', for example terms excluding statutory rights or seeking to limit or exclude liability for death or personal injury. Written contract terms must be transparent and written in plain and intelligible language so that the consumer can learn and understand about their rights and obligations before they are bound by the contract. We have been at pains to continually improve the ISBA Model Parent Contract with this in mind.
Exemptions	No exemptions.	Some types of contracts (e.g. residential accommodation contracts) are excluded.	Core exemption: The test of fairness does not apply to terms about price or the subject matter of the contract, as long as they are transparent and prominent and not on the 'Grey List'. These are the

			'core' elements of the contract and in a free market the parties are considered free to shape the core obligations as they see fit, free from legal prescription.
Remedy / impact	<ul style="list-style-type: none"> Potential enforcement action by the CMA or Trading Standards Services. Criminal liability for specified offences, with potential liability both for individuals and corporate bodies. 	<ul style="list-style-type: none"> Failure to provide information on cancellation rights means the consumer will have the right to cancel up to 14 days after having been notified of their rights (or within 1 year and 14 days if never notified). Potential enforcement action by the CMA or Trading Standards Services. Criminal liability for specified offences, with potential liability both for individuals and corporate bodies. 	<ul style="list-style-type: none"> Terms which are unfair are not legally binding on consumers. Potential enforcement action by the CMA or Trading Standards Services. Direct legal action by a parent.
Key questions for schools	<ol style="list-style-type: none"> Does the school have a sense of what its material information is? Where and how is such information made available to prospective parents, and is it clear, intelligible and accessible? (This would be a sensible time to update or remove any out of date prospectuses!). Does the school use third parties to help market the school to prospective parents? Do the contracts with those third parties contain sufficient safeguards to ensure that the information provided by third party agents is accurate and only provided e.g. with the school's approval? Do any steps need to be taken to ensure that staff at the school are aware of the importance of pre-contract communications with parents? 	<ol style="list-style-type: none"> Pre-contract information under the CCRs is more important than material information under the CPRs. Does the school have a sense of where and how it provides pre-contract information in light of the relevant schedule under the CPRs? If the school is considering making a significant change to any of the matters covered by pre-contract information, is it conscious of the need to engage with prospective parents (those with offers or who have accepting offers) about those changes, in the same way that the school would engage with current parents about changes? Has the school addressed its position on whether it contracts on-premises or at a distance? 	<ol style="list-style-type: none"> Has the school adopted the ISBA Model Parent Contract? If so, many of the issues and risks associated with 'unfair terms' are addressed via that template contract. If the school hasn't adopted the ISBA Model Parent Contract, then it will need to review each of the terms of its parent contract against the CMA guidance and the Act. Should responsibility be allocated for checking and reviewing the broader set of rules, regulations and procedures which (the law says) constitute terms of the contract (whether or not they're written in the parent contract)?
Risk areas for schools	<ul style="list-style-type: none"> Information available about the school which entices parents to apply for a place which is misleading, inaccurate, or doesn't present the 'full picture'. 'Material information' which is outdated or inconsistent with other information available about the school. Difficulties involved in controlling staff and third parties when they 'sell' the school to prospective parents. 	<ul style="list-style-type: none"> Failure to provide the requisite pre-contract information, especially for distance contracts, as parents will benefit from an extended cancellation right if pre-contract information is not provided. Failure to notify significant changes about the school to <u>prospective</u> parents. 	<ul style="list-style-type: none"> ISBA and Farrer & Co are in the process of reviewing the ISBA Template Parent Contract in light of the Act, and considering any changes which might be prudent. Schools that adopt the ISBA Template Parent Contract The CMA is of the view that a contract 'term' is not limited to the specific clauses of the parent contract, and instead will include all the provisions in the contractual documentation which set out the parent's rights and obligations. As such, even if the school adopts the ISBA Model Parent Contract, the school may still need to (1) identify and (2) review other documents, policies, procedures and rules falling within 'contractual documentation'. The Act attaches heightened importance to the need to the requirement that terms are transparent, clear and legible, so that parents can make informed choices (note the link to the requirements under the CPRs). Unlike terms which are unfair, failing to meet the transparency requirement doesn't make the term automatically unenforceable, but many schools will need to think carefully about what steps need to be taken to

			make their terms as transparent as possible.
Were schools can find more information	<ul style="list-style-type: none"> • OFT Guidance on the CPRs 	<ul style="list-style-type: none"> • Farrer & Co general note on the CCRs • Farrer & Co note: <i>The School-Parent Contract: 'Distance Contracts' & Cancellation Rights....?</i> • Department for Business Innovation & Skills Implementing Guidance 	<ul style="list-style-type: none"> • CMA Guidance landing page

