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Response by: Which?

Consultation response

Care Homes Market Study
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About Which?

Which? is the largest independent consumer organisation in the UK with more than 1.5 million members and supporters. Our mission is to make individuals as powerful as the organisations in their daily lives. We tackle consumer detriment through the products and services we offer and through our campaigns to drive change. We are an a-political, independent social enterprise working for all consumers and funded solely by our commercial ventures. We receive no government money, public donations, or other fundraising income.

Summary

There are extensive problems in the care home market – from people’s current experiences, to future provision. Which?’s research has led to the same conclusions as the CMA’s initial analysis, and so we agree with many of the CMA’s proposals on information provision. These should be extended to help individuals as they make choices now.

However, the CMA should examine more closely the underlying structural issues in the market, particularly the impact of local authority (LA) spending and how it affects current provision and future investment. Understanding the root causes of these issues will be critical to finding a route to a sustainable future for care in the face of growing future demand.

Following Which? research and analysis of the care homes market, the following issues must be addressed:

- Decision-making about care homes is difficult for consumers. Care homes are poor at providing online information, and information provided by LAs can be of variable quality. The Competition and Markets Authority (CMA) should consider more oversight of the information provided by LAs, and issue guidance on the information that care homes must provide.



- Any information remedies must be carefully designed to ensure that information is genuinely accessible and effectively aids decision-making. However, due to supply-side constraints on choice, such as limited top-ups, information remedies alone are unlikely to significantly improve the market.
- Too often, people feel unable to raise concerns or complain when services are not good enough, and find that when they do, their feedback is not taken into account to improve the experiences of others and ensure problems do not recur. At its worst, this can have disastrous consequences, particularly in relation to healthcare. The CMA is right to seek to make it easier for people to complain, in particular by improving access to advocacy as well as signposting. We also support the need for better oversight of the performance of individual providers' complaints systems, including how complaints are managed.
- However, there must also be greater transparency of complaints and redress, through regular publication of data on the number and the outcomes of complaints to providers and LAs about care home services. This should drive system-wide improvements and be systematically fed into Care Quality Commission (CQC) inspections and re-ratings to improve service quality and complaints handling.
- The CMA should expand the scope of its competition case if it finds further evidence of breaches of consumer law. We have a number of consumer protection concerns around price transparency, charging practices, and terms and conditions (T&Cs). Given the problems Which? has found in a snapshot investigation of care home contracts, the CMA should issue updated guidance to care home providers on unfair practices and T&Cs, and should increase monitoring of compliance, enforcement of requirements, and action against any breaches.
- The CMA should further examine potential cross-subsidisation and its impacts on different consumer groups carefully. If it is found that LA behaviour is significantly driven by insufficient funding, then the CMA should be clear that government action is required to address these underlying issues.
- We welcome the CMA's further work on profitability. This should provide an objective view on claims of growing financial unsustainability, as well as the quality and fitness for purpose of provision. Any considerations about future capacity in the market should account for responding to the changing needs of future service users.

Choosing Care Homes

The ability to make informed choices is currently restricted in this market, and Which? research has shown that decision-making about care homes is difficult for consumers. People choosing care homes often have no prior experience, and engagement in the market is generally low.



*"Despite my mother being 94, she'd never been involved with social services before...so when it suddenly appears in front of you, you've no background of who to contact, you've little background at all."*¹

Previous Which? research looking at consumer engagement across different markets showed that social care consistently scored lowest in terms of knowledge compared to all private markets, and low compared to other public services. For example, only 42% of people said they felt knowledgeable as a consumer when choosing a social care provider, compared with 62% in relation to choosing a GP and 65% in relation to choosing a bank².

In a spot-check of UK care home websites in June 2017³, we found that care homes themselves often fail to provide adequate information online – only 14 out of the 100 care homes reviewed provided any pricing information on their website and only three providers had their terms and conditions available online.

Of the 79 English care home websites reviewed which have a CQC rating, over one in four providers (27%) completely failed to display their CQC rating or did so poorly, despite there being a legal requirement to do so⁴.

The provision of information by LAs can be variable, despite the duty upon them to provide accessible and proportionate information. Independent Age research in January 2016 found that only 45 out of 152 LAs provided all the online information that is required.

In reality, many consumers are facing limited choices in terms of care home provision. This is particularly the case for publicly-funded consumers who may only be offered one care home option, and for those in areas where LAs appear to be limiting the availability of top-up options despite the terms laid down in the Care Act.⁵ More generally, there are significant regional variations in capacity⁶, fees⁷ and quality⁸, so whilst the market may be delivering effectively for some people in some areas, it is failing others.

Complaints and Redress

It is clear that the current systems for raising and resolving complaints and providing redress are not working as well as they should be. There are considerable barriers to complaining, in particular people dealing with these services fearing negative treatment as well as a lack of awareness of processes and advocacy services.

¹ Which? The Care Maze: The challenges of navigating care for older people. April 2014 Quote from one of 30 people who kept a diary during the process of arranging care for an older relative, a partner or themselves.

² Ibid. Data from Which? Consumer Insight Tracker, September 2013. These figures exclude people who said they have no experience of the services in question.

³ Which? Care Homes Website Review, June 2017, unpublished.

⁴ Regulation 20A of the Health and Social Care Act 2008. Regulation 20A requires providers "to display their ratings legibly, conspicuously and lastly indicating on the date it was issued by the regulator".

⁵ Competition and Markets Authority, Care Homes Market Study Update Statement, June 2017

⁶ LaingBuisson, Care of Older People UK Market Report, 28th Edition, Table 5.5

⁷ Ibid, Table 8.2

⁸ Independent Age, Care Home Performance Across England, March 2017, p6



Which? research showed that over half of care home users (55%) encountered an issue with the service – and of these, 34% did not make a complaint. Of care home users that had experienced a problem:

- 24% would have been too scared to complain without seeking independent support and advice, and
- 24% wanted independent support, but could not find any.

Our research also found that, of those who did not make a complaint, when asked why, 46% said that they did not believe that anything would be done about the problem. 25% were worried that complaining might lead to worse service or treatment, and 25% did not feel their complaint would be listened to⁹.

However, the ability to raise a complaint is just the first step in the journey. Evidence suggests there are also issues around the effectiveness with which complaints are subsequently handled and the experience of the process. Our research shows that, of care home users who complained, less than half (44%) were satisfied with the outcome.¹⁰

In addition, the lack of a clear and transparent national oversight system for social care complaints makes it difficult to ascertain the extent to which lessons from complaints about care homes are ultimately being learnt in the current system. Given the potential reduced frequency of inspection and re-rating by the CQC, it is also important to understand how complaints data will systematically inform their inspection regime.

Consumer Protection

Which? has a number of consumer protection concerns around price transparency, charging practices, and T&Cs. As mentioned in the previous section, our review of care home websites supports evidence from other studies in this respect. Out of 100 care home websites, only 14 provided any pricing information, only nine offered information on extras not included in the base price, and only three had some T&Cs available online.¹¹ This is important information for any consumer in assessing the value of the different options available to them. Of 50 care homes we contacted by telephone, 17 sent further information by post or email.

Overall, we obtained only four sample contracts from care home providers in our investigations. There were a number of consumer protection issues in this sample, many of which were identified as issues in the sector by the OFT as far back as 2003. These included:

- Making a relative who signs as a “representative” responsible for the payment of fees if the consumer fails to pay on time or at all;
- No insurance coverage for the consumer’s personal effects;
- The ability of a care home to terminate with only 24 hours for undefined “detrimental behaviour”;

⁹ Which? Public Markets Market Research, June 2017, unpublished. (Note low base size for these questions n<50)

¹⁰ Which? Public Markets Market Research, June 2017, unpublished. (Note low base size for these question n<50)

¹¹ Which? Care Homes Website Review, June 2017, unpublished.



- A failure to pass on any reduction in fees if the consumer has an extended hospital stay (or only a small discount after a lengthy – six week stay);
- A lack of clarity as to whether fees paid monthly in advance will be reimbursed upon death. One set of T&Cs expressly provided for a 28-day charge from the point of death.

Only one set of T&Cs from the sample we collected presented none of these issues.

Local authority procurement

Our analysis of the care home market has also raised significant questions around the ability of current procurement practices to drive good outcomes for consumers. There is a risk that LA procurement practices may be less able to reflect the personal needs of the prospective resident and might give disproportionate weight to price. While it is difficult to assess how LAs are reflecting prospective residents' preferences, the CMA should do more analysis in this area to understand if this is the case. It is important to establish whether a consumer's source of funding is determining whether they receive care that is less appropriate or may not reflect their needs.

It is clear that there is a price differential between self-funders and publicly-funded places. We accept that there could be reasons for this differential other than cross-subsidisation, but further investigation is required to explain whether these reasons account for the full 40% more that self-funders pay in England and Wales (2015 figures).

The CMA states it has no evidence of where LAs are paying fees that do not cover a firm's direct operating costs. However, recent figures from LaingBuisson suggest that the average fee per resident paid to care homes by English local authorities now falls short of service provision costs by more than £100 per week. Fees being paid to care homes by councils averaged £486 per resident per week in 2016-17, against a minimum requirement of £590 in order to generate a reasonable return¹².

Given this evidence, the CMA should explore the issue of cross-subsidisation further to examine the reasons why this price differential might arise, and consider the potential for harm and unfairness closely. There is a risk of creating an increasingly polarised market, primarily focused and responsive to the needs of more affluent self-funders. If it is found that LA behaviour is significantly driven by insufficient funding, then the CMA should be clear that Government action is required.

Investment in future capacity

As the CMA states, there are significant questions around the adequacy of current incentives for long-term investment. There are problems in the approach to planning and market-shaping across LAs, and limited incentives for the expansion of LA provision.

The CMA's position appears to be that the system is working today but is not viable tomorrow. Given that average LA funding is not now covering costs, the problems around signalling are

¹² LaingBuisson, Care of Older UK Market Report, 28th Edition, Figure 8.10



likely to be even more acute and the CMA should conduct a further, more detailed analysis of this tipping point.

Funding challenges

The CMA is also right to state that there are significant questions around the future sustainability of the care-home market. It is likely that considering margins/profitability in aggregate will miss regional variations in the market, and the risk to provision in particular areas, so we await the further work that the CMA is doing on national and regional differences.

In addition, given the latest figures from LaingBuisson showing that LAs are now paying below the cost of care, if indeed the sector as a whole is remaining profitable, then this would suggest that levels of cross-subsidisation are increasing.

As well as addressing an imbalance between future demand and supply in terms of capacity, the CMA should consider the expectations and changing needs of future care users, so that future capacity is suitable for future consumers.

Which? view of next steps and proposed remedial actions

Choosing Care Homes

We welcome the CMA seeking to understand how barriers to making informed choice are affecting outcomes in the sector and what more can be done to enable well-informed decisions.

Given the weakness of advocacy services in social care,¹³ we particularly welcome the proposals to look at supporting consumers in understanding options and making decisions in the care home market, as well as providing them with information. However, any information remedies need to be carefully designed and tested to avoid unintended effects. Providing more information to consumers will not enhance decision-making, unless the information provided is genuinely accessible.¹⁴

In addition, oversight of LA information and advice services should be improved, with more focus on joining up information provision across health and social care services. The CMA should also consider standards and issue guidance for care home providers on the information they must provide to consumers, including online. It should propose a legal requirement for care homes to provide example T&Cs online and on request.

The exercise of informed choice is essential for a market to work well. Yet most care home residents and prospective residents are not in a good position to exercise that informed choice at the current time. Improving this is essential for the consumer experience, but it is important to be cautious about the wider impact that this will have on the market, given the supply-side issues that restrict choice, particularly for publicly-funded consumers. While the CMA is considering these issues - for example, whether LAs are restricting top-ups – the suggested solution, such as recommended good practice on enabling top-ups, seems unlikely to have a

¹³ Healthwatch, *Suffering in Silence, Listening to Consumer Experiences of the Health and Social Care Complaints System*, October 2014

¹⁴ *The Role of Demand Side Remedies in Driving Effective Competition, A Review for Which?*, Dr. Amelia Fletcher, November 2016



significant impact, if the driver of the practice is LA concern over financial liability under the Care Act.

Complaints and redress

Too often, people feel unable to raise concerns or complain when services are not good enough, and find that when they do, their feedback is not taken into account to improve the experiences of others and ensure problems do not recur. At its worst, this can have disastrous consequences, particularly in relation to healthcare. The CMA is right to seek to make it easier for people to complain, in particular improving access to advocacy as well as signposting. We also support the need for better oversight of the performance of individual providers' complaints systems.

Effective complaints and redress are also about the consumer experience, and the transparency and effectiveness of resolution processes once complaints are raised. This should be facilitated through greater transparency, including making publicly available data on the number of complaints to providers and LAs about care home services, and the outcomes of these complaints. This should be systematically fed into CQC inspections and re-ratings.

Finally, it is important to note the potential benefits of a single Public Services Ombudsman (PSO) in England in this context. The two most common types of complaints that the Parliamentary and Health Service Ombudsman (PHSO) and Local Government Ombudsman (LGO) receive relate to health and adult social care. Combining these two bodies into a single PSO could make it easier for users to access redress, and the experience of using an ombudsman is also likely to be improved. This could also lead to improvements in complaint handling across the care homes sector. A PSO could also choose to report on and raise systemic issues, as is the case in Scotland. We also support a Bill that enables consumer bodies to raise concerns with the PSO. The CMA should recommend that the Government pursues the PSO Bill, which was published in draft in December 2016.

Consumer protection

We welcome the CMA acting quickly on evidence of problems and opening a consumer protection case. While we understand the focus on two specific issues where there is the greatest evidence, if there is further evidence then the CMA should expand the scope of the case.

Given the problems Which? found in a limited sample of care home contracts, the CMA should consider updating guidance for care home providers on unfair practices and T&Cs. It should consider increasing monitoring of compliance, enforcement of requirements, and action against breaches.

Local authority procurement

We agree that undertaking more work on how procurement approaches are affecting outcomes for consumers with different funding sources in the sector is particularly important. We welcome the CMA looking in more detail at the price differential and its impact across consumers. The CMA should further examine potential cross-subsidisation and its impacts on different consumer groups carefully.



Investment in future capacity

We welcome the CMA's further work on profitability, considering regional differences and differences across provider types and resident mix. This should shed objective light on claims of growing financial unsustainability. This work should also take into account the quality and fitness for purpose of provision, not just financial considerations.

In respect of future capacity, the emphasis needs to be not only on addressing the mismatch between future demand and supply in terms of capacity, but also the expectations and changing needs of future care users, so that future capacity is suitable for future consumers. This should be informed by consumer-focused research that considers what care home provision should look like if it is to be fit for the future.

Response to Specific Questions

Choosing Care Homes

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?

It is important that the information available to consumers choosing a care home is framed around the choices available to them. Recent surveys suggest a significant proportion of people who seek information would begin their search online. 29% of people would use Google as their first point of seeking information¹⁵. Yet online information from LAs and care home providers is often poor.

The CMA should set standards and issue guidance for care home providers on the information they must provide consumers, including online. This should include standard descriptions of the service, fees, and summaries of T&Cs. The CMA should propose a legal requirement for care homes to provide example terms and conditions online and on request.

Given the range of pressures on care homes, it is unlikely that providers will improve information unless it is mandated. We note that previous regulatory standards required care homes to provide consumers with information to support choice (The National Minimum Standards, 2003-10). This requirement is not explicit in the CQCs Fundamental Standards, and should be revised.

CQC ratings can be outdated, poorly displayed, or missing from providers' websites. As well as being up to date, they also need to be improved to ensure that they reflect what matters most to consumers.¹⁶

We have noted the existence of alternative quality rating schemes, and their inconsistency with CQC ratings. The CMA should follow up its previous guidance to the sites which offer these, and take enforcement action where necessary.

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?

We agree that it may be helpful to link planning ahead for care needs with other life decisions – such as retirement planning, or financial planning for later life. This would be an area that would benefit from further research.

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

¹⁵ Independent Age. Shining a light on care: helping people make better care home choices. 2016. (Date from ComRes online interviews with 2030 British adults between 29-30 October 2016.

¹⁶ Nuffield Trust. Rating providers for quality: A policy worth pursuing? 2013.



effectively, e.g. giving greater personalised assistance through 'care navigators' and other advocacy services?

We agree that people may need support in considering options and making choices, and information alone may not be sufficient in all cases. There is scope for more use of advocacy services.

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?

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

We support measures to increase awareness and uptake of advocacy services, including signposting by care home providers, LAs, regulators and ADR schemes. A model complaints process would help to drive consistency in accessibility and in the consumer experience of complaint resolution in the care home sector across providers and nations.

It is important that any process is built around best practice principles for complaints handling, and addresses identified barriers to raising and effective resolution of complaints, including:

- The ability/capacity to complain given vulnerability of care home residents.
- Worries about complaining due to potential repercussions.
- The belief that complaints will not lead to change.
- Practical barriers to complaining, including complexity and the time taken for resolution.

Therefore it is critical that any process incorporates a key role for advocacy in the process, and that complaint handling is designed around ensuring a positive consumer experience, built on research about things that matter to them. When we asked people who had had a problem with care home services what kinds of support they would have found helpful, by far the most common response was "someone to talk to face to face" (63%), followed by "advice about who to complain to" (19%), "advice to help me understand whether I had grounds to complain" (18%), and "information about what sort of redress I might get" (16%).¹⁷

There are also broader factors to address to encourage people to complain about care homes when they experience problems or poor service. People are more motivated to complain after learning about other complaints and how they were resolved, so providing greater "social proof" of complaints handling and resolution would give salience to the process.

People's preconceptions that complaining will lead to bad treatment prevent them from raising concerns, so dispelling these pre-existing negative anchors around the implications of complaining would encourage more people to come forward to resolve issues. Moreover a lot of people are motivated by putting the situation right for others as well as themselves, and getting a fair outcome. Tapping into these drivers could encourage more people to come forward when there are problems.

¹⁷ Which? Public Markets Market Research, June 2017, unpublished, (note low base size for these questions n<100)



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

We agree that better signposting to ADR is critical. It should be targeted and personal, and at the right time so it is not too late for people to complain.

Research by Which? in 2014¹⁸ found low awareness of ombudsman services:

- 27% were aware of LGO
- 12% were aware of PHSO
- 4% were aware of SPSO
- 4% were aware of PSOW
- 3% were aware of NIO

This was mirrored in 2017 Which? research¹⁹ that showed that awareness of ADR in general is low, although awareness and familiarity with the concept of an ombudsman is much higher. It also found that familiarity with the term “ombudsman” is lower in lower social grade households.

However, Which? research also suggests that an emphasis on awareness alone to enhance uptake is not sufficient. There also needs to be a focus on the consumer experience of ADR once people are aware of schemes. A 2014 survey found a wide range of reasons for not taking complaints to an ADR scheme, across all sectors, including:

- Not being bothered (25%)
- Too difficult (22%)
- Lack of awareness (21%)
- Did not think complaint would be successful (19%)
- Unsure of consumer rights (13%)
- Confused about which organization to contact (10%)
- Thought it would cost money (9%)
- Other reasons (17%)

Awareness is therefore only the first step to improving ADR. There are also likely to be barriers around other parts of the process. Applying a good practice framework for ADR to the care home sector, we suggest a number of particular areas for improvement²⁰:

- The amount and accessibility of information provided to consumers about ADR
- Support for vulnerable consumers
- Time limit to submit complaints
- The consumer journey and experience
- Complaint resolution times
- Award powers

¹⁸ Which? Research, Escalating Complaints, June 2014, unpublished (GMI survey of 3641).

¹⁹ Which? Research, Survey on ADR Use, March 2017, unpublished

²⁰ Which? ADR Policy report, unpublished

- Ability to enforce decisions

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

Effective complaint resolution systems have a fundamental part to play in increasing trust in a market by providing protection when things go wrong. There are three key roles that should be fulfilled by complaint systems:

1. Effective redress for individuals in cases where services go wrong – benefitting those individuals who have complained;
2. Using information from complaints to drive improvements in service providers' direct complaint handling – benefitting everyone who complains to those service providers;
3. Using information to identify systemic issues and drive improvements in entire sectors – benefitting all consumers in that sector.

Regulators have a part to play in ensuring each of these features of complaint resolution systems are fulfilled.

They should have adequate mechanisms to ensure that complaint handling by providers is delivering good consumer outcomes and enhancing confidence in the complaint handling system generally. For example, they should focus on access issues, including the existence of clear complaint processes and appropriate support for complaint handling, and process issues, including information, ease of complaint, and timely resolution. They should also have some oversight of complaint outcomes, and an awareness of the consumer experience and levels of satisfaction.

In particular, there should be mechanisms in place for working with regulated providers and other stakeholders to ensure information from complaints is fed back to service providers in a way that helps them to identify opportunities for improvement. There should also be transparency about how complaint data informs regulatory activities, and appropriate action where it doesn't currently inform activity.

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?

Our research mirrored the concerns in the CMA analysis. However, given that even a limited sample of T&Cs revealed issues – such as care homes reserving the right to terminate at short notice, large fees charged after death, and a failure to pass on any reduction in fees of the consumer has an extended hospital stay - this suggests that problems are likely to be widespread and significant.

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?



Given the prevalence of problems, a reminder of existing obligations and a requirement to provide T&Cs on websites and on request, as well as further consumer protection and enforcement activity could be beneficial.

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?

There is no evidence to suggest that this would be effective.

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

Sector regulators could undertake increased monitoring and enforcement activity.

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?

Ideally, a requirement on care homes to provide timely contractual information, including T&Cs being included on websites, would be introduced by legislation.

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