

## **Citizens Advice comment on CMA statement of scope for care home market study**

Citizens Advice welcome the CMA's decision to carry out a market study of the care home sector. In 2015/16, Citizens Advice supported people with nearly 27,000 advice queries relating to social care, around a third of which were about the care home sector. In addition, Citizens Advice received nearly 200 additional calls through the Consumer Helpline concerning residential or nursing care. More broadly, social care is an issue of importance to Citizens Advice. 40% of our clients have a long-term health condition or disability.

As a consumer champion, Citizens Advice works with government, regulators and competition authorities, to spot problems and identify when markets are not working well for consumers. As a service, in 2015/16, we helped 2.7 million people face to face, by phone, email or webchat, and handled 36 million visits our website to get advice. The unrivalled real-time data this work generates has huge value, particularly when joined with other data sources, allowing new ways to spot detriment early, guide enforcement, and scrutinise consumer outcomes.

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

Citizens Advice helped people with over 8,600 advice queries relating to the care home sector in 2015/16. Of these, around a third related to funding queries. Analysis of anonymised client case notes shows that one of the reasons people turn to us is for help with consumer protection concerns.

To explore how widespread these concerns were across the market, Citizens Advice undertook further research. In February 2016, Citizens Advice published research based on mystery shopping of 404 care homes in England.<sup>1</sup> In November 2016, Citizens Advice published additional research based on a survey of 510 people in England who had helped an older person arrange and pay for care. This was

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<sup>1</sup> Citizens Advice (2016) Hidden charges in care homes

complemented with insights from 15 depth interviews.<sup>2</sup> Below we summarise the key concerns based on our research and insights from our network and calls to our Consumer Helpline.

Our research combined with evidence from our clients suggests that some care homes are not complying with consumer law and there could be need for enforcement action. Current protections offered by consumer law and other measures address some of the issues raised above, but we believe that some of these protections should be strengthened.

### **Short notice and arbitrary fee increases**

Our research published in February 2016 found that 11% care homes gave less than 4 week's notice for an increase in care home fees. Insight from our qualitative research and case notes shows that these fee increases can seem arbitrary. Given that moving care homes is distressing and time-consuming, families often have little choice but to accept a short notice fee increase.

Existing consumer law and guidance on care home contracts suggests that at least in some cases the short notice fee increases experienced by care home residents are unfair. The OFT's 2003 Guidance on unfair terms in care home contracts (subsequently adopted by the CMA) suggests that care home contracts should "provide an adequate notice period which at least corresponds to the notice required for termination of the contract". And Part 1 of Schedule 2 of the Consumer Rights Act lists terms which permit the trader to increase price without giving the consumer the right to cancel as amongst those which may be regarded as unfair. Furthermore, CQC guidance relating to Regulation 19(1)(a) of Care Quality Commission (Registration) Regulations 2009 states that "Providers must notify people of any changes to their terms and conditions including increases in fees and give them sufficient time to consider whether they wish to continue with the service".

Citizens Advice believes there is an opportunity to strengthen existing consumer protections by introducing a minimum notice period for fee increases. We believe this would be helpful both as a safeguard to older people and their families, but also to providers who may currently find it difficult to understand what constitutes an unfair notice period. Minimum notice periods exist in other consumer markets. For example, in energy markets where consumers are protected by a minimum 30 day notice period for fee increases.

### **Unexpected additional charges**

Analysis of anonymised client case notes also shows that people sometimes experience unexpected charges. In some cases, these can be very high. For example, one client contacted us about a £2,000 administration fee. Our recent research offers insight into the scale of this consumer protection concern. 1 in 5 (20%) people who

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<sup>2</sup> Citizens Advice (2016) Taking greater care: why we need stronger consumer protections in the care home market

responded to our survey reported experiencing an unexpected additional charge, such as a back-bill or unexpected top-up fee.

Findings from our mystery shopping research provide further insight into the range of additional charges families can face for key essential services such as hairdressing, carer assistance and chiropody. In some instances, these charges can be high. They can also be difficult to discover in advance of moving into the care home and there is often little option to shop around once an older person has moved in.

Some of these cases are likely to be instances where the care home has failed to provide relevant information in their contract with the consumer as required by Schedule 2 of The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (CCRs), or failed to disclose material information to the consumer which would constitute a "Misleading omission" under Regulation 6 of The Consumer Protection from Unfair Trading Regulations 2008 (CPUT Regs). Some others may be cases where the information relating to additional fees was provided but not in a "clear and comprehensible manner", which is required by the CCRs.

We think there are opportunities to strengthen consumer protections. We would like to see care home providers include information about care home fee ranges online and in marketing materials to help people make informed decisions about which care home to choose. We also recommend a clear breakdown of costs (including additional charges) in bills to make charging practices more transparent.

### **Not issued a contract**

Over a third (36%) of respondents to our survey were either not given a copy of the care home contract until after the resident had moved in, or not given a contract at all. This can lead to a lack of transparency about what is included in fees and in contract terms and conditions.

The CCRs stipulate that consumers must be provided with, among other things, information about the main characteristics and total price of the goods and services. CQC guidance relating to Regulation 19(1)(a) of Care Quality Commission (Registration) Regulations 2009 states that providers must give people information about the terms and conditions of their care, including costs. Moreover, the 2003 OFT Guidance notes that "consumers should always have an opportunity to read and understand contracts before agreeing to them. Terms that bind consumers to provisions they have not seen are liable to be considered unfair".

Of course care home providers should comply with the regulations and guidance just outlined and provide consumers with a contract before they begin to receive the service. However, one key further protection present in the mortgage market is the requirement of lenders to provide a Mortgage Illustration Document, which outlines the key features of the contract. A similar protection could be introduced to the care home market.

### **Deposits for care home places**

Over a third (37%) of survey respondents in our recent research have put down a deposit with a care home and nearly 1 in 5 people (18%) put down a deposit of £1,000 or more. We receive queries from people through both our network and the Consumer Helpline about difficulties getting care home deposits back. 7% of our survey respondents who had put down a deposit said they did not get it back when the older person moved care homes or passed away.

Given that care home residents do not have comparable rights to tenants in the private rented sector, the requirement for a deposit seems difficult to justify. Furthermore, there is currently no deposit protection scheme for care home residents. Consumers are offered greater protection on the private rental sector, where landlords must put their tenants' deposits in a government backed protection scheme.

### **Other consumer protection issues to consider**

Analysis of anonymised client case notes shows the following issues may also be worth considering: requests for family members or friends to act as a guarantor for care home fees, terms and conditions concerning trial periods and long periods for terminating a care home contract (including after the care home resident passes away).

## **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?**

Over 26% of survey respondents in our recent research have had concerns about a care home. Despite this, care residents and their families face a number of barriers to complaining when something goes wrong.

The first is the fear of negative treatment. Just over 1 in 5 (22%) respondents who had concerns about a care home made a complaint, either to the home itself or to an industry regulator or ombudsman. The most common reason given for not complaining (offered by 37% of respondents) was the worry that doing so would result in negative treatment from the care home

The second barrier to complaining of poor experience of complaining in the past. Previous Citizens Advice research has found that almost half (45%) of social care complainants are extremely or quite dissatisfied with the outcome of their complaint, and nearly a fifth (18%) gave up altogether.

The third and final issue is the fact the moving is often not a viable or desirable option. This is not a barrier to complaining itself, but it does give the care home more leverage in relation to the consumer, making the previous two barriers more acute. Fewer than 1 in 10 (9%) respondents to our recent care home research who have had

concerns have moved care home as a result. 9% of respondents said they have thought about moving care homes but haven't. The most common explanation (given by 68% of survey respondents) for not moving is that it would cause too much harm or distress. There is some clinical research suggests that moving care home can present health risks.

The effectiveness of complaints systems will differ vary across care homes. One Citizens Advice client we spoke to as part of our recent research reported that her mother's care home organised regular meetings between staff, residents and relatives which provided an opportunity to receive updates about what was going on in the care home and raise concerns. But good practice is patchy at best, and our findings suggest that more could be done to design complaints processes more appropriately so that residents and their families feel confident raising concerns if they have them. As part of this, we think access to independent advocacy support is crucial.

## **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? Is it easy to access and understand this information? How can existing information/advice be improved? What further information would be useful?**

**6. What other factors may impede older people in choosing a care home initially or subsequently in moving between care homes (if appropriate)?**

When deciding about care homes, older people and their families receive information and advice from a range of sources including care homes, the local authority, and third sector organisations. They often have difficulty accessing and understanding this information. Below we set out 4 key reasons.

### **Time**

The trigger for the decision to arrange a care home place is often sudden, and few people have discussed care plans with their families in advance of them developing care needs. In this difficult context, the decision is also often made very quickly: over half (55%) of survey respondents to our recent research said the entire process - from the point at which they decided a family member or friend needed to move into a care home, to the point where the older person actually moved into the care home - took under a month. Nearly 1 in 10 people surveyed (8%) said the entire process took less than a week. Only 4% of respondents said they spent 6 months or more planning and arranging the older person's move into a care home. This very short time period offers limited opportunity to access information that is often fragmented, with different parts available from multiple sources, and even less time to understand that information once it has been found.

### **Emotion**

The people we spoke to as part of our recent research into the care home market described the range of overwhelming and sometimes conflicting emotions they experienced when helping an older person move into a care home, as well as the sometimes complex dynamics that emerged when making decisions involving other family members. Common emotions include a sense of guilt, anxiety about whether they are doing the right thing, and concern that they have failed their family member. The fact that the context of the decision to arrange is so fraught with emotion can impede decision-making, and the ability to access and understand information.

### **Complex and unfamiliar**

Arranging a care home place is a complex and unfamiliar task. People have to shop around to assess and compare the various features of an often unfamiliar product - from the friendliness of the staff and the familiarity of the surroundings, to the quality of care and the terms and conditions in the contract. Furthermore, many of these features can be hard to assess which makes it difficult to compare different care homes across the market. Current processes can exacerbate this confusion. Nearly half (49%) of survey respondents said they found the process distressing and 45% reported that they found the process frustrating.

### **Opaque pricing**

37% of respondents to our recent survey said it was complicated to access the information they needed to make their decision. Only 7% of respondents were provided with information about care home fees, for example through marketing materials or the website, prior to making direct contact. Few other markets have such opaque pricing.

### **Additional barriers to moving care homes**

Whilst in some cases, changing care homes will be a positive experience for older people and their families, this experience can be highly distressing for families and is often a last resort. We reported that a very small proportion of those who have thought about moving care home have actually done so, and the legitimate reasons given for this in, our answer to question 4 above.

Nearly a quarter (24%) of respondents have moved care home. But even this comparatively low figure should not be seen as a sign of engagement or agency: over three quarters (76%) of those who did move did so for reasons outside of their control, such as the older person's care needs changing or the care home closing down.

Families are often highly reluctant to move family members because of the levels of disruption it creates for the older person. We would therefore be wary of recommendations that focus on encouraging greater levels of switching in this market.

## **Themes 3: Regulation of care homes**

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

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

As part of the CMA's study of the care home market, an important question to consider will be whether local authorities are paying an adequate amount for local authority funded places. Given their purchasing power as the sole or partial funder of 56% of care homes places, local authorities have the potential to distort the market.

If they are underpaying, this could have negative implications for the market including a 'race to the bottom' in quality as providers are incentivised to cut costs as much as possible. It may also incentivise providers to find other means of raising the funding required, such as through some of the high extra charges our research has highlighted. Recent research by Age UK suggests that self-funders continue to cross-subsidise local authority places.<sup>3</sup> Previous arguments suggested that the market would correct such cross-subsidisation because providers would refuse to sell care home places at such low rates.<sup>4</sup> The longstanding evidence of this cross-subsidy existing within the care home market, however, suggests this correction has not occurred in practice.

## **Theme 4: Competition in care homes**

**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?**

Our research provides some insight into potential gaps in capacity within the care home market. Findings from our survey suggest that a large minority of people (39%) felt there was not enough choice. Our qualitative research provides further insight.

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<sup>3</sup> Age UK (2016) Behind the headlines: 'stuck in the middle' - self-funders in care homes

<sup>4</sup> See for example, the OFT's initial response to the super-complaint made in 2003 about the care home sector.

<http://www.communitycare.co.uk/2004/03/12/oft-downplays-anti-competitive-care-homes-complaint-against-councils/>

Some interviewees felt that there were not enough options given their budget or the older person's care needs. As part of the study, the CMA should explore whether there are some groups of older people who are less (or not) profitable to provide care to - and if so what interventions are necessary to support sufficient choice, competition and capacity in the market.