UPDATE REPORT ON CMA CARE HOMES MARKET STUDY

Comments from Bob Ferguson

Introduction

1 My name is Bob Ferguson. 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 interim report on the CMA study. These comments should be taken as complementing those that I submitted earlier on the CMA's scoping proposals. 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 have limited my responses – some of which I regret are statements of the obvious – to those questions on which I believe I have a reasonable level of competence. Others may take a different view. I am happy to have my comments attributed to me by name.

Summary

4 It is apparent that care home residents are seriously disadvantaged by the lack of *effective* information and advisory hubs. I have suggested that such services should be established across the country.

5 As I have indicated at various points below – under State procurement and Investment in future capacity – there has never been any shortage of guidance on commissioning practice. The problem has always been ensuring that local authorities put it into effect. I have suggested that the many shortcomings in council (and indeed health) commissioning will not be remedied without the restoration of statutory oversight.

6 Much has been made of the deficiencies that have been found in resident contracts (agreements of residence); and the CMA rightly proposes to consider further action to remedy the defects. I have suggested that, as part of that theme, it would also make sense to consider the terms of local authority contracts/framework agreements with providers, including top up agreements.

7 I believe there is a case for the providers responsible for the business/contractual practices that raised serious concerns with the CMA to be investigated by CQC for institutionalised financial abuse.

8 I have urged upon the CMA the need to give serious consideration to making a recommendation that a form of price/fee control should be introduced for the care home sector.

9 The lack of conviction on social care funding demonstrated by the governing party during the recent election campaign suggests that the chances of CMA recommendations, particularly those with financial consequences, bearing fruit are slim to non-existent. Nevertheless, that should not deter the CMA from speaking truth to power – even if it does no more than add fuel to the fire.

10 It would be helpful were the CMA to pre-empt the possibility of its recommendations being remitted en-masse for consideration under the promised Green Paper – a temptation that Whitehall may not be able to resist – by taking such actions to protect consumers that can, and should, be effected promptly within existing powers.

11 The CMA has an opportunity to consolidate consumer protection within the framework of care home regulation. It must put in place a comprehensive solution, one that will last. Social care has already had to endure more than its fair share of patches to problem areas – and the current political climate suggests it is likely to suffer a few more. The CMA must not add to that number.

A word of warning on the CMA's impending foray into the regulation of adult social care: it must bear in mind that many of the warm words in which policy intentions for that sector have been written have failed to translate into the desired outcomes.

Responses to key questions

General

Q.1 *Do you agree with our analysis of the issues affecting the care homes market? Please provide evidence in support of your views.*

This useful analysis of relevant factors is sufficient to its purpose.

Q.2 *Do you have any comments on our proposed next steps and remedial action, including any suggestions for other remedial action?*

It is palpable nonsense for the CMA to insist that contract terms be fair while at the same time distancing itself from active involvement in drafting standardised specimen documents – spelling out unmistakably what "fair" should look like. By hiding behind the familiar caveat about the courts being the ultimate arbiters of "fairness" the CMA is in effect throwing providers to the wolves.

It must abandon this hands-off approach and instead get its hands dirty by making a practical contribution on contract terms – it owes no less to vulnerable consumers like care home residents. The CMA must put aside what appears to be ultra sensitivity to the possibility of being overturned on appeal and get involved directly. Other agencies and arms of government have undergone a similar experience and survived.

Choosing care homes

Q.3 *What could be done to make information about care homes more useful and easily accessible so people can see which care homes have availability and compare factors such as fee rates, quality ratings and contractual terms or whatever other information they may find useful and can engage with?*

To be effective, information provided must be locally focused, it must be comprehensive and it must be easily accessible.

Some authorities already provide (or fund the provision of) an online collation service for bed vacancy information. A number of care homes already publish their terms and conditions on their website, so there would appear to be no good reason why they shouldn't make them available for publication, alongside other relevant information – fees (some will be person-specific, the majority will not), quality ratings, facilities and the like – on an independent website. Logic (and statute) dictates that such a service should either be provided (at arm's length) by the local authority, or be commissioned by it.

Q.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?*

How, indeed? Could the million-dollar question be answered by offering financial incentives through the tax system? Surely, though – notwithstanding my comments at Para.9 – this is an issue that, with its multiple implications, might properly be subsumed into the discussion on the forthcoming Green Paper.

Q.5 *Do people need greater support in considering the care options available to them and in choosing a home, and if so what are the best ways to ensure this is delivered effectively, eg giving greater personalised assistance through 'care navigators' and other advocacy services?*

Local authorities are already under a duty (S.4 of the Care Act) to provide relevant information. The CMA's finding that available "good sources of information and advice" are "rarely used" suggests that they are failing to discharge that duty in an effective way – perhaps a failure of communication. That must be remedied, preferably by the provision of (well-signposted) independent one-stop shops for information, advice and, where necessary, advocacy.

Effective signposting is crucial: not only do people need assistance, they need to know that assistance is available and how they can access it.

Although the idea of "care navigators" has been floated before, it has not had a universal impact.

It is imperative that self-funders are not ignored. One wonders if local authorities' tendency to indifference towards self-funders in this context may to some degree have been an unintended consequence of the delayed introduction of the duty on local authorities to meet the eligible needs of self-funders in care homes (S.18 (3) of the Act).

Even with the best possible information, however, the nature of the challenge for family, friends or supporters arranging placements for prospective residents should not be underestimated. One study[1], albeit in a different context, has found that far from being a luxury, the exercise of choice could be "terrifying", to the point where "most people want the state to make these decisions for them." That could provide a rationale for the implementation of a "trusted advocacy" service, where people wish to use it. Were such a recommendation to be made, I feel sure it would enjoy majority support.

It is essential, nevertheless, that these hubs – which would lend themselves to being shared across authority areas – should not be compromised in a postcode lottery. They must be funded to be available to all service users in all authority areas.

Complaints and redress

Q.6 *How can people be helped so that they feel more comfortable in making a complaint about a care home, eg through advocacy or support services?*

It should be recognised that people will be unlikely ever to feel truly "comfortable" making a complaint about their care home – it is their "home", after all. Reasons for a reluctance to complain – eg, fear of retaliation – are well known, having been rehearsed many times over the years. Clearly, in procedural terms, the priorities should be to ensure that, first, they know they can actually complain; second, that their complaint will be listened to and investigated. The culture of the home is an absolutely critical factor here.

Grounds for complaint can vary widely, from the trivial (at least to an outsider) to the fundamental; it must be recognised, however, that the business/contractual practices identified by the CMA are altogether more complex issues to deal with, requiring, I would say, specialist assistance. An established "trusted" advocacy service could represent the optimum solution for residents.

Q.7 *Would it be helpful to introduce a model complaints process specifically designed for care homes in each of the four nations?*

I'm sure that would be helpful.

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[1] www.theguardian.com/commentisfree/2010/aug/08/catherine-bennett-education-health-big-society

Q.8 *To what extent would better signposting and access to the ombudsman improve the complaints processes?*

I don't believe it would make a marked difference. As valuable as the Ombudsman service is, it does not exactly provide a speedy resolution; it is seen as more of a last resort. The signposting should be to the advisory/advocacy service, with the Ombudsman identified as a backstop.

Q.9 *What role should regulators play in relation to complaints systems and complaints from individuals?*

CQC should be the natural home for complaints against providers (like its counterpart in Scotland) – indeed, many people assume that is already the case. It is also something that has been mooted by CQC's chief executive. Should that change come about, it is essential that the path to CQC should be open to all residents (and their advisers), regardless of their funding source(s).

Consumer protection

Q.10 *Are there any other consumer protection concerns in relation to care homes that we have missed and which we should be looking at?*

The priorities should be: first, prevention, and second, prompt, effective and well-publicised enforcement. See also my comments on specimen contracts under Q.2. Given that local authorities enjoy monopsony power in the purchase of state-funded social care services, and since there have been examples of local authorities using their contract terms to exclude top ups, I believe it is equally important for the CMA to scrutinise local authority contract documentation: (a) with providers; and (b) dealing with top up agreements.

Q.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?*

Yes, it would. It should be built into fundamental standards (as statutory guidance), perhaps as part of the duty of candour. It must certainly cover the issues identified as concerns by the CMA.

Q.12 *Could self-regulation play a greater role in this sector to drive good practice eg through the development of voluntary consumer-facing codes of practice?*

Emphatically not. Two important factors to bear in mind: first, representation in the care home sector is fragmented – arguably, irretrievably so; second, in any case, only a minority of providers are members of trade associations. The practical ability of the sector to develop and deliver self-regulation must therefore be questionable.

More important is the issue of credibility. Could it possibly be commanded by a voluntary arrangement dependent on representative bodies whose silence about the business/contractual practices that raised concerns with the CMA – no attempts to counsel on their propriety/morality, far less outright condemnation – has made them complicit in them? Some of them,

it should be noted, have since responded to the interim report with lamentable insensitivity, attempting to shift the blame to residents' families for not reading the small print. Against that background, the answer must be an unequivocal no.

Q.13 *What role might sector regulators play in helping to further 'embed' compliance with consumer law and best practice across the sector?*

This should be handled with care; the last thing the sector needs is more duplication in regulation. Respective responsibilities might be clarified, however, via a Memorandum of Understanding between the CMA and CQC. CQC already has many MoUs with other organisations.

Since CMA regulation tends to be reactive in nature, CQC staff could be trained to identify relevant issues at initial registration as well as during comprehensive inspections, with a view to alerting the CMA issues to be the subject of focused inspections that concentrate on the "well-led" key question.

In view of CQC's intention to extend the period between inspections for homes rated "good" and "outstanding" – likely to be around 70% of the total – I suggest that, were such an "identification" regime to be instituted, it should start by subjecting the relevant documentation of **all** homes to scrutiny. This could be done at minimal cost on a "desktop" basis.

The CMA has identified a number of business/contractual practices that cause concern on the grounds of unfairness to self-funding residents: for example, deposit taking (particularly where fees are paid in advance), upfront payments, guarantors, fee increase terms, the place of FNC in fees, fees charged after death – to which might be added "cross-subsidies". I believe there is a case for CQC to be asked to investigate the providers concerned with a view to establishing if there is evidence to support a prosecution for an offence of institutionalised financial abuse.

The example set by such an approach – *pour encourager les autres* – would consolidate the relevance of consumer protection within the regulatory system for adult social care. Equally, it would be a powerful statement of intent: warning unscrupulous providers that playing fast and loose with residents' money, their rights and their interests will not be tolerated; and reassuring residents themselves that the CMA and CQC will always be there to fight their corner. In relation to the latter, it could well be that the CMA's toughest task will be convincing care home residents that they are, indeed, "consumers".

Q.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, eg in relation to ensuring clear, timely and comprehensive information for people when choosing care homes and to safeguard residents' deposits in full?*

I have made a number of suggestions in this paper. As a non-expert in consumer protection legislation, I would say that, in general, it would be best to follow the general principle that, where possible – and desirable – the tendency should be to give preference to “more effective” over “more”.

As far as deposits are concerned, however, should not the CMA be questioning the need for them at all – perhaps outlawing them when fees are paid in advance? In (rare) circumstances where they are considered to be legitimate, deposits should be ring-fenced.

There are also questions about if/how payments of FNC for self-funders might be handled differently to minimise/avoid a risk of exploitation – another facet of transparency. Might it help if, for example, they were paid direct to self-funders – and for state-funded residents to the relevant local authorities?

The theory is that as and when private and public fees converge – “market equalisation” – both the incidence and the amounts of top ups should decrease correspondingly, before eventually withering on the vine. Residents must be assured that the theory will become practice – in a timely fashion.

It is imperative that residents are not abandoned to the vagaries, let alone the excesses, of the market. Guidance for care home operators is a necessary means of providing consumer protection, but it is not sufficient; in my view, provision should also be made for conduct to be routinely measured against it, reinforced where necessary by effective sanctions.

State procurement

Q.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, eg in relation to offering choice to people and facilitating top-up payments?*

At this stage in proceedings, there can’t possibly be any excuses for ignorance; local authorities are already awash with guidance from a variety of sources (see comment on Q.20), including on the examples quoted. Rather, it might take the provision – and application – of regulatory teeth to concentrate minds.

Q.16 *What factors should we take into account in our further work exploring price differentiation between publicly funded care home residents and self-funders?*

When the Dilnot cap was being consulted on, it was assumed that the information contained in care accounts could be relied upon to act as the primary signpost to price differentiation, thus enabling it to be challenged. That was the theory. The question is: should not absolute transparency – perhaps via publicised fee breakdown – be guaranteed in any case?

While robbing Peter to pay Paul might be acceptable in certain transactions, there are a number of fundamental questions to be asked about the practice of “cross-subsidy” in care home fees – ostensibly where

fees charged to unwitting self-funders are at a level that will offset a shortfall in prices paid for the care of state-funded residents. Is it a genuine attempt to compensate for a calculated deficit in local authority rates? Or could it be camouflage for profiteering?

In any case, surely, it can't be acceptable for residents and their families to be left to determine the answers for themselves. Would the practice be acceptable if residents were fully informed at the outset of the reason for their care and accommodation costing more than state-funders in like-for-like circumstances? I believe that turning a blind eye to the practice, or in effect nodding it through, would be a betrayal.

Investment in future capacity

Q.17 *What are the barriers to providers responding to future needs for care home beds and how are these best addressed?*

I think this question is best left to current providers.

Q.18 *Can local authorities and other commissioning bodies effectively 'shape' how local care home markets develop and, if so, what are the indicators that this is working well?*

Authorities are expected to publish Market Position Statements outlining their commissioning priorities and intentions. However, the MPS will be just another piece of paper gathering dust on a council shelf unless (a) it is a dynamic document, the product of an ongoing dialogue that includes providers; and (b) is delivered within an equitable procurement framework, maintained by sustainable prices. In short, authorities can provide some of the preconditions for the development of a vibrant market. If that qualifies as "shaping", so be it. I am not competent to give an opinion on effectiveness.

Q.19 *What is the potential to promote long-term considerations through better sharing between local authorities and other commissioning bodies of good practice on care home 'market shaping' and planning and procurement?*

First, there should be no silo working where commissioning bodies are insulated from one another. But as limping progress towards integration demonstrates, that may be easier said than done.

It is essential that commissioners (of both health and social care) routinely engage in open constructive dialogue with providers as well as with each other. That said, experience (and history) suggests that, in the real world, things are not quite so straightforward. Since the implementation of the 1993 community care reforms, local authorities have benefitted from reams of official guidance. Regardless of the fact that in some cases they were party to the drafting, and even where the guidance possesses the imperative of statutory status, many authorities have chosen to either disregard it completely or treat it as discretionary.

Consequently, provider confidence in the prospect of constructive collaboration with commissioners, where it existed at all, has been eroded (see also comments on official guidance under Q.15). CQC's power to regulate council commissioning was removed a few years ago – replaced by an LGA-sponsored, inter authority "buddy" system; in practice, a pale and ineffective reflection of independent statutory regulation. The consensus in the provider sector is, and has long been, that, unless properly targeted statutory oversight is restored, little will change.

Q.20 *What is the scope to establish an independent body or bodies with a duty to provide support and guidance to local authorities and other commissioning bodies in relation to long-run planning and facilitating development of care home capacity?*

The Institute of Public Care at Oxford Brookes University might justifiably claim to be doing so already. It is for others to judge both the quality of the guidance and the extent to which it has been implemented successfully on the ground.

Funding and staff challenges

Q.21 *Would there be merit in establishing an independent body (or bodies) to develop a framework to estimate reasonable fee rates, which will take account of the full cost of care, to advise local authorities and other commissioning bodies, and to adjudicate on disputes between local authorities and providers?*

This would undoubtedly be welcomed by providers and service users alike, particularly if its remit covered fees for self-funders as well as local authority prices (see comment under Q.16). An independent adjudication facility was mooted – albeit tentatively – during consultation on draft regulations and guidance to implement the cap on care costs[2]. Unfortunately, it fell by the wayside alongside the Dilnot proposals.

Although return on capital calculated on purchasers' expectations – as the reciprocal of the profit purchase multiple of sustainable EBITDA at which freehold care homes change hands – may complete the circle neatly, it does not necessarily reflect accurately the level of risk in the care home sector. I suggest the proposed body should examine critically the method currently used for setting return on capital (see also the publication[3] cited in my original comments on the scoping paper, Paras. 15 to 18).

The CMA should note that a voluntary/advisory arrangement would provide the appearance but not the substance of authority; it would almost certainly fail to meet expectations. The ADASS, like providers' associations, can do no more than make recommendations to its members. History suggests that for such an initiative to have a reasonable chance of success compulsion will be necessary.

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[2]www.gov.uk/government/uploads/system/uploads/attachment_data/file/400757/2903104_Care_Act_Consultation_Accessible_All.pdf

[3] WHERE DOES THE MONEY GO? Financialised chains and the crisis in residential care (http://www.cresc.ac.uk/medialibrary/research/WDTMG%20FINAL%20-01-3-2016.pdf), pp.27-30

Which leads to what I would argue is the CMA's logical next step: exploring the viability of the control of prices/fees – or, as a minimum, of the most frequently contested component of prices/fees: return on capital. Inevitably, that process would have to address the not inconsiderable factor of the acceptability of price/fee regulation to national government.

Q.22 *Would there be merit in local authorities being required to be more transparent in relation to the fee rates they pay for care home places and how these fees are determined?*

Again, this would be welcomed by all parties. It is essential, however, that providers are equally transparent, not least in respect of the issue covered in Q.16.

Q.23 *How should the challenges of recruitment and retention of care home staff be addressed, including by local authorities, in particular are there any regulatory barriers to the labour market?*

Currently, the obvious barrier appears to be Brexit-associated immigration restrictions – including, it seems, anticipation of their imposition. However, I fear the remedies to this and other roadblocks on overseas recruitment may be way above the CMA's pay grade.

Bob Ferguson
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