

Care England response to statement of scope for CMA care homes market study

Introduction

Care England is the leading representative body for independent care services in England. Our members provide a wide range of services for adults with care and support needs including residential and nursing settings, homecare, housing and community-based support. Our members also deliver specialist care home services such as rehabilitation, respite, palliative care and mental health services.

While there are references to local authority commissioning and procurement practices we believe that as monopsony purchasers in many areas, the local authority role and influence on the provider market and consumer choice is very significant and due regard needs to be given by this study to local authority commissioning and contracting behaviours. Indeed the OFT report into the care home sector in 2005 did encompass local authority care home contracts and made recommendations which were taken up in Scotland with joint local authority/provider action to develop a national contract and residency agreement. Likewise notice should be paid to NHS/CCG contracts with care homes for people fully funded for example through continuing healthcare arrangements and how those contracts impact on consumers and the market.

We hope and expect that the information gathering exercise for the study, which to date has focussed on care homes providers answering very detailed CMA questions and also questions being asked directly of residents and relatives, extends also to local authorities to determine how their assessments, admission processes, information provision and the fairness of their contracting policy impacts on consumers and how much consumers are involved in the process.

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?**
 - While responsibility lies with care providers to ensure consumer protection in the care homes market, commissioners must also be held responsible for their role and influence over the market. Poor quality commissioning has a negative impact on the entire market, and on the consumer.
 - By not properly funding the local care market by paying realistic fees that represent the costs of care for providers, commissioners are preventing a vibrant and varied local care market from developing, and are thus limiting consumer choice about care homes.
 - When commissioners deny, or do not provide adequate information about third party top-ups, they also deny the consumer from choosing a home that best suits their needs or offers a comfortable environment for their care.

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?

- Care England offers a legal advice service to all members, and information on the members' section of our website about legal duties, compliance and best practice.
- Care homes are inspected thoroughly, and this includes talking to relatives and residents about how they have been engaged with and how care has been arranged. Providers are held accountable for their actions in this way.

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

- We believe that they are sufficient but if there is evidence of non compliance then CMA recommendations to address this would be welcomed.

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?

- Care homes have complaints procedures and policies that will be taken into consideration as part of Care Quality Commission (CQC) inspections. The CQC will also reflect in their inspection on the extent to which a care home operates an open, approachable and learning culture, and has good relationships with family and friends who may wish to complain. The CQC may well reflect on how well a care home handles complaints in their inspection report.

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 and advice be improved? What further information would be useful?

- Care England supports its members to provide transparent information about moving into their services.
- Care providers would support the strengthening and improvement of local authorities' information and advice services: many local authorities just provide a list of care homes in the area, and offer no more guidance to private funders. Often, it falls on the third sector and voluntary organisations to provide this advice.
- The process of moving into a care home could be much less stressful and not put a strain on local health services, if local authorities offered consistently useful information and advice to prospective residents and their families.

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

- Local authorities' denial of third party top-ups, or their failure to provide useful information about them, can limit choice in the market and prevent the consumer from achieving value for money and satisfaction.

Theme 3: Regulation of care homes

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

- Regulation is burdensome and expensive. Social care providers have had to shoulder increasing cost burdens as the CQC moves to full cost recovery. This comes at a time when the sector is also paying the new national living wage (NLW) for all staff over 25, increased national minimum wage (NMW) costs, have increased running and insurance costs, and are spending more on activities provision than ever before. As local authority fees have not risen in line with these cost increases, providers have struggled with the increased burden from CQC fees, as well as the demands of consistently aiming to improve standards.
- The burden on time is another key factor. Regulation, and providing evidence of procedures and policies, is time consuming for a busy care home, especially at a time when recruitment and retention of care staff and nursing staff are exceptionally difficult.
- Inconsistency in regulation is still an issue, and interpretations of inspectors locally can vary from national guidance or best practice.
- Overly-burdensome regulation may have an adverse impact on quality, although it is important to note that CQC's regulatory regime has shown marked improvements in the sector, and inspections help contribute to improvements in care.
- Rightly so, in late 2016, the CQC spoke out about the relationship between price and quality in the sector. Care homes that received low fees were finding it increasingly difficult to make improvements. The CQC marked that providers were increasingly handing back contracts. The CQC had observed that the availability of social care in many local authority areas was declining because of low fees, negatively impacting both competition and the consumer. The CQC described this situation, and the sustainability of the sector as 'at tipping point'.¹

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

- Poorer experiences of transitions from hospital or home and into residential care are the result of commissioners refusing to engage with providers on cost. Many local authorities are consistently ignoring the cost of care, and commission care at an insufficient or arbitrary amount. With local authority fees as low as £2.25 per hour, excellent quality care is hard to provide, and often comes at a cost to the provider.

¹ CQC's State of Care report, October 2016

- By their lack of engagement, local authorities create a difficult market, and discourage new entrants to the market or force services to close, which negatively impacts local market competition.
- 9 To what extent is local authorities' 'market-shaping' role affecting competition in the care homes sector?**
- Market shaping, a new duty for local authorities under the Care Act, has not been fully taken on board. Many Market Position Statements (MPSs) that outline councils' intentions for market shaping and stewardship, have not been updated since 2014, despite the fact that they are intended to represent the changing market and represent a living document.
 - Some councils' MPSs state reducing the use of care homes as a long-term aim. This is seemingly without having embarked on a community needs assessment, engaged with or visited local care homes, or understood the potential role that care homes can play in reducing delayed discharge and providing high-acuity respite, step-up and step-down care, as well as longer term caring arrangements. Many local authorities' MPSs do not reflect that care homes are often the most appropriate and most cost-effective option for older people in need of social care, this is seen by providers as a major cause of local systems' failure in effectively managing delayed discharge locally and achieving better use of care homes for the reduction of pressures on hospital trusts.
 - Despite paying lip-service to market shaping and engagement, many local authorities are denying providers proper conversations about fee-setting and commissioning.
 - Despite their obligations under the Care Act to do so, commissioners are not engaging in outcomes-based or personalised commissioning, and this is making it harder for providers to offer quality care.
 - CCGs' use of Commissioning Support Units (CSUs) is a great difficulty for providers. Providers find that CSUs offer inexperienced approaches to commissioning, and serve as a barrier between provider and commissioner, preventing constructive local discussions.

Theme 4: Competition between care homes

10 How well does competition work between care homes?

- While Care England is not aware of care homes entering into any anti-competitive actions, we are aware that as smaller providers find they cannot survive in areas with low fees and poor local authority market shaping and inevitably exit the market, local competition is affected by the loss of smaller homes. Larger, corporate providers although able to spread costs across regions and achieve, to some extent, economies of scale are also closely individually uneconomic care homes. If the market continues without a considerable funding injection or better commissioning practice, the closure of care home providers will limit choice and competition.

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

- Fees that do not represent the true costs of care are the biggest single factor affecting the sustainability of care home providers. The below table illustrates some of the very lowest rates paid for high-acuity residential care for older people:

Local Authority	Weekly rate (residential)	Hourly rate (residential)
Sheffield City Council	£ 377.00	£2.24
Bury Council	£ 382.11	£2.27
Cheshire West & Chester	£ 385.56	£2.30
Coventry Metropolitan Borough Council	£ 390.71	£2.32
Halton Borough Council	£ 391.29	£2.33
Liverpool City Council	£ 394.33	£2.34
Oldham Metropolitan Borough Council	£ 395.00	£2.35
Stockton-On-Tees Borough Council	£ 395.00	£2.35
Wigan Council	£ 395.00	£2.35
Sandwell Metropolitan Borough Council	£ 398.21	£2.37

- The gap between the costs of care and average fee rates was calculated by Laing and Buisson at £42 per resident, per week in 2015. This is a gap that has widened by almost 5% for council-funded residents in the five years to 2015/16.² Laing and Buisson also estimated that considering the NLW increases together with other drivers of inflation, care home costs went up about 6-7% in April. These were not met with equivalent local authority fee rises.
- Our members calculated that last financial year, they would need on average between 5% and 7.5% fees uplift, in some areas with long-term underfunding even more. This was just to cover the national living wage introduction and the NMW uplifts. Few providers received uplifts that adequately covered these workforce cost rises, or the cost of care more generally. Many are still in negotiations with councils about fee rates for this financial year 2016/17. Where councils still had not determined their fee rates before April 2016, they were asking providers to 'buy blind', which is dangerous for business viability and represents an unsustainable approach.
- The second biggest factor in care home provider sustainability is workforce supply and increasing demand. The estimated turnover rate for ASC jobs was 27.3% (339,000 leavers per year) in 2015/16. There has been a steady increase in turnover rates between 2012/13 and 2015/16 (4.7%). This is mainly due to difficulties in retaining younger workers and people leaving the sector soon after joining. 9% of the 47,000 nursing jobs in adult social care are vacant.
- This workforce shortage is particularly acute for nursing staff: In the last year, over a third of nurses left their post. This has meant that many services are relying upon agency staff, which undermines their ability to provide continuity of care for residents. Our members tell us they can wait up to 2 years to fill a nursing vacancy. Health Education England (HEE) has not planned for the nursing workforce across health and social care, and was criticised for this by the Migration Advisory Committee in 2016.

² CCMn, Laing and Buisson.

- In order to protect long-term care home provider sustainability, HEE must start planning for the social care workforce now: rising demand due to the ageing population must be met with increased nursing capacity in the sector.
- Although the implementation of the National Living Wage (NLW) in April 2016 should have brought about improvements in recruitment and retention for the sector, several of our provider members inform us that it is harder to recruit and retain staff than it was previously.

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 state of the market briefly described in this response to the CMA's draft scope describes the major disincentives for entering the care homes market. Business viability is seriously threatened by rising demand, rising acuity, workforce shortages, increased regulatory burden, unfunded statutory costs, and poor commissioning practice including lack of attention paid to determining the actual costs of care provision. Instead of expanding activities, many of our members are being forced to take difficult business decisions, and it is hard to imagine why new entrants would choose the publicly funded care homes market, when it is so beset by challenges.
- Care England would like to see a funding, regulatory and commissioning landscape that allowed for care provider expansion and new entrants to the market, allowing for healthy competition and increased choice for people and their families.

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