Potential Market Failure in Residential/Nursing Care Home Services in Scotland: The Case for its Assessment as part of the Competition and Markets Authority (CMA) UK Care Home Review – Andrew Dodds comments

1. Introduction

My mother, for whom I hold power of attorney in respect of her financial affairs, entered a Residential/Nursing Care Home in June 2014.

My experience in securing for her a place in a Residential/Nursing Care Home leads me to believe that there is a clear case of market failure for such services in Scotland and that this is causing direct and substantial financial detriment to all Self Funders of Residential /Nursing Care, including my mother.

I consider that the key cause of the market failure is the dominance of the Local Authorities, which collectively represent 70% of the demand for Residential/Nursing Care Home services in Scotland, and that this

(a) severely limits the availability of the types of nursing/care services to Self Funders and

(b) results in Self Funders paying a substantial subsidy (Residential Care - approximately 54% -£15,642 per annum) towards the care of local authority funded residents. If the "Free Personal Care" element contributed by the Scottish Government/local authority was removed the excess rate would increase to £471per week (84% - £24,559 per annum greater)

The purpose of writing to you is to highlight my concerns about the ineffective operation of the market for Residential/Nursing Home care in Scotland. I ask that you take them into consideration as part of your review of the UK Care Homes market.

I set out below the factors that I consider have caused or contributed to the market failure in the Residential/Nursing Home care market in Scotland, some or all of which may also apply to the rest of the UK.

2. Causes of Market Failure

(i) Lack of Consumer Protection

Consumer protection in the Residential/Nursing Home care market is low priority as is evident in your Scope document (CMA - Market Study of Care Homes - Statement of Scope).

There is a significant difference in charges paid for local authority funded residents and those that are Self Funders for the same level of service in a Private Residential/Nursing Care Home (Appendix 1). The difference in charges in effect means that the Self Funders funding residents subsidise the local authority funded residents by circa 54% - £15,642 per year. This is a grossly unfair system and I believe it to be, if not a breach of competition laws, deeply unethical.

(ii) Financial Disincentive for Private Residential/Nursing Care Homes to Accept Self Funders Under Route 3

There are three contractual routes through which Self Funders can contract directly with Residential/Nursing Care Homes (see Appendix 3):

Route 1 - Self Funders-determined

This is when you pay privately for your care home fees. You can choose to contract privately with the care home for all your fees.

Route 2 - mutual

You may choose to have the local council contract with the care home for the "free personal and nursing care" part of your fees but make a contract privately for the rest of your fees.

Route 3 - integrated

You may choose to have the local council contract with the care home for all your fees.

Even if you're Self Funded, you may choose to have the local council contract with the care home on your behalf so you're protected by the "National Care Home Contract".

If your funding runs out, you might be able to stay in the same care home if your contract is under the "National Care Home Contract".

The Route 3 option means that a Self Funded Resident would pay the local authority the "National Care Home Contract" rate to the local authority who would then pay the Care Home. The local authority would also pay the Scottish Government "free personal care" element to the Care Home.

It should be noted that this Route means that the Self Funding Resident would be paying substantially less per year by using this Route in preference to Route 1 or 2 - the "National Care Home Contract" rate is typically £300 per week less than the Route 2 option.

My Mother's Experience

My mother was assessed by the Local Authority (Scottish Borders Council) as requiring 24 hour Residential Care rather than Nursing Care and this was agreed by my mother and me. This assessment meant that residency in a Residential Care Home would best address this requirement.

Since my mother lived in a separate local authority area to me it was decided that we would look for Residential Care Home accommodation in my home area of West Lothian.

The second assessment by Scottish Borders Council was to determine the financial position of my relative and whether she would be local authority or Self Funding. In this case my mother was designated as being Self Funding.

I was advised to obtain details of the Residential/Nursing Care Homes in West Lothian. The West Lothian Local Authority provided a list Care Homes in the West Lothian area both Public and Private.

I noted that there were:-

3	Local Authority Residential Care Homes	consisting of 111 residents
2	Private Residential Care Homes	consisting of 22 residents
12	Private Nursing Homes	consisting of 740 residents

For Local Authority Funded Residents these Residential/Nursing Homes offered all of the above places (873) for Residential Care or Nursing Care at the "National Care Home Contract" rates agreed between Scottish Local Authorities and Scottish Care (main Care Home Association in Scotland). Currently, these rates are £558.77 per week for Residential Care and £648.92 per week for Nursing Care.

Since 2006, local authorities in Scotland have had a "National Care Home Contract "in place, which defines the terms of local authority placements into voluntary or Private Care Homes.

For Self Funded Residents the local authority Residential Care Homes (plus two others) were offered at the agreed "National Care Home Contract" rates (see above). All other Private Nursing Homes offered only **one** rate for those requiring Residential or Nursing Care even if the resident only required Residential Care. **These rates were are typically in excess of £300 per week (54% -£15,642 per annum greater) greater that the "National Care Home Contract" rates (see Appendix 1 for my mother's rates). If the "Free Personal Care" element contributed by the Scottish Government/local authority was removed the excess rate would increase to £471per week (84% - £24,559 per annum greater)**

Consequently, in accordance with my mother's instruction, I requested that Scottish Borders Council pursue Route 3 for my mother's care. However, for reasons unknown to me, the local authority did not advise the Care Home that my mother wished to use Route 3. Because of my mother's financial position they assumed that she would be using Route 2. When I discovered this and after objecting to it, the local authority asked the Care Home if they would accept my mother via Route 3. The Care Home declined for reasons that were never explained to me, however, I strongly suspect they did so because Route 3 would have meant a significant reduction in the Care Home's income compared to Route 2. I believe that the disclosure of my mother's financial status fundamentally prejudiced my mother's ability to pursue her chosen option of Route 3 since this alerted the Care Home to the potential to earn higher fees since they now knew my mother's financial status and that she had already chosen their home. At this stage there was no alternative so my mother was admitted to this Care Home paying the only available (higher) rate for Self-Funders.

Following further protracted discussion with the local authority (Scottish Borders Council) they found an alternative Care Home (after 4 weeks) in the West Lothian local authority area that would take my mother via Route 3. However, by this stage my mother was settled in the existing Care Home and did not want to move to another one.

It was clear from my mother's experience that the Route 3 option for Self Funders is no longer acceptable to the vast majority of Private Care Homes as it imposes the "National Care Home Contract" rates (typically £300 less per week).

(iii) Forced Disclosure to Nursing/Care Homes of Financial Wealth of Self Funders

Due to the differential pricing that has developed over the years between local authority funded residents and Self Funders the Route 3 option has become very attractive from an administrative and financial perspective for Self Funding Residents.

Many Private Care Homes now state that they will not accept Self Funding Residents using the Route 3 option. Local Authorities now insist that any extra payments beyond the nationally agreed contract rates are paid directly by Residents to the Private Care Home. The Private Care Homes are then able to identify those that are Self Funders and can then

refuse to accept Route 3 and force the individual into Route 2, ensuring that the Care Home receives the much higher Self Funding rate.

I believe that the local authorities and Care Homes have adopted the above practice as it is in both of their financial interests; Care Homes would otherwise receive lower fees from residents who would qualify as Self Funders and local authorities would otherwise have a higher financial burden of paying for local authority funded residents. This ensures that Self-Funders continue to subsidise the lower charges of Local Authority Funded Residents.

In my view, the process residents and relatives must follow to obtain a placement in a Care Home raises some serious questions regarding the fairness of the system in place between the Scottish Government, local authorities and the Care/Nursing Homes both Private and Publicly run. It seems that those parties are working collectively to establish the price payable for both local authority funded and Self Funders and creating a situation where Self Funders financial means are disclosed to ensure they then have to follow the most expensive route: Route 2.

This is a win-win for local authorities and Care Homes.

(iv) Few Residential Places for Self Funders

In West Lothian there are only 18% (157) of the 873 Care Home residents places (5 out of 17 Care Homes) available for Self Funders as Residential Care. The other 82% of places are only offered to Self Funding Residents at the one higher Nursing rate whether they need Nursing Care or not. I am sure this does not reflect the demand for Self Funding Residential Care places as opposed to those requiring Nursing Care.

By Private Care Homes becoming Nursing Homes they have been able create **one** high fee for both Residential and Nursing Care and apply this to Self Funding Residents. The Local authority "National Care Home Contract" rates insist on two lower fees, no matter the status of the Care Home, for local authority funded residents.

Local authorities and Care Homes are able to benefit from this unfair Care Home pricing model.

v) Local Authority Anti-Competitive Practices

I found it difficult to understand why Private Care Homes accepted such a large percentage of their residents (circa 70%) from the local authorities via the Scottish "National Care Home Contract" and only 30% from Self Funders since the Self Funders pay typically £300 per week more.

If I was running a Private Care Home I would be looking to have all my residents as Self-Funders and would either be able to lower my charges or make significantly more profits.

From my experience I have identified two areas where undue pressure is brought to bear on Private Care Homes to take Local Authority Funded Residents. (see Appendix 4)

It is my understanding that local authorities do **not** include Care Homes on their "lists" if they did not take residents funded by them under the Scottish" National Care Home Contract". Omission from this list means that potential residents would have difficulty

identifying these "off list" Care Homes and the Care Homes would therefore struggle for business. The Scottish Care Inspectorate do have an all inclusive list but potential residents when dealing with Social work staff are not normally advised of this list (or others). Consequently, Private Care Homes, not on the local authority list, would be invisible to potential Self Funding Residents looking for appropriate accommodation.

Secondly, West Lothian Council apply a "Service Matching Unit". I don't fully understand this arrangement between local authorities and Care Homes. However, it appears to be a process whereby Care Homes agree to accept "Local Authority" and "Self Funded" residents in proportion to the need within the local authority area. In the case of West Lothian circa 70% local authority funded and 30% Self-Funded.

These two processes enable the local authority to dominate negotiation between the vast majority of potential residents as they enter a Care Home and results in a biased/discriminatory, grossly distorted and unfair marketplace.

3. Recommendations for the Scope of the Market Study

In my view, the scope of your Market Study should focus on the overall structure and operation of the organisations and their relationships. I believe that the Study should work through the system and processes to identify the shortcomings. There are also areas where processes and options put in place by the Scottish Government are sidestepped or ignored because it does not suit the local authorities or Care Homes to implement them. In most of these instances the local authority and Care Homes would be financially disadvantaged.

I believe the CMA should review their Statement of Scope to reprioritise the investigation.

It should focus on:-

- **the whole system in each Country (Scotland, England etc) and their respective Local Authorities**
- **the relationship between Scottish Government, Local Government and Care/Nursing Homes**
- **the National bodies representing Local Authorities in Scotland and Private Care/Nursing Homes in Scotland.**

4. Summary

Elderly people requiring care, at a difficult time in their lives, put their trust in the local authorities to provide independent assistance to find appropriate Care in Care Homes.

The creation and implementation of the "National Care Home Contract" between COSLA (Confederation of Scottish Local Authorities) and the Private Care Home Association(s) has led to a financially discriminatory system under which Self Funders are substantially financially disadvantaged. In my view there is clear evidence of market failure: Self Funders have no negotiating power. It has created a situation where Social Service Departments operate as a monopsony with direct control of 70% of elderly Care Home residents and indirect control of the remaining 30%.

I have outlined in this document the shortcomings of the current administrative and financial processes that disadvantage Self Funding Residents in Care Homes.

I believe that the causes of market failure need to be addressed urgently.

The system is stacked against Self Funding Residents. The "Full Report on the Future of Residential care for Older People in Scotland Feb 2014" (see extracts in Appendix 2) and the Scottish Care "National Care Home Contract Reform July 2016 (P7 & 21 refer) both refer to the unfairness for Self Funding Residents in Care Homes.

Should the CMA wish to understand my concerns in more detail, clarify the points or require further information I would be willing to help.

APPENDIX 1

[name of care home excised] - Care Home of my Mother

Self Funder Resident (Residential & Nursing Rates the same)

Rates are £1069 per week (£55,740.71 per year).

This rate is reduced by the government contribution (Free Personal Care) of :-

a) £171 per week for a Resident requiring Residential Care
Resident Contribution **-£898 per week (£46,824 per year**)

b) £249 per week for a Resident requiring Nursing Care
Resident Contribution --**£820 per week (£42,757 per year)**

Local Authority Resident rates:-

a) **£558.77 per week (£29,135.86 per year)** for Resident requiring Residential Care

b) **£648.92 per week (£33,836.54 per year)** for Resident requiring Nursing Care

[name of care home excised] **Care Home receives £55,740.71 per year for every Self Funder whether they require Residential or Nursing Care.**

For Local Authority Funder Residents [name of care home excised] receives

a) £29,135.86 per year for Residents requiring Residential Care

b) £33,836.54 per year for Residents requiring Nursing Care

Self Funders such as my mother requiring Residential Care pay £339.23 - 60.7% per week (£17,688.14 - 60.7% per year) more than a Local Authority Funded Resident in the same Care Home.

Note:- [name of care home excised] **Receives**

- **£26,604.85 - 91% more per year for Self Funders requiring Residential Care and and**
- **£21,907.17 - 65% more per year for Self Funders requiring Nursing Care.**

APPENDIX 2

Copies of Sections which identify issues for Self Funding Residents of Care Homes taken from -

"Full Report on the Future of Residential care for Older People in Scotland - February 2014"

Providers argue that at least 4 to 5 per cent increase in fees is required to stand still and make improvements in quality. COSLA have asked Scottish Ministers to intervene in this impasse. Since the collapse of Southern Cross negative media coverage infers that standards of care are falling and that the focus of private providers is profit, not care.

The implications of failing to provide adequate funding might include:
(i) heightened risk of care home providers going into administration;
(ii) still higher care fees for Self Funders;
(iii) a decrease in the level of quality of
provision and services;
(iv) an increased level of delayed discharges from hospitals;
and
(v) increasing difficulties in the recruitment and retention of care home staff at all grades.

The current framework (as outlined in Table 1, Annex B) is perceived as unfair by those with capital and assets greater than the upper limit because:

It requires families to sell homes to pay for care – and those who have not saved for old age and retirement get all their fees paid by the state;

The upper capital limit catches more older people, many of whom had exercised their right to buy their council homes – so, even families of modest means are surprised to find themselves liable for care home fees;

Individuals have to negotiate their weekly fee rates directly with providers and do not have the benefit of bulk purchase negotiation – so invariably pay a higher (often significantly higher) fee rate;

While the right to choice is enshrined in regulation, often families are restricted in their choice of care home;

The current system of charging is complex and difficult to follow, and families are often unaware of all the options to fund their care;

Once in a care home, a resident has few rights of tenancy and can be moved from one room to another or into a different care home. When providers go into administration, residents have to be moved from their homes with few options or choices.

Breaking even is currently difficult as:
Current contract rate for publicly funded residents does not cover running costs for small and medium sized care homes;

Without higher income from Self Funders, many care homes would not be viable. Self Funders are cross-subsidising publicly funded residents with no discernible difference in the quality of service;

Over time, new residents entering long term care tend to be frailer or have more challenging behaviours than previously, and those with higher needs are making up a greater proportion of the population in care homes, these higher needs have higher care costs;

Variable occupancy rates have an impact on viability, and the current contracting framework does not guarantee any level of occupancy;

The national contract framework currently does not differentiate between different client group needs – such as those with dementia, or requiring palliative care;

Operating costs have increased, in addition to rising staffing costs, there have been sharp increases to utilities and food bills;

With increased scrutiny and rising expectations for care home standards of care and environment, greater investment in training and buildings have had an upward pressure on running costs;

The costs of capital and property have also changed with a rise in the number of care homes who “rent” their property from a landlord;
and
The property boom and subsequent downturn has left many property owning companies with negative equity and significant debt to service. The continuing operation of the care homes they own and associated income stream is essential to stave off the demands of their creditors and many are forced into increasingly complex financial restructuring to avoid realising the massive loss in property values. Pressure in this area would increase significantly should the interest rates go up as planned in two years‟ time.

The main concerns of Local purchasers and commissioners are:

Most care in care homes is procured through a nationally agreed contract with standard fees, used locally to spot-purchase care. There is little scope to negotiate differential fees if local market conditions could accept a lower fee. In some areas, particularly where there are labour market problems, and the NCHC level is perceived to be too low, partnerships could increase fee levels to help solve some of these issues;

Placements are made in response to levels of need and the commissioning role of the authority is limited to purchasing care from a local „market‟ – the tools to fully commission care and shape the local market are weak and underdeveloped;

Providers are often granted planning permission for new developments without regard to the market conditions for residential care in a geographic region – often leading to over-supply in areas where development land is more available and less expensive; and a lack of capacity in remote areas or where land is expensive;

Little flexibility to develop personalised packages within the rigid framework of the NCHC;

Recognition of the public policy question for national and local government around the extent to which we are prepared to preside over a drift between the rates paid by publicly-funded and Self Funding residents;

Lack of transparency over the financing arrangements of care homes. The split between property ownership and the provision of care has at times led to complex financial arrangements that make it difficult to determine where risk lies in business continuity terms. This in turn can fuel suspicion that paying higher rates to independent providers will only increase shareholders‟ profits, not increase the quality of care;

A general concern that demand for residential care – and community care more broadly - cannot be accommodated within projected budgets.

APPENDIX 3

Free Personal & Nursing Care Scotland - July 2003

Routes for contractual arrangements

4. There are 3 routes for contractual arrangements for individuals, local authorities and provider agencies in relation to payments for personal and nursing care in care homes and for personal care at home. Individuals must be able to choose which route they wish to take. This will require flexibility in approach from local authorities and voluntary and independent care providers.

Route 1 - The Self Funders-Determined Route

This can be taken for 2 reasons:

- the individual decides not to apply for personal or nursing care payments, chooses not to have a local authority assessment and enters into a contractual arrangement privately and independently with the provider agency

- the individual may apply for personal and/or nursing care payments but be assessed by the local authority as not having a level of need which makes the individual eligible for personal and/or nursing care payments. The individual can choose to enter into a contractual arrangement privately and independently with the provider agency.

Route 2 - The Mutual Route

This route involves the individual applying for personal and/or nursing care payments and being assessed as having a level of need which makes the individual eligible for payments. This route is likely to be for care home provision rather than care at home.

The individual wishes to receive the flat rate payments for personal and/or nursing care but wishes to continue to have or to set up a direct contractual relationship with the provider agency for the other elements of their care - ie the hotel/accommodation/living costs. This route may be chosen because the individual wishes to negotiate and purchase a care package or care home place in a place of their choosing and to their specification ie outwith any existing contractual arrangement the local authority may have with that establishment and does not wish to involve the local authority in their private contractual agreement.

In these circumstances the individual will use 2 contracts, one privately with the provider agency, and the other nationally consistent contract for payments for personal and/or nursing care. This contract will be between the local authority on behalf of the individual and the provider agency and will relate solely to personal and/or nursing care payments. A framework for such a contract is attached as Annex C. Payments for personal and nursing care will be made to the care home not the individual.

Route 3 - The Integrated Route

This route involves the individual applying for personal and/or nursing care payments and being assessed as having a level of need which makes the individual eligible for personal and/or nursing care payments.

The individual decides to ask the local authority to manage the contractual arrangements on their behalf.

The local authority will use its normal contract for care services or for care homes but the contract will have an additional nationally consistent annex which relates solely to the personal and/or nursing care payments. This annex would have close similarities with the Route 2 contract outlined in Annex C.

The advantages of Route 3 for the client is that the local authority's normal contract will usually have certain elements eg:

- restrictions on the level of increases of fees made by provider agencies (excluding any adjustment to the flat rate payments for personal and/or nursing care, which are determined in regulations);

- agreements on when fees can be increased by provider agencies (excluding the timing of any adjustments to the payments for personal and/or nursing care, which will also be determined in regulations); and

- an over-arching quality assurance and monitoring of all the care provided.

APPENDIX 4

[Excised by CMA]