NATIONAL CAREassociation
The voice of the nation's independent care sector

National Care Association's response to the Competition & Markets Authority's Market Study of Care Homes.

Introduction

The National Care Association strives to influence and lead policy which has a direct impact on small and medium sized health and social care provision in England**.** We promote best practice and the delivery of quality care to vulnerable individuals at critical times in their lives.

We submit this response on behalf of our membership using our experience of delivering health and social care, and entering into contracts with both public sector commissioners and private citizens.

Below is a summary of our key points:

- How can there be a market and competition when the fee for the service is imposed by each local authority without taking into account the actual cost of providing care? A number of Judicial Reviews which have considered this point, found in favour of the providers of care but the practice continues. https://www.lawgazette.co.uk/legal-updates/costs-and-care-homes/5046367.article.

- The public sector (Local Authority and NHS commissioners) control demand and access to care home services putting them in a dominant position. Despite evidence, often commissioned by themselves, of the true cost of care, it has to be noted that they will not pay the actual cost of providing the service.

- In traditional markets the consumer receiving the goods and services negotiates the contract; in social care there is a primary negotiator who will not be the end user - the public-sector commissioner - who uses their position to determine how much the customer has to spend. The price the commissioner is willing to procure services at is widely below the price needed to effectively deliver the service, leaving a funding **gap** that families or friends must contractually agree to pay, (widely known as a top up).

  Local Authority commissioners have duties and responsibilities enshrined in the Care Act to shape the market. As the budget holder for commissioning care services, there is a **clear conflict of interest**.

- The Care Market does not operate in a traditional way. Customers of care services are forced to make life changing decisions purchasing care at a time when they are in crisis, vulnerable and unwell.

    - The care service is often needed immediately, under considerable pressure from professionals who may be motivated by deadlines to free scarce hospital beds. This leads to the potential for consumers to make purchasing decisions without being able to fully understand the product and the market.
    - Information, advice and guidance is disjointed and often difficult to obtain, especially if not seeking public funding. This can result in consumers (or their representatives) committing to contracts without fully understanding the long-term implications or the variety of services available.

- Care homes are subjected to a high level of regulation. Within England this is the responsibility of the Care Quality Commission (CQC). Their remit is to focus on regulating and providing evidence that high quality person centred care is at the heart of the service.

- To achieve high quality person centred care, it is imperative that the individual care needs of each person being supported are agreed by them, or where this is not possible with the person who has the appropriate power of attorney or who is charged to ensure the individuals 'best interests'.

- In order to effectively deliver high quality person centred care a Care Home needs to be able to vary its charges dependent on the services required. However, for public funded individuals this is not possible as Councils use their dominant purchasing position to impose a one size fits all approach to procuring care home beds

- Adult Social Care services cater for adults from 18 years old to end of life. The Market Study defines adult services as starting at 65 years old, however care homes are routinely providing services for people who are much younger as well as much older; with this in mind we would argue that this review must take all ages in to account.

- The procurement methodologies adopted by public sector commissioners are disadvantageous to older people and people with learning difficulties, they limit choice, and there is a power imbalance.

We have responded to the questions trying to demonstrate the difference between people who fund their own care, and people whose care is funded by public sector commissioners. Below is our response to the questions.

Theme 1: Consumer protection issues in the care home sector

1. What are the main consumer protection issues in the care home sector? How widespread are these issues and what harm do they cause to residents and their families?

Responsible care providers endeavor to work in the best interest of those they care for; which is reflected by the plethora of policies and procedure which can be found within Care Homes to ensure that the needs of the consumer are assessed and met. The challenge usually come from referring authorities, like the NHS or LA, who may not furnish the service provider (Care Home) with all the relevant information to ensure that the consumer (potential resident) needs are fully disclosed.

The LA and the NHS can be slow to re-assess a resident needs when their needs have increased, this can result a delay to the consumer receiving the most appropriate service. Re-assessment can take a minimum of to six weeks in some LA areas.

2. To what extent are care homes complying with consumer law, in particular in relation to the fairness of their contracts and their behaviour towards residents and their families?

Responsible providers ensure that they are robust in issuing terms and conditions of (admission) accommodation which would be seen as their contract. Families identified as next of kin (and will the appropriate Lasting Power of Attorney) will be party to discussions if the consumer is in agreement or unable to make decisions for themselves

3. Are the current protections offered by consumer law and other measures (such as sector regulations) sufficient to address these issues?

We are unable to comment on this as it is out of scope for us as an organisation

4. Are there barriers to residents and their families raising complaints when something goes wrong, and how effective are the current complaint and redress systems for care home residents?

There are robust procedures in place for residents and their families to raise a compliant this is a requirement under regulation. However if the consumer is not happy with the response they receive to a compliant, if they can contact the Local Government Ombudsman for redress. The LGO also acts for the service user in complaints to a Local Authority and the Health Ombudsman for complaints about NHS services.

CQC or Healthwatch have no enforcement powers to noncompliance of contractual terms although they can publicise through their reports non-compliance with contract terms in the local media which is a fairly big deterrent.

Theme 2: Older people's decision making on care homes

5. What information and advice is available for older people and their representatives when deciding about entering or moving between care homes?

It is a regulatory requirement that Care Homes provide accessible information on the services they offer; this includes displaying their Care Quality Commission rating on all literature and prominently in the care home itself.

The vast majority of Care Homes will produce and supply promotional literature to market their services in their locality; will often advertise in Local Authority commercially produced guides, and the majority of Care Homes will have an online presence, either through listings websites or their own website.

Care Homes also must provide their terms of business and conditions for admission (Contract) to interested parties and all individuals who enter the service.

The difficulties arising for consumers when entering a Care Home for the first time, are:

- **Admission is normally required because of a crisis,**
- **For the vast majority of individuals and their families it will be the first time a care service has been required and so they will be unfamiliar with the 'service', and will not have considered what they need as they don't know what choices are available**
- **People are unclear about their entitlement to financial support to meet costs. Often individuals assume that Social Care is free at the point of delivery like NHS care**
- **Care Homes are not able to offer the financial advice many individuals require, they do not have the expertise to do so and are not registered to do so**
- **Individuals and their families often do not know where to get help, advice and information.**

Local Authorities (LA) have a duty to provide information about care homes within their boundaries, however in most case this is just a list giving the name of the service and the address.

A LA may provide support in finding a care home but this is only for people to whom the LA will be contributing towards their care costs. For people funding their own care (self-funders), there is often little support available in a locality, although perversely they will have the opportunity for far more choice of care service than an individual whose care needs will be purchased by the LA. This does bring into question a person right to choose a care home of their choice.

There is a growing move for Local Authorities to use a "brokerage" system; including online tendering or bidding for individual packages of care from a list of "preferred suppliers".

Similar to an eBay style auction, care homes bid for the package of care to support the individual and the care homes offering the lowest price are then put forward to the person to select which Home to use.

This choice is based purely on price not on meeting the individual and jointly agreeing how best to meet their needs.

Moves between Care Homes rarely happen; the vast majority of residents in Care Homes being too frail and unable to access information on other potential services. There is significant evidence to suggest that moving care homes is often not in the person's best interests.

Where an individual does move Care Home, it is usually as a result of the Care Home no longer being able to meet the person's needs, (for example if an individual develops challenging behaviour due to a medical condition) or if a 'self-funding' resident, their funds run out or rarely if the relationship between the care home, the individual or the family has broken down.

It needs to be understood that in the vast majority of cases a care home will try to ensure it meets the needs of all its residents because it will only receive payment when they have someone occupying a room.

If funds have run out, the Local Authority is required to take over funding the individual's package of care, subject to a needs assessment, and will often then seek to move the individual to a care setting that offers a price the Local Authority is willing to pay. The impact of such a move on a vulnerable person cannot be over-estimated.

If the Care Home can no longer meet the needs of the person, and they are 'self-funding' the Care Home should advise the person and family, and should support them to find a new care home. If the person is LA funded, the LA takes on the supporting role.

If the Local Authority is contributing towards the care cost, individuals may, in some areas, only be able to take a placement that accepts the Local Authority rate. This rate is usually substantially lower than the prevailing market rate across the locality. Those with means will have the option of paying the gap between the amount the LA will pay and the fee charged by the Care Home (top-up fee).

The gap between the LA contribution and the Care Home fee must be paid from the resources of the family or friends, this is a separate (third party) agreement, in which the service user is unlikely to be involved in.

Paying a top-up will enable a person to have more choice, however, many families cannot afford this or do not want to take this financial contract on

which may only ends when the person dies or receives NHS funding or moves to a different care facility.

Getting financial information is very difficult for the consumer,

- **The LA will give information about their eligibility for financial support via a LA welfare rights team.**
- **If they are not eligible for LA financial support, they will need to access specialist financial advice or do their own research.**
- **It is not appropriate for the Care Home to provide specialist advice, it is a conflict of interest and they do not have the financial expertise.**
- **Care homes are more widely requesting evidence of ability to meet the fees of self-funders, as some consumers take on care home places with the means to meet anything from two years to 10 years of fees.**
- **When a person runs out of funds, the LA will sometimes contribute, but there is no clear guidance about what happens and people are normally moved to a service that takes the LA rate.**
- **The consumer does not understandA the importance of lasting power of attorney for finance and wellbeing.**

Case Study A

Service Users may have a lasting power of attorney for finance but not for health. A social worker told a manager of a care home if the family do not have a lasting power of attorney then they are not entitled to be invited to reviews, best interest or welfare meetings. We find this incredible. However, another social worker from the same area has phoned a family member asking them to a review meeting without asking if they have lasting power of attorney.

Is it easy to access and understand this information?

No, it is not easy to access, most people do not know where to start. There are a variety of websites listing care homes, across the country, but they differ on the information they provide. There are local publications produced by some Local Authorities that provide printed lists which are still very useful as not all areas across the country have good access to broadband,

How can existing information/advice be improved? What further information would be useful?

There should be national guidance that supports people to find care services, to which each LA should contribute to meet their requirement under the Care Act and provide the local information about available services.

Financial information - some LAs will direct people to organisations who can help them to meet the fees if they have assets over the eligibility criteria for Local Authority funded places. This is not universally available.

Access to financial information (what happens if you have cash or assets over the funding threshold) and how the social care system works, including assessing needs to gauge the eligibility to be funded needs to be improved, including the consequences of entering into a contract with a care service.

Case Study B

When families are looking for a care home, usually in a crisis, it is often the spouse who has to do the enquiries. The spouse is often elderly and traumatized and does not understand the complexities of the social care system, including funding for care. The Local Authority state they will fully fund the care needs of the individual when their means test is met so the spouse assumes they will keep the individual's pension which is used to support their own living costs. We then find that the spouse loses the pension of the person in care and then cannot meet the costs of living in their own home.

6. What other factors may impede older people in choosing a care home initially or subsequently in moving between care homes (if appropriate)?
For services who only take private clients, it is easy, as they are contracting directly, entering into a supplier/customer contract which is clear.

Local Authorities are the biggest commissioners of care services. When commissioning a place, they become the third party in the negotiation, this impedes the normal supplier/purchaser relationship between the care home and the person receiving the service.

NHS Clinical Commissioning Groups are becoming increasingly commissioning care services. However, the relationship between NHS funding (Continuing Healthcare) and Local Authority funding or self-funding is complex.

If the CCG places a person in a Care Home at a higher rate because of the perceived additional needs that triggers the NHS being responsible for the cost of care and then in a subsequent re-assessment withdraws the funding as the primary health need is perceived by the assessor to be no longer there, it can be difficult getting the LA to pay the care home fee, particularly if there is a gap and the family cannot meet the gap.

The following dilutes the clarity:

- **The agreement of the care to be delivered is done by the LA Care Coordinator with the potential resident, however when the care home does their assessment and the placement is made, the care home may find that the person's needs are different to those initially assessed. If this increases the costs the LA may not pay, and the person may need to find an alternative provider who can meet the needs at the rate commissioned.**
- **The Local Authority's care home payment, is made up of two elements, the individual's pension or other income sources, including benefits, plus the Local Authority's contribution. This**

causes significant confusion as many believe if they are told their care homes costs will be met by the Local Authority they will not have to pay anything towards the cost of their care; when in reality they will lose the vast majority of their income, save for a small "personal allowance".

- **For example, a local authority will say their rate is £421.90, when in fact their contribution is only £291.90.**
- **Most people think they can pay the gap (top up) using the individuals' own pension and are alarmed to find out that the Local Authority rate has included the pension. This lack of clarity is very confusing for customers.**

- **If a Care Home is raising their fee, the increase is often added to the gap the family and friend have agreed to pay. Local authorities will not usually increase their rate to take account of the increase, which is normally driven by business costs out of the control of the Care Home (for example NLW increases). This is not made clear by the LA to the consumer.**

Case Study C

Care home agrees a placement for a person who is eligible for LA contribution to care, the family have agreed to pay the top up fee. LA have undertaken all financial assessments. Six months later it becomes clear the person has not disclosed a private pension. LA reduces their contribution and the care home is left to tell the family their top fee will need to be increased. LA takes back any over payments made in the six months by reducing the payment to the care home. The care home has to recoup the overpayments from the family.

Theme 3: Regulation of care homes

7. What impact do regulations have on competition in this sector, particularly on price and quality?

The regulators have no impact on price/quality equation. There is no correlation between price and quality. For example, a care service can be rated Required Improvement – and charge the same price as a service rated 'Good' by CQC in England.

CQC are not interested in the fee paid for the service and do not judge whether customers are receiving value for money for the fees paid. They do not have the competencies to make this judgement.

8. How do local authorities' commissioning and procurement practices affect competition in this sector?

Local Authorities have a conflict of interest as they are commissioning services and will be managing service user's budgets.

As the biggest commissioner of services, they try to impose a price that helps them to meet their budget. Their budget is not designed nor reflects the needs of citizens or the local market rates for services. Local Authority total budgets have suffered year on year reductions and that has impacted on Adult Social

care budgets who have to compete with the other statutory duties LA's have. Adult Social care budgets are not ring fenced, it is designed by the amount allocated by elected members for social care from the local authority budget divided by the demand, and this sets the LA contribution.

LA's add a burden of compliance through contract compliance checks that can duplicate those undertaken by CQC which takes resources away from delivering care.

LA commissioners still commission with poor quality providers, as they commission on price not quality.

9. To what extent is local authorities' 'market shaping' role affecting competition in the care homes sector?

Local Authorities do not pay the true cost of care, they work on the basis that the cost of every care home placement is the same. This is a poor assumption as the fee charged by a care home is determined by a number of factors, the needs of the individual requiring care, the staffing requirements to meet the needs of those receiving care and the financial repayments to lenders. This will differ from service to service.

The majority of Local Authorities know their contribution does not meet the full cost of care within their local Care Homes.

They also rely on the fees charged to those who pay their own cost of care in the same care home funding the shortfall.

This is cross- subsidisation and is fundamentally unfair, and perversely means that those funding their own care will reduce their personal funds available for their care more quickly and may end up requiring public funding.

If Local Authorities paid the true cost of care, perhaps the price could come down for everyone.

Small and medium size care homes are being squeezed out of the market because the fee offered by the dominant purchaser of care home services in most geographical areas pays the same price regardless of the need of the individuals being support and the size of the care home itself. This has turned the sector into a volume market, where larger services can use economy of scale to be viable.

Smaller care businesses are being driven out of the market reducing local choice. Evidence from CQC recent reports suggests that small care homes are more likely to be rated Good, and larger services are more likely to be rated Requires Improvement.

Significant capital is required to invest in providing a care service. It requires a multi-million-pound investment to build or to purchase a commercially viable care home, a risk that requires significant returns on investment to make it a viable business proposition. The LA has a low risk appetite to developing new services and more importantly by not paying a price for services that meets all the costs incurred in delivering that service plus a small margin it limits the appetite of any new investor to enter the market place.

Theme 4: Competition between care homes

10. How well does competition work between care homes?

Care homes compete on quality, reputation within a community, and for a very small pool of people prepared to work in care. Good Registered Managers, nurses and care workers are like gold dust.

11. What are the key pressures for care home providers that are affecting their long-term sustainability?

The low fee rates paid by commissioners reduces the opportunities to re-invest in the service, resulting in the care home becoming dated, not being able to purchase new equipment, and not able to invest in the workforce.

Also, not being able to recruit the right staff because of the image of working in care and the poor remuneration.

12. What, if any, barriers exist to care home providers entering the market and/or expanding their activities? Is there a lack of capacity in some geographical areas?

The barriers are:

- **The high levels of investment required to develop and start a service.**
- **Financing investment, bankers expect a minimum profit per year and the fees do not always facilitate this.**
- **Banks who have traditionally lent to this sector are requiring more and more collateral for their debts and impose covenants on care businesses that can limit their ability to reinvest and expand.**
- **Services are no longer valued on property and revenue received. The business is valued on a multiple of the EBITDAM. For example, a property worth £1m with a service income of £500k and a margin of £50K, will be valued at a lower figure than the value of the empty property.**
- **Older Care Home properties that have not undertaken significant refurbishments do not necessarily meet the revised expectations of individuals and their families who need to use their services. For many, changing demands for care and increasing regulations has meant that the investment for upgrading older properties is not viable. Smaller care homes are more likely to be in older properties and require investment.**
- **Having the competencies and knowledge to run a care service in a highly-regulated sector.**