

Consultation Response

Competition and Markets Authority market study of Care Homes Statement of Scope

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About this consultation

The CMA is carrying out a market study into care homes for older people, to review how well the market works and if people are treated fairly. This consultation is inviting comments on issues raised in the CMA's statement on the scope of the study.

Key points and recommendations

- Although recommendations from the CMA investigation are likely to relate to consumer or competition legislation, the need for such legislation should not be considered in isolation from other parts of the legislative and regulatory system. For example, self-funders do not receive protection under the Human Rights Act so consumer protection is particularly important.
- In defining what constitutes a 'good' market the CMA should take account of the needs of care home residents for security and stability. Ease of entry and exit from the market might indicate an efficient market, but high levels of 'provider churn' are not desirable in this market.
- The CMA should examine the cross-subsidy between self-funders and local authorities, and at the effect that this has on the functioning of the care home market. The CMA should also consider how the market works for older people who receive some local authority funding, but who have to pay extra 'top ups' to the care home.
- As well as transparency of costs and charges, and rights to notice, the CMA should consider whether consumer law and enforcement have a role to play in improving security of tenure, ensuring that reasonable services are available to cope with changing needs, and protecting the right to complain.
- Short term respite care is excluded from the scope of the consultation, but it is not clear whether planned re-ablement, which may last for up to 6 weeks, is included. There is an argument for looking at this type of care as it should provide examples of good practice in developing personalised, outcome-focused care plans.
- Good quality information is important, but where the CMA finds that there are systemic failings in the provision of information about important terms and conditions, it should consider dealing with the problem at source by using powers under Unfair Terms or Unfair Trading regulations.
- The CMA may want to consider whether provider bodies should be more transparent about what happens if someone runs out of money – and whether sufficient protection is in place for individuals if this happens.
- We hope that this study by the CMA can look at how well different regulatory regimes and approaches fit together, and whether there are any gaps in coverage. A particular line of inquiry might be whether complaints from self-funders are used to make systemic improvements across the industry.

Introduction

Age UK is the country's largest charity dedicated to helping everyone make the most of later life. The Age UK network comprises of around 150 local Age UKs reaching most of England. Each year we provide Information and Advice to around 5 million people through web based and written materials and individual enquiries by telephone, letters, emails and face to face sessions. We work closely with Age Cymru, Age NI and Age Scotland. Local Age UKs are active in supporting and advising older people and their families in the care market.

We welcome the opportunity to respond to the Competition and Markets Authority's notice and statement of scope of a market study of care homes. In our view this study is extremely welcome as there are currently a number of barriers to the effective operation of markets for care homes for older people.

Although recommendations from the CMA investigation are likely to relate to consumer or competition legislation, the need for such legislation should not be considered in isolation from other parts of the legislative and regulatory system. The way in which local authorities carry out their duties under the Care Act and the Human Rights Act will certainly affect the functioning and sustainability of the care home market.

Public law duties which are particularly relevant include;

- Care Act duties on local authorities to manage the market to ensure that a choice and sufficiency of high quality care service are available in the locality, including for self-funders;
- Care Act adult safeguarding duties, which are not limited to care home residents who are funded by the local authority;
- Services provided to individuals who are funded by local authorities fall within the ambit of the Human Rights Act (HRA). The right to respect for private and family life, home and confidentiality (Article 8 of the European Convention on Human Rights) is relevant to decisions that might result in the person having to leave their home, or in their being unable to maintain contact with friends or family. However, people whose care is not funded or arranged by local authorities do not receive this protection. Age UK has a long-standing position that this introduces a serious gap in protection which should be filled. In the meantime, this places a greater onus on consumer bodies to ensure that people who are not within the ambit of the HRA are adequately protected.

The extent to which the functioning of the market enables local authorities and their contracted service providers to comply with these duties should be taken into account in assessing how well the market is serving the interests of consumers.

Age UK comments on the statement of scope are grouped under the four themes set out in the statement.

Theme 1 – Consumer issues in the care home sector

Age UK has already provided the CMA with evidence drawn from our information line which reveals a number of issues with the way the care home market is currently workingⁱ. These include requirements for relatives to guarantee that fees will be paid, requests for large upfront payments, unexpected or arbitrary fee increases, charges for ‘extras’ and having to pay for long notice periods. Our report also highlighted poor transparency of important terms and conditions. People who have to pay for their own care usually have to pay much higher fees for the same service than local authority funded clients. Laing and Buisson, in conjunction with Local Government Association members, have carried out research into the extent of these cross subsidiesⁱⁱ. This research found that 96 per cent of self-funders paid more than local authorities did for the same type of room in the same home. The average level of this premium was 43 per cent.

A further issue applies to older people and their families who are entitled to local authority funding, but who are frequently being asked to make additional ‘top-up’ payments towards the cost. Laing and Buisson research shows that the extent of these top-ups varies regionally, depending on how wealthy the area is. In North East England, only 18 per cent of residents have to find top ups, but in the South East this rises to 54 per cent. Across the country an estimated 24 per cent (48,000) of care home residents are part funded by top-ups. Laing and Buisson estimate that the size of top-ups varies from about £25 a week to over £100 a weekⁱⁱⁱ. We hope that the CMA will investigate any consumer protection issues in relation to top-ups.

In looking at whether the functioning of the market causes consumer detriment, the CMA should take account of the fact that most older people who enter residential care expect it to be their home for life. In the event that they are forced to move they may face extremely negative consequences. It is of course inevitable that residents will have to move if their home closes. The CMA should consider whether stronger regulation of the financial viability of homes, and better contractual entitlements to adequate notice could reduce the likelihood of an unexpected closure resulting in a hurried and poorly planned move.

However individual residents may also be evicted, because they run out of money, because their needs change, or (in the worst cases) simply because they are seen as ‘difficult’, for example because they complain. As well as transparency of costs and charges, and rights to notice, the CMA should consider whether consumer law and enforcement have a role to play in improving security of tenure, ensuring that reasonable services are available to cope with changing needs, and protecting the right to complain.

The statement of scope states that the focus of the review is on permanent residency in care homes so respite care is not included. Care homes may also be used as a location for step down or intermediate care for people leaving hospital. This may involve a person becoming a resident for 6 weeks or more, and may result

in a subsequent permanent move. It is not clear whether this type of care will fall within the scope of the review. One reason for looking at re-ablement is that it should involve a planned program of activity and might therefore provide examples of good practice in developing personalised, outcome-focused care plans for residents.

Theme 2 – Choosing care homes

The statement of scope asks whether information or advice is available to older people and their relatives when deciding about entering or moving between care homes. This is an important issue, but it is not enough for information and advice to be simply available. Older people who need residential care are likely to face a range of barriers to obtaining and using information. They may lack capacity to read and understand information, may be physically unable to obtain information unless they have assistance, or be under pressure to make a decision rapidly, for example if they are being discharged from hospital.

It is important, therefore, that providers, local authorities and other agencies take active steps to ensure that information reaches people at the time that they need it. A shortcoming of the actions taken following the 2005 OFT market study on care homes^{iv} was that recommendations focused on publishing better and more accessible information but not on steps that might be taken to ensure that older people and their representatives have timely access to this information.

As the CMA statement of scope notes, a 2011 evaluation of progress since the OFT looked at provision of information (e.g. the number of local authorities saying they had published directories). However this survey also examined outcomes, including changes to consumer behaviour, and this approach revealed the limitations of simply publishing information. The report notes that, out of a sample of 658 individual service users or their representatives ‘There was only one example of an individual (an older person’s representative) who had used what can be described as a very wide range of resources to make their decision. These resources included: a local authority-produced directory of local care homes; family friends with expertise in the area; a social worker; inspection reports found on the internet; and visits to homes (which she considered to be the most valuable way to collect information)’^v.

It would therefore be useful if the CMA investigation looked at the sources of information that service users and their representatives should be able to draw upon in order to underpin recommendations for making information more accessible to consumers.

Where the CMA finds that there are systemic failings in the provision of information about important terms and conditions, it should consider whether rather than trying (and failing) to improve the information, the appropriate remedy might be to deal with the problem at source by using powers under the Unfair Terms in Consumer Contracts or Unfair Trading regulations.

The CMA should consider whether care homes meet the reasonable expectations of residents, given that needs will change. Care homes should be reasonably flexible in the services they provide, and registration categories used by the regulator should

be flexible enough to support a person to remain in place if they are provided with support in addition to the usual service provided by the home.

Clear and usable information about costs is particularly important, as individuals may be evicted if they under-estimate their longevity or care needs and run out of money. The CMA may want to consider whether provider bodies should be more transparent about what happens if someone runs out of money – and whether sufficient protection is in place for individuals if this happens.

Theme 3 – Regulation of Care Homes

Age UK has commented on the wider role of regulation of care homes in responding to the Care Quality Commission consultation on the commission's strategy for 2016-21^{vi}. In its response, Age UK highlighted the need for regulators to take account of information asymmetries between users and providers. However, regulators should also take into account the extent to which services empower service users and staff to influence quality – for example by being consulted and involved and, where necessary, through whistleblowing and complaints.

Much more active use of existing consumer protection legislation in relation to care home contracts should be a priority, for example (as stated above), Unfair Terms and Unfair Trading Regulations. However, a number of different enforcement bodies have duties in relation to this sector – e.g the CQC in relation to quality of services and consumer protection bodies in relation to 'fair trading' issues. We hope that this study by the CMA can look at how well different regulatory regimes and approaches fit together, and whether there are any gaps in coverage. A particular line of inquiry might be whether complaints from self-funders are used to make systemic improvements across the industry.

Theme 4 – Competition in care homes

A particular challenge in this market is the need to balance consumer protection with adequate supply. While there has been a nine per cent increase in the number of nursing home beds since 2010, there has been a steady decline in the number of residential home beds over the same period^{vii}. Moreover there is huge variation across the country, with the reduction in residential beds ranging from 18 per cent in London to two per cent in the East of England. The increase in nursing home beds has been similarly uneven^{viii}. This represents a significant problem for local authorities and consumers as care markets are hyper-local; it is no use to someone if a suitable, affordable placement is available in Bradford if they live in Bournemouth.

A market characterised by high levels of provider entry and exit may be viewed as efficient in many industries but high levels of provider 'churn' are not desirable in the care home industry, where consumers expect stability and security. The procurement activities of local authorities, and the level of public funding for the sector, are therefore extremely significant.

The impact on the market of local authority procurement practices varies depending on the extent to which a local authority is a dominant purchaser. If most care home

places within a local authority area are purchased by local authorities, care homes may have little choice but to accept local authority fee rates even though they are insufficient to fund a good quality, sustainable service.

On the other hand in areas where a large proportion of older people purchase and pay for their own care home places, care homes can expect to obtain higher fees so are more likely to be thriving financially. However they may choose not to accept clients from local authorities, resulting in a shortage of places at the rate that the local authority is prepared to pay.

Competition may be ineffective due to local monopolies, particularly in areas of low population density where there are few care homes.

The examination of the occupancy rates of care homes that the CMA intends to undertake should therefore include looking at the proportion of residents who are self-funding, the extent to which they pay higher fees, whether there is any evidence that they receive different services or accommodation to justify these higher fees, and whether there are regional or local variations in how markets work.

Conclusion

A theme which emerges from the above comments is that social care is a complex system which is shaped by numerous drivers including the operation of the market. The market does not operate in isolation from other system drivers, and indeed would be unlikely to do so successfully due to barriers that consumers face, including their own mental and physical capabilities at the time they are making life changing decisions. This means that it is impossible to consider whether the market is functioning in the interests of consumers without considering how well other parts of the system are functioning. The CMA may therefore need to consider how parts of the system which are outside of its normal remit impact on market relationships and on consumer rights.

We look forward to continuing to work with the CMA on this vital market review.

ⁱ Age UK - Behind the Headlines: Stuck in the Middle – Self Funders in Care Homes (2016)

ⁱⁱ Laing and Buisson (2015); "Care of Older People Market report 2015."

ⁱⁱⁱ Laing and Buisson (2015); "Care of Older People Market report 2015."

^{iv} OFT – Care Homes for Older People in the UK (OFT 780) (2005)

^v GHK Consulting Limited – p. 62 Evaluating the Impact of the 2005 OFT Study into Care Homes for Older People (2011)

^{vi} Care Quality Commission – Consultation on Strategy 2016-21 (2016)

^{vii} Humphries R, Holder H, Thorley R, Hall P, Charles A; "Social Care for Older People: Home Truths," Kings Fund/ Nuffield Trust (2016) -

https://www.kingsfund.org.uk/sites/files/kf/field/field_publication_file/Social_care_older_people_Kings_Fund_Sep_2016.pdf

^{viii} Humphries R, Holder H, Thorley R, Hall P, Charles A; "Social Care for Older People: Home Truths," Kings Fund/ Nuffield Trust (2016) -

https://www.kingsfund.org.uk/sites/files/kf/field/field_publication_file/Social_care_older_people_Kings_Fund_Sep_2016.pdf