



Competition and Markets Authority, Market Study of Care Homes, Update Consultation:

Care England Response – Final

Introduction

Care England welcomes the opportunity to respond to the Competition and Markets Authority (CMA)'s update on its market study of care homes, particularly at a time when the care provider market is facing significant financial stress and uncertainty as a result of continued pressure on public spending set against rising levels of demand, alongside clear evidence of a need for greater transparency across the whole sector, including local authority and health commissioners to ensure access and choice to high quality care services.

About Us

Care England is the leading representative body for independent social care providers in England. Our members provide services for adults with care and support needs including in residential and nursing settings, homecare, and community-based support. Our members deliver specialist services such as rehabilitation, respite, palliative care and mental health services.

www.careengland.org.uk

Key questions

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

Care England welcomes this report as a timely stimulus for further consistency and transparency in how the market responds to individual needs and expectations. We note that the analysis is broadly consistent with our own understanding of the challenges and opportunities facing the sector. Indeed we welcome the references to the many examples of good practice by providers across the UK and the CMA's recognition of the impact of low rates paid by commissioners upon the market, particularly in terms of investing in new services and products.

Whilst the general tone of the report echoes our own understanding of the market, **we have a number of significant concerns namely;**

- While responsibility lies with care providers to ensure consumer protection in the care market, commissioners **must** also be held responsible for their role and influence over the market. Poor quality commissioning has a negative impact on the entire market, and on the consumer. The report repeatedly cites, but does not quantify and give examples of good commissioning practice. These positive examples should be made available and the CMA should give a view as to what proportion of commissioning does, in reality, demonstrate good practice.
- By not properly funding the local care market by paying realistic fees that represent the costs of care, commissioners are preventing a vibrant and varied local care market from developing, and are thus limiting consumer choice about care homes. In this context, we do not agree with the CMA analysis that Local Authority and Health commissioner's payments cover the true costs of care, which is being played out by the significant numbers of care providers exiting the market and giving back contracts to commissioners. These decisions are never taken lightly, but providers increasingly have no other options and are not willing to compromise quality over costs.
- Indeed the recent ADASS Budget Survey 2017 highlights the increasing fragility of the care market in response to pressures on public sector budgets, and we note that whilst the consequences of unreasonable prices paid for care by commissioners are felt across the whole sector, small scale operators who are exclusively reliant on commissioned placements are particularly vulnerable to closure. The ADASS Budget Survey noted that that in the last 6 months Local Authorities reported closures of provider services that affected 7,463 individuals and providers handing back contacts affecting 3,486 individuals.

- We disagree with the CMA’s statement that *there is scope for local authorities to pay rates that cover operating costs and allow homes to remain open, but below the rates that would cover the costs of long-term investment in new capacity*. Such a short-sighted approach is incompatible with commissioners’ Market Shaping duties under the Care Act and would jeopardise providers’ ability to re-invest in existing capacity.
- The CMA needs to tackle the many instances where commissioners deny, or do not provide adequate information about third party top-ups. These practices deny the consumer from exercising choice about care homes that best suits their needs or offer a comfortable environment for their care.

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

Care England agrees with the CMA call to ensure greater transparency between costs paid by self-funders and by commissioners, but we urgently need greater clarity from the CMA on how commissioned payments can be upgraded to reflect the true cost of care - which then provide margins to allow for future investment. This transparency and adequacy is a key component of the Market Shaping duties held by Local Authorities in terms of supporting growth and innovation.

Providers report that some Local Authorities do not allow for top-ups, which restricts choice, which is further compounded by some Local Authorities only offering one care home to potential residents. These practices deny choice and control (key principles of the Care Act) and Care England urgently seeks clarity on action to be taken to prevent these unfair restrictions upon consumers – and market diversification in general.

Whilst Care England seeks clarity and transparency of costs, we do not support the option of Local Authorities to negotiate prices paid by self-funders. This would further restrict choice and control through strengthening the monopsony position Local Authorities already hold over the market and the potential risks of escalating a “race to the bottom” in terms of prices paid, as already demonstrated by Local Authority commissioning activity – for example the use of “reverse auction” to procure care services.

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?

Local Authorities hold responsibilities under the Care Act to provide information and advice to help local people make timely and informed choices about their care. In this context, Care England supports the strengthening and improvement of Local Authorities' information and advice services – and notes that at present many Local Authorities just provide a list of care homes in the area, and offer no more guidance to private funders. Often, it falls on the third sector and voluntary organisations to provide this advice, and Care England welcomes the opportunity to work closely with the CMA alongside stakeholders including Government Departments, Local Authorities, Independent Financial Advisors, and Regulators etc. to help establish reliable mechanisms to empower individuals and their families / carers when choosing a care home or service.

The process of moving into a care home could be much less stressful and not put a strain on local health services, if Local Authorities offered consistently useful information and advice to prospective residents and their families.

Finally, we urge the Government to prioritise the proposed “consultation / Green Paper” on social care funding is taken forward with a real sense of commitment to provide the assurances and transparency for individuals in planning for their future (and imminent) care needs. **The current impasse creates significant uncertainty for all concerned.**

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?

As noted in response to question 3, there is urgency upon the Government to provide the policy framework to give individuals greater certainty in planning for their care needs. As part of this approach, a national awareness scheme complemented by timely and accessible Local Authority information and advice service is critical to supporting individuals (consumers) to exercise choice and control.

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, e.g. giving greater personalised assistance through ‘care navigators’ and other advocacy services?**

Whilst there already exists many different mechanisms and agencies to help individuals navigate the (complex) care system, including advice and information by independent care providers – although as noted additional services are welcomed. However, the option to introduce “care navigators” needs to be carefully considered in terms of ensuring impartiality both within an open market environment and in being able to challenge commissioners- and in this context Care England welcomes further clarity from the CMA on how this can be achieved.

Complaints and redress

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

Care England notes that there already exists an open and transparent system to allow for individuals to comment on provider services; However, as noted in the CMA report many older people and their relatives are reluctant to raise complaints or lack the capacity to complain. Care England is supportive of any initiative that can help overcome these “barriers, for example the use of advocates. Any such approach however needs to take into account of existing duties held by Local Authorities, the issues of impartiality and where costs are held.

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

Care England welcomes consistency across the UK, but any “one size fits all” approach must allow for local flexibility and importantly, avoid additional unfunded burden upon the system in terms of costs, complexity and incompatibility.

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

As previously noted, Care England welcomes improved transparency and accessibility to allow individuals to raise concerns and encourages providers to ensure their complaint systems signpost and support individuals to approaching the Ombudsman where complainants feel unsatisfied with the response to their complaint. However there is no evidence to suggest a need for any additional changes to the existing system.

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

Care England believes that all national regulatory bodies could offer their help to residents and relatives who want to make a complaint as an additional source of support. These costs of this support should be absorbed by the regulators and it will be important to ensure no additional unfunded burden is placed upon providers.

Consumer protection

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 CMA is aware that Local Authority contracts covering placements of self-funding residents or involving third party top up contributions are to be treated as consumer contracts; this was confirmed by the Office of Fair Trading (“OFT”) in Paragraph 6.49 of its 2005 Market Study Report. The CMA should be looking at how unfair Local Authority commissioning practices could be having a detrimental effect upon consumers.

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?

Care England welcomes further guidance for providers. It will be important that this guidance is made accessible and applicable to all commissioners as well as providers to ensure consistency of approach across the whole sector.

Care England believes that clear guidance is also urgently required for commissioners, particularly in respect of unfair terms in Local Authority contracts for care home placements.

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

Care England welcomes the concept of self-regulation and notes that work is already underway by the Care Providers Alliance (CPA) to develop a voluntary Code Of Practice to improve practice across the sector. Further examples include the recent establishment of the “Outstanding Society”, formed by providers awarded the quality rating of “outstanding” - who aim to share good practice with other providers. Both approaches are supported by Care England.

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

Care England supports the CMA position that regulators have a clear role in embedding compliance with consumer law. However, there is a genuine issue of capacity. The Care Quality Commission (CQC) has experienced significant funding cuts despite increased areas of responsibilities, and any new responsibilities must be subjected to a full impact assessment and required additional funding provided by the government.

Although the responsibility for the regulation of Local Authority commissioning within the sector had at one time rested upon CQC and its predecessors, there is currently no direct regulatory oversight. As previously noted, Care England believes that this needs to be rectified to address the serious concerns about the quality of commissioning and the ultimate consequences upon the market in terms of choice.

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?

Care England do not believe that further legislation is necessary in this area, but rather good practice of providing comprehensive, timely and accessible information and advice is to be encouraged by all providers and commissioners. This includes sharing of good practice as regards to resident’s deposits.

State procurement

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?

Whilst the sharing of good practice would be useful, Care England believes that urgent attention must be paid to eliminating poor practice amongst public bodies. Care England notes that evidence of Local Authorities’ denial of third party top-ups, or their failure to provide useful information about them, as well as only offering one care home to potential residents significantly limits choice in the market and prevents the consumer from achieving value for money and satisfaction. These practices are not consistent with the choice and control ethos of the Care Act.

Care England is very concerned with the growing number of Local Authorities seeking to commission residential care by way of a “reverse auction” process (i.e. a competitive online auction in which potential providers of care compete in real time to win social care contracts). Commissioning services in this manner fails to take the individual care needs of residents into account and removes any element of choice in the kind of care that they receive.

Where services are commissioned in this manner, because there is no clear “usual price” residents face a lack of transparency from Local Authorities in respect of prices, terms and availability of beds from care homes. This is particularly so where a Local Authority is seeking top up contributions towards the cost of residents’ *more expensive* residential accommodation. Given that baseline prices arising from individual residents’ reverse auctions may be very different, there is a risk that Local Authorities may be seeking different levels of top up payments from individuals who have chosen a particular *more expensive* care home, even though the fee charged by the provider of that *more expensive accommodation* may be the same for all of those individuals.

Care England believes that the Government should take action to prohibit Local Authorities’ use of reverse auctions as a means of commissioning individuals’ care packages.

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

Care England is seriously concerned about the failure of commissioners paying a fair price for care and the subsequent consequences upon fragility of the market and incentives to invest in the future. Indeed, the consequences of underfunding by Local Authorities are not higher self-funder fees, but reduced capacity, investment and consumer choice. Further clarity is urgently required as to how to ensure costs of delivering high quality care which meets individual need is met, and Care England urgently welcomes further discussions (and agreements) with CMA and stakeholders to ensure ongoing market stability and assurances for individuals (consumers) – whether they are self-funders or recipients of Local Authority funding.

Investment in future capacity

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

Care England is concerned by the short term planning approach of commissioners, which is in turn determined by the relatively short term Government's approach to public sector finances (the current financial spending review only goes up to 2020).

Business viability is seriously threatened by rising demand, rising activity, workforce shortages (particularly nurses within Nursing Care Homes), increased regulatory burden, unfunded statutory costs, and poor commissioning practice including lack of attention paid to determining the actual costs of care provision. Instead of expanding activities, many of our members are being forced to take difficult business decisions, and it is hard to imagine why new entrants would choose the publicly funded care homes market, when it is so beset by ever increasing challenges.

Care England would like to see a funding, regulatory and commissioning landscape that allowed for care provider expansion and new entrants to the market, allowing for healthy competition and increased choice for people and their families.

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?

Market shaping, a new duty for Local Authorities under the Care Act, has not been fully taken on board. Many Market Position Statements (MPSs) that outline Local Authorities' intentions for market shaping and stewardship have not been updated since 2014, despite the fact that they are intended to represent the changing market and represent a living document. Further, Care England notes that the vast majority of MPSs do not provide financial forecasts to allow providers to plan ahead.

Some Local Authorities' MPSs state reducing the use of care homes as a long-term aim. This is seemingly without having embarked on a community needs assessment, engaged with or visited local care homes, or understood the potential role that care homes can play in reducing delayed discharge and providing high-acuity respite, step-up and step-down care, as well as longer term caring arrangements. Many Local Authorities' MPSs do not reflect that care homes are often the most appropriate and most cost effective option for older people in need of social care, this is seen by providers as a major cause of local systems' failure in effectively managing delayed discharge locally and achieving better use of care homes for the reduction of pressures on hospital trusts.

Feedback from Care England members notes that despite paying lip-service to market shaping and engagement, many Local Authorities are denying providers proper conversations about fee-setting and commissioning, or engaging in outcomes based or personalised commissioning, and this is making it harder for providers to offer quality care.

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?

As previously noted, Care England supports a more long term approach to market shaping, planning and procurement by commissioners. This longer term approach must be co-produced with providers as equal partners.

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?

Care England welcomes further discussion on the need for independent oversight of commissioners to improve practice, transparency and consistency. Care England has been making similar repeated calls for the Care Quality Commission to regulate commissioners and note CQCs piloting of “locality Inspections” as a means of holding commissioners to account. Care England notes that any new advisory body should not pass on costs to providers and should be developed on a co-production basis.

In terms of creating an independent body, it is noted that the model used in the NHS of Commissioning Support Units (CSUs) has been potentially problematic for providers. Many providers find that CSUs offer inexperienced approaches to commissioning, and serve as a barrier between provider and commissioner, preventing constructive local discussions.

Funding and staff challenges

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?

Care England welcomes the proposals to develop a framework under the auspice of an independent body to determine the true costs of care. Any such approach must be co-produced between commissioners and providers as equal partners, and developed at pace to offset the current fragility of the market. It will also be important that the scope of any such independent body is clearly defined to focus **solely** upon setting a floor level for Local Authority fees.

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?

Care England fully supports any proposals to require Local Authorities to be more transparent in how fees are determined and shared with the public. As previously noted any fee setting process should be undertaken in equal partnership with providers using an agreed costing model.

It is also important that any agreed fees reflect provider's investment in the market.

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?

The current shortage of registered nurses within care homes is a significant challenge, alongside ongoing challenges of recruiting and retaining care staff particularly in the context of pressures upon costs exacerbated by low rates paid by commissioners.

Whilst the sector is attempting to address staff shortages (for example the development of the "nurse associate", the issue of Brexit is likely to be a critical factor in addressing these challenges and we welcome close negotiation with the Government to ensure adequate staffing levels to meet individual need and ensure high quality care.