

Response to Care Homes Market Study Update Paper: 14 June 2017

We are a firm of solicitors who specialise in health and social care matters. We act for a significant number of the small, medium and large care home providers and also have relationships with trade bodies, including the National Care Forum and Care England. We also have a large practice operating through the Court of Protection and carry approximately 80 deputyships and are therefore regularly engaged on behalf of individuals in procuring care services, including residential care.

The following responses are given against the numbered paragraphs of your key questions but you will see that some of the comments are of wider application than in connection with the specific question raised. We have only addressed some of the questions.

Question 4 – how could people be encouraged to consider, and plan ahead, for care needs away from an immediate crisis or circumstances arising that trigger a decision to move into a care home at short notice?

1. Unless and until the funding system can effectively cap care costs in a way that establishes a known level of risk, it seems unlikely that insurance will be a major feature in the market. Immediate need care annuities are useful but expensive, so spreading the risk across the large group through insurance would be a good outcome. Particular thought will need to be given as to how the recent changes to pension drawdowns will impact the ability of future generations to meet care costs.
2. It would not be inappropriate for local authorities to direct individuals of a certain age to consider seeking independent financial advice: similar to age-triggered health reminders for certain NHS services. However, such advice will only be useful where there are genuinely affordable options for self-funders.

Question 9 – what role should regulators play in relation to complaints systems and complaints from individuals?

3. Complaints and redress is a sensitive area, but there needs to be some recognition that the provider is the party best placed to handle complaints from individuals. Addressing complaints directly to the provider encourages a better dialogue between service users, their relatives and the providers and makes sure that issues can be dealt with effectively at source.
4. At the same time, it should also be recognised that placing a relative in a care home can lead to significant contention between family members or family members and the local authority who, in turn, can seek to draw the provider into such arguments. We have seen providers placed in difficult circumstances where families seek financial concessions either for their own financial gain or because they carry a sense of guilt for being able to provide care to their relative personally. In such cases, an independent arbiter is necessary to provide a neutral perspective on the issue or complaint in question.
5. A well-informed and balanced Ombudsman service, as the backstop for complaints, is probably the most realistic solution to poor complaint handling. CQC should not be responsible for complaints, as that would harm what should be an objective and impartial approach to their regulatory functions.

Question 10 – are there any consumer protection concerns in relation to care homes that we have missed and which we should be looking at?

6. A typical care home placement could easily cost the individual £100,000 or more over their lifetime. When spending such amounts it would be normal to consider whether financial advice should be sought from an appropriate source. Our experience, arising from our work as Deputy appointed by the Court of Protection, is that significant benefits can be obtained from seeking independent financial advice from a suitably qualified advisor, such as one recommended through the Society of Later Life Advisors. This approach can generate a significant level of potential protection for the consumer and could be more widely encouraged.

7. At the other end of the spectrum, a large number of individuals are placed either privately or by the local authority on an 'emergency' basis, for what is intended to be a short period which can become a long-term placement. In such circumstances, the contractual arrangements are (as a matter of necessity) secondary to that of providing immediate care and it is rare that individuals will have any time to consider a contract in advance. Both individuals and providers may find benefit from some form of standard commissioning practice they can expect to govern the temporary or transitional arrangement whilst the longer-term contractual arrangement is negotiated.
8. When a person lacks capacity, a Deputy or Attorney may be appointed to make 'best interests' decisions in relation to either Property & Financial Affairs or, Health & Welfare. It is rare that a Health & Welfare Deputy is appointed because the primary concern is to arrange for care fees to be paid and in practice health and care professionals will constantly make best interest decisions relating to welfare. Therefore whilst Deputies or Attorneys, may wish to move a resident to a new provider, their power is often limited and choosing where an individual lives and what type of care they receive strays into the realm of personal welfare, rather than financial management.
9. In addition, professional Deputies are wary that considering moving a person to a different home can be an intensive process: where they charge on a time basis this can come at quite a cost to the individual. There is a layer of additional consumer protection required here for people who are likely to have higher needs and less autonomy over their care.

Question 11 – would it be helpful to produce further guidance for care home providers on their obligations under consumer law and, if so, what should it cover?

10. A new set of guidelines with detailed examples about what is or is not acceptable in care contracts would be helpful. We have often seen providers seek such guidance from both local authority and NHS commissioning where they receive conflicting or incorrect advice. A more objective approach, supported by a proper analysis of the manner in which unfairness can arise, would help providers to create both compliant and more user-friendly terms and conditions.

11. It should not be under-estimated how complex some of the contractual issues which arise can be: rights of cancellation; contracting through third parties; obtaining necessary guarantees from family members where an individual lacks capacity; securing information about the person's ability to continue to fund the placement; all have to be resolved within a contractual framework which therefore requires a degree of complexity.

Question 14 – are there any areas where additional consumer protections may be necessary beyond those provided by consumer law, existing sector legislation and national care home standards, e.g. in relation to ensuring clear, timely and comprehensive information for people when choosing care homes and to safeguard residents' deposits in full?

12. The use of deposits by providers is not unreasonable. Most customers will move into a care home and spend the last of their days there (or at least in hospital having been admitted from the home). At the point of death, all access to the deceased's funds terminates, so the home may be left unpaid for its services until probate is obtained, which may be several months later.
13. In addition, there are often circumstances where an individual's funding is reduced and they may be unable to meet the cost of their care whilst a replacement care provision is found or replacement funding is arranged. Whilst providers are sensitive to these circumstances they are frequently at financial risk whilst seeking alternative arrangements with family and commissioners.
14. Furthermore, residents may lose capacity after having moved into a home: leaving the home without a competent contracting party to authorise any payments or agree any necessary changes to the care arrangements. Unless a family member or the relevant social worker is willing to make an application to the Court of Protection, this can leave the provider in a vulnerable position. The alternative to such deposits is for providers to increase their rates to everyone to cover the cost of the contingencies which the deposit was intended to cover, which seems unfair.

Question 15 – are there any areas in relation to the procurement of places in care homes where more sharing of good practice amongst public bodies would

be useful, e.g. in relation to offering choice to people and facilitating top-up payments?

15. Local authorities need to adopt commissioning strategies which support long-term investment. It is legitimate, in return for certainty and appropriate pricing, that providers offer a degree of transparency about how their business model works. Local authorities are in a position to require open book accounting but too often this is seen as an excuse simply to reduce costs, rather than encourage investment.
16. Ultimately the duty of local authorities is to ensure that there are sufficient beds and a sufficient choice of providers available to meet their statutory obligations. This cannot be achieved by the use of dynamic purchasing systems, but only by adopting a flexible and long-term approach to commissioning.
17. Markets for care are, inevitably, local markets because of the influence of individual local authorities and because individuals are unlikely to travel significant distances to move into a care home: because they wish to maintain contact with their family and friends.
18. It would significantly help the market if there were positive obligations on local authorities to collect and publish specific and more detailed data which would provide information upon which potential providers could judge the potential market's size and shape. This would make investment decisions simpler. The lack of any such specific obligations leaves local authorities to do their own analysis which is usually unhelpful and often very weak. The data required should be readily available to local authorities and it should be possible to produce a template format for the data report and impose an obligation that an annual update of the data must be produced by each local authority using the standard template.
19. The CMA should consider much more carefully the obligations of local authorities and the duties imposed on them under the Care Act. A careful study of the Statutory Guidance on the Care Act would be helpful.

Question 16 – what factors should be taken into account when exploring price differentiation between publicly funded care home residents and self-funders?

20. Local authorities are monopsony purchasers and this creates an overwhelming temptation to use that power to purchase at the lowest price immediately available. The consequence is that eventually the low margins offered to private providers will result in them leaving the market, leading to local authority commissioners not having access to sufficient numbers of suitable placements. In turn this means that local authorities cannot place people and, rather than pay the true cost of doing so, they will then not make placements and needs will remain unmet. In the meantime, providers who have resisted the temptation to offer rates below their costs grow their private placements and gradually withdraw from the publicly funded marketplace.
21. Local authorities do not understand the financial models employed by organisations which operate care facilities, so fail to engage in any meaningful way with the pricing method which needs to be adopted to support the long-term investment required. They also fail to actively engage in their responsibility to commission in a way that allows for investment and improvement in care services. This leads to the conclusion that it would be better if there was a national model, to which suitable local variations could be applied, which recognised the need for an adequate return on capital and the long-term maintenance costs as essential elements in the cost of supply. It would still be possible to incentivise cost reduction by the suppliers by the use of such things as assistive technology and bulk purchasing, but this should be done in a transparent way.
22. In particular, there is a failure to address that those individuals with the highest and most complex needs require care from homes that have specially trained staff and specialist equipment. This impacts on economies of scale and requires a different commissioning approach than were providers can accommodate a larger number of individuals with a 'lower' level of needs.
23. It is surprising to hear the CMA suggest that there is a lack of evidence of public sector residents being cross-subsidised by private payers. It may be appropriate for the CMA to analyse the accounts of a selection of providers who provide a mix of supplies and identify what the "break-even" point for pricing is and how far below break-even local authority rates are, in such cases.

Local authority costs should reflect the actual costs of provision and include an adequate return on capital to justify the significant capital investment required.

24. Often, profit figures analysed by reference to single homes operated by owner/managers fail to establish the costs of the work of the owners of the business.
25. An examination of the availability of genuine choice should be undertaken. If it is accepted that 15 miles is a reasonable distance to travel, it is suspected that, in many parts of the country, there is very limited or even no choice of homes offered by local authorities at their “standard” rate. It could be made obligatory for local authorities to publish, routinely, details of all the current beds which they have available in their area under pre-arranged terms with providers and include within that the costs at which such placements can be made. This ought not to be a difficult issue as local authorities must have access to that information to enable them to make the placements they have to make on a regular basis.
26. We note that this question relates significantly to Question 4 in relation to incentivising individuals to plan for their care costs.

Conclusion

Our experience has shown that there is already significant regulatory and financial pressures placed on care home providers to ensure that service users are well informed and engaged consumers. What is currently lacking is the incentive for commissioners to do the same: empowering individuals as consumers and/or to distributing sufficient market information to providers. Without the active engagement of commissioners as primary purchasers, long-term investment in the care home market will be stifled which will in turn, lead to a lack of service diversity and a stagnation of best practice.

We would welcome the opportunity to discuss these issues further with CMA.

Anthony Collins Solicitors LLP

www.anthonycollins.com