

CMA MARKET STUDY OF CARE HOMES – BOB FERGUSON COMMENTS

- 1 For 20 years I owned and operated a residential care home for older people, during which period (and for several years thereafter) I worked with a local and a national care homes' association on a consultancy basis. Among my responsibilities for the former were dealing with local authorities on prices and drafting a suite of sample agreements of residence, in the course of which I liaised with the OFT (by email) in an attempt to ensure consistency with its 2003 Guidance on unfair terms in care home contracts.
- 2 More recently, I have been actively involved in a search for a nursing home placement for a family member. I have written op-ed columns for care sector magazines for around 17 years. It is on the basis of that combined experience that I offer the following comments on the scope of the CMA study. I hope they might provide useful context. I should add that I am now at an age where my interest in social care services is becoming personal as well as professional.
- 3 I mean to concentrate on the sustainability of care home provision and the market for self-funders – although I will also touch on the top ups that are paid by, or on behalf of, publicly funded residents. Forgive me if the documents that I quote are already familiar to you.
- 4 Briefly, in my view there is a dysfunctional market – or quasi-market – in social care services for older people, which works to the detriment of providers and consumers alike – albeit frequently through the former to the latter. Responsibility for propping up the market in residential care has effectively been devolved to self-funders, and to a lesser extent to the third parties (usually relatives) that pay top ups in respect of publicly funded residents. Everyone – from the PM to the Downing Street cleaner – knows that is the case. No-one, apparently, is willing to do anything about it.
- 5 According to analysts LaingBuisson, one of the characteristics of the current social care market for older people is an “Information deficit: the market is not fully transparent, with private-pay cross-subsidies to public-pay usually hidden, and there are poor information flows generally”.¹ They go on to describe: “The information asymmetry which exists between private purchasers and care home providers which facilitates the charging of premium prices to private individuals and supports the system of cross subsidies to public payers which is endemic in the care home sector.”² They amplify that theme in following pages.
- 6 Contracts and terms and conditions of residence are covered by Regulation 19 of the Care Quality Commission (Registration) Regulations 2009. However, the competence of CQC inspectors to police this regulation, particularly doing so pro-actively, must be questioned. Clearly, contracts

¹ Strategic commissioning of long term care for older people: Can we get more or less? (www.laingbuisson.co.uk/Portals/1/Media_Packs/Fact_Sheets/LaingBuisson_White_Paper_LongTermCare.pdf), page 4

² Ibid, page 5

should be written in plain English to make them easily understandable. That said, it must be understood that lawyers, being lawyers – with the worst possible eventualities in mind – will be constantly reminding providers of the need for legal precision, priorities that are not always compatible.

- 6 There is an obvious need for a standardised form of contract framework – similar, perhaps, to the NHS contracts with providers. I know how guarded OFT were when I was drafting sample agreements of residence, regularly reciting the mantra that the final arbiters on the “fairness” of contract terms are the courts. But I believe it’s time for CMA to get off the fence and take the initiative – say, facilitating consultation between representatives of providers and residents to thrash out an agreed framework. It won’t be straightforward – the parties will have different priorities – but it is not impossible, differences are not irreconcilable.
- 7 To be clear, there is nothing new about self-funders being charged more than publicly funded residents – or indeed top ups being sought from third parties for publicly funded residents (you should be aware that top ups are not sought exclusively at the start of placements; they can also be asked for at the point where the assets of an existing self-funder fall below the threshold for public funding in order to maintain parity with the self-funder rate). Both practices have been common since the 1980s when public funding was provided centrally through income support.
- 8 The notable differences are two-fold: first, fees for self-funders, be they in homes that only accommodate private payers or in mixed funding establishments, have gone through the roof – by any reasonable measure, they are excessive. Second, where once extra charges tended to be justified on the basis of superior accommodation and/or additional facilities, now the notion of cross-subsidy is openly acknowledged as an economic necessity to maintain an acceptable/sustainable level of overall income. Significantly however, that acknowledgement is not shared with residents or their relatives.
- 9 It is also believed that national chains may be cross-subsidising geographically; using profits from their private payers in the south to cross-subsidise their care home beds in parts of the north where local authority buyers are typically more dominant in local markets.
- 10 However, the question remains: to what extent, if at all, are higher fees for self-funders actually calculated to cross-subsidise local authority prices? Surely, providers must first determine what total income is required to cover projected costs and provide an acceptable return on capital invested, before setting/adjusting their fees (including self-funder premiums and council-funder top ups) to balance out receipts from council-funded residents. Fee setting will presumably involve either making a projection of, or placing a limit on, the number of publicly-funded residents that can be accepted. What evidence is there that providers (of all sizes) actually do behave like rational economic beings and systematically make such calculations to counteract perceived shortfalls in council funding? Or is it the case, as NAO reported, that fees will

simply “reflect customers’ willingness to pay”³ – providers will charge what the market will bear?

- 11 Critically, in the event that additional public funding is made available at some juncture, by whatever means, what assurance can residents have that their inflated fees/top ups will decrease accordingly?
- 12 In 2015, in advance of that year’s spending review, the County Councils Network of the Local Government Association produced a report⁴ to support its lobby of central government for increased funding. The report was based on research conducted by LaingBuisson. It projected that, as private and public fees converge – what it called “market equalisation” – the cross-subsidy element in self-funder fees would indeed decrease accordingly. Significantly perhaps, some of the language used – “be reduced/eliminated”, “bringing self-funder fees down” – suggested there is no expectation that this will come about spontaneously: it will rely on some external agency, a form of direction/control.
- 13 When the first edition of William Laing’s toolkit, *Calculating a fair price for care*, was published in 2002, it was seized on by providers as authoritative support for their long-standing campaign to have care home costs accurately and routinely reflected in council prices. It should be noted that ever since funding responsibility for social care was transferred to local authorities in 1993, care home owners have complained, justifiably, that the actual costs of care were, at best, a secondary consideration in council price setting – council officers focused exclusively on their allocated budgets. Even after the toolkit was in the public domain, councils regarded LaingBuisson’s figures – particularly the allowance for return on capital – with considerable scepticism.
- 14 Subsequent editions are now widely cited to illustrate the shortfall in council prices and to benchmark providers’ fees. However, if those figures are the base, there appears to be no ceiling – LaingBuisson’s own research suggests that some providers are setting self-funders’ fees far in excess of the analysts’ published “care cost benchmarks”.⁵
- 15 LaingBuisson maintain that: “A key structural issue in the publicly funded care home market is that investors and providers are exposed to a high risk that local authorities, as monopsony purchasers in their localities, may at any time use their market power to drive prices down to levels which are unsustainably low, in the sense that they are insufficient to maintain investment in existing facilities and to incentivise investment in new capacity”.⁶ You should be aware, however, that there is an alternative view of risk and the appropriate level of return on capital invested.

³ www.nao.org.uk/wp-content/uploads/2014/01/10333-001-Deciding-prices-in-public-services_30-Dec.pdf, page 23

⁴ County Care Markets: Market Sustainability & the Care Act, (www.countycouncilsnetwork.org.uk/countycaremarkets/)

⁵ Ibid, page 22, especially Table 3

⁶ Op cit, Strategic Commissioning of Long Term Care, page 14

- 16 That alternative was provided in a public interest report from the Centre for Research on Socio-Cultural Change (CRESC).⁷ For your information, one of the academics authoring this document is also a venture capitalist. The report claims that the figures on which the social care “crisis” narrative is based “should not be believed”. The problem, it says, hinges on LaingBuisson’s measurement of return on capital invested (ROI) – in its “fair price” toolkit – solely by the expectations of care home purchasers. “There is an element of circularity in the calculation,” the report argues, “which undermines its own pretensions to rationality”. “The fair price institutionalises a ... return on capital which is both unjustified and unjustifiable”. “We should regard 12% as a political target not an economic calculation”. The upshot, it concludes, is an “unjustifiably high” return being extracted from what is a low-risk activity.⁸
- 17 For some time now, representatives of care providers, local authorities and commissioners, as well as sundry think-tanks, have been singing from the same song sheet about the effects of austerity on adult social care. Of the elements in the funding equation, the amount available for adult social care is known; what is required is not so certain. Nevertheless, there is an unquestioning consensus that the size of the gap between the two can be measured effectively by using the prevailing orthodoxy of the LaingBuisson “fair price” model as a benchmark for what is required. I have to say there is a remarkable symmetry between this uncritical acceptance of how to measure the scale of the shortfall and the circumstances that produced the mother and father of false alarms that was the Millennium Bug. And we all know how that ended.
- 18 Although the CRESC report has been greeted by the care home sector like a bad smell – where it has been recognised at all – such is the defining importance of ROI within the fee structure, it is my opinion that the basis of LaingBuisson’s calculation should be re-considered objectively and thoroughly in light of the CRESC argument.
- 19 The apparent equanimity with which self-funders cross-subsidising publicly funded residents has come to be accepted as the norm is disturbing. Having to pay for one’s own care is one thing, paying well over the odds to subsidise the care of others is something else. However righteous the indignation, it will not be enough to generate change. The fundamental question to be addressed is whether we, as a society, should countenance care home residents being routinely abandoned to the vagaries of the market. Is it acceptable for them to be treated as economic actors transacting business in a conventional market environment – as if they were taking a casual shopping stroll around John Lewis or Ikea – without so much as a cautionary “buyer beware”? Does not the state owe its citizens a duty of financial care? Would not some form of regulation/control of care home fee levels (including top ups) be no more than a logical extension of the principle that underlies the Dilnot proposals?

⁷ WHERE DOES THE MONEY GO? Financialised chains and the crisis in residential care (<http://www.cresc.ac.uk/medialibrary/research/WDTMG%20FINAL%2001-3-2016.pdf>)

⁸ Ibid, passim

- 20 Although top ups must be openly declared – in amount if not in calculation – you won't find cross-subsidies explained in any agreement of residence. The people who pay them have more chance of seeing the dark side of the moon. As Baroness Browning put it in a recent House of Lords debate: "I still find it bizarre that we have this subsidy in residential care ... whereby self-funders subsidise those for whom the local authority purchases care. There is never any discussion around this. We do not talk about how fair it is. There is no discussion about the fact that individuals who find they have to self-fund are not paying just their weekly fees, but are also subsidising the person in the next room, or possibly even more than one person. I really think it is time that we exposed how the funding system for care works. It is like having a secret tax that nobody knows about. I find that quite abhorrent."⁹
- 21 Testing what people are willing to pay has long been entrenched in market systems, but concealing from self-funders the fact that great chunks of their fees are being carved off ostensibly to support their council-funded counterparts is indefensible. That some providers have exploited the "information deficit" to generate "super-profits" – "private payers [are] now paying an average 40% plus premium over public payers for like for like accommodation"¹⁰ – is nothing short of scandalous.
- 22 As a follow-up paper to the Barker report has noted, "There has always been an element of cross-subsidy between self-funders and those supported by the public purse. This cross-subsidy, however, is clearly rising so that, rather than taxpayers as a whole supporting those in need of social care who do not have the funds to provide for themselves, a subgroup of the more affluent who, through no fault of their own are unfortunate enough to need longterm care, are now increasingly providing that subsidy. This is profoundly inequitable and a long way from 'we are all in this together'".¹¹
- 23 The Government plans to bring transparency to household bills – for example, enabling consumers to decipher "opaque and confusing" rates for dental care. It is equally concerned to make energy suppliers more accountable on their pricing. Meanwhile, care home fees remain shrouded by non-disclosure, leaving self-funders to be overcharged often eye-watering amounts, paying the price, it is claimed, for sustainable service provision. These people know nothing of what is being done in their names, with their money. Why can't the Government, at the very least, make a priority of insisting on clarity in care home bills?
- 24 As to the relationship between price and care quality, Caroline Abrahams, Charity Director at Age UK, told the Telegraph: "This new league table suggests that finding a good care home is a postcode lottery, and tracking down a good and affordable care home harder still. It seems increasingly to

⁹ <https://hansard.parliament.uk/lords/2016-12-01/debates/C1C0E019-BB75-4613-8C14-E86D9D67D690/SocialCare>

¹⁰ Stabilising the care home sector & preparing for implementation of Part 2 of the Care Act in 2020, LaingBuisson, 2015, page 2

¹¹ www.kingsfund.org.uk/sites/files/kf/field/field_publication_file/barker-commission-spending-review-statement-nov15.pdf

be the case that unless you have substantial wealth it is extraordinarily hard to secure really good residential care, but even if you are in that fortunate position this table implies you may not get what you want.”¹²

- 25 Funding is what it is, and will be what it will be, but that doesn't let the CMA off the hook. Something needs to be done. The provider sector does appear to have some appetite for a measure of price regulation; Chai Patel, chairman and acting CEO of leading care home chain HC-One, has already called for a “fair margin” in care home prices to be set by an independent regulator. “I'd be very happy if the government wanted to have a price regulator, like we have in utilities, because this service is a public good, an essential public good ... Let's have somebody tell us the fair margin that you should make in this sector and then see if we can, open-book, confirm that we're doing that but no more than that.”¹³ A variation on that theme has also been explored by LaingBuisson.¹⁴
- 26 Regardless of the current unanimity between commissioners and providers on the need for increased funding, there is little confidence in the provider community that the (temporary?) consensus will automatically lead to a greater realism in council commissioning. Providers believe that unless and until council commissioning – in particular, statutory duties on market shaping – is made subject to official scrutiny, the leopard will not change its spots. The unsatisfactory, and expensive, alternative could be a reliance on redress through the courts.
- 27 Might there be lessons to be learned from, say, the CCG improvement and assessment framework? Might providers also have a role to play? For example, where allegations of failure in commissioning centre on “inadequate” prices for care services, providers would need to be completely transparent about their cost components if they are to prove “inadequacy”.
- 28 It is important for the CMA to understand that when providers and commissioners meet to discuss prices – where they do actually converse – it is not a negotiation between equals: the local authority enjoys monopsony power while the provider's ability to, for example, combine with his peers in order to ensure acceptable pricing, is restricted by the terms of the Enterprise Act 2002, as amended by the Enterprise and Regulatory Reform Act 2013. The council position of take it or leave it makes for anything but a fair contest. And please be aware that in this context “contest” is not a metaphor.

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¹² www.telegraph.co.uk/news/health/elder/11988560/Costly-care-homes-may-not-be-the-best-league-tables-reveal.html

¹³ www.theguardian.com/social-care-network/2015/oct/14/chai-patel-social-care-essential-public-good

¹⁴ Stabilising the care home sector, op cit, pages 13-17