CARE ENGLAND
Representing independent care providers

Overview of Care England

Care England is the adult social care sector's largest representative body. Our members run and manage approximately 4,000 care services, amongst them single care homes, small local groups, national provider and not-for-profit voluntary organisations and associations, as well as private providers. Members provide over 120,000 beds and a variety of services for older people and those with long-term conditions, learning disabilities and mental health problems.

This response

The paper represents Care England's views, crafted in collaboration with our members. Much of our submission focuses upon section 3 of the consultation paper, which has been raised as a concerning development by our membership. Especially, when considered alongside the experiences of Care England members with the Competition and Markets Authority in recent years. Therefore, there is a fundamental need for future plans to give adult social care providers the certainty that the need. However, at present, the consultation paper does not provide such clarity and security to many members. This is particularly worrying given the uncertainty that persists in the adult social care sector as a result of Brexit and the Covid-19 pandemic. Similarly, the Government's recent Build Back Better Plan for health and social care, too, has provided more questions and worries than answers.

General comments:

It is worth beginning by starting that Care England is fully supportive of the current strong set of rights that UK consumers benefit from. Which the CMA has exercised, in recent years.

We believe, in broad terms, that the Administrative Model laid out in the consultation paper has the potential to have a variety of negative unintended consequence specifically for the care sector.

The changes in context:

Recent cases against Care UK and Barchester have, in Care England's view, confirmed that when a regulator believes a company or sector is breaching consumer law it should be required to "prove its case" before remedies are imposed. Even in the current regulatory context, the CMA's actions had a negative impact upon the sector, and some providers changed their approach immediately upon the CMA findings, when attempting to implement a position that was found in the courts to be an inappropriate analysis of consumer protection law. Considering these very negative actions which have undermined much of the sector's faith in the CMA, there is now a real fear that the newly proposed regime risks further undermining provider certainty and sustainability. In particular, members have cited the following issues in their discussions with Care England:

- The new regime would have an adverse effect on relations between the CMA and smaller providers. If the above cases had been imposed under the proposed regime this would have led to exorbitant fines being imposed, which would have undermined provider sustainability.
- Under the proposed system, some providers would not have had sufficient resources to appeal against the enhanced consumer measures or fines if they had been administratively enacted.

- The proposed system, ultimately, puts pressure on businesses to challenge the CMA's conclusions at a time when the sector's faith in the conclusions it comes to has been depleted. Whilst CMA conclusions, often come many months and years after intrusive investigations.

We would implore the CMA to demonstrate that the current system is itself not fit for purpose and that such change is essential. Including how the new system would reduce delays relative to the system that is currently in place. A failure to do so will not replenish the already low levels of faith that parts of the sector already has in the CMA. Whilst we would question whether the principles that underpin the new system are more attractive than the current, where the CMA must persuade a judge of the merits of its case.

Refunds:

Members have cited that administrative powers to demand refunds from providers would create uncertainty and delay for consumers. In particular, there is a lack of clarity regarding how such refunds may be distributed and how this would interact with the newly proposed appeal process? Would the refunds wait on the outcome of an appeal, or would they be distributed to providers and then recouped following a successful appeal? The consultation proposals lack detail on these issues that will fundamentally affect the implementation of such a system.

Understanding and protecting the interest of vulnerable consumers is the essence of Care England members experience and expertise at the very heart of our sector. Consumers and their representatives are vocal and active in asserting and defending their rights. Our members operate complaints procedures which are well used by residents, and consumers have access to Local Government, The Social Care Ombudsman and the CQC if they wish to escalate their complaint. Complaints such as contract terms make up a tiny proportion of complaints. The recent ruling for Care UK and Barchester by the High Court, leaves Care England members very concerned by the proposal to grant the CMA new powers to impose remedies and sanctions in respect of matters which have given rise to no, or negligible, concern on the part of actual consumers, which in turn has a very serious reputational impact on our members.

The nuances of the consumer and competition sectors:

Care England Members have raised concerns that the proposals would lead to the application of the CMA's powers in the consumer remit being aligned with those that they already possess in the competition field. However, such actions have the potential to undermine the nuances that exist between these two areas, and further given the different between businesses operating in and outside of the care sector.

We would ask the Government to consider the following when considering the potential to align the consumer regime with the competition given the difference between sectors:

- Smaller organisations do not necessarily have the resources and appetite to risk to challenge CMA decisions via the appeals process, and are unlikely to be able to recover costs of defence regardless of outcome in a regulatory capacity.
- The inability to challenge future decisions which undermines the true application of the law, for a sector continually challenged by policy, regulatory change, underfunding and workforce shortfalls, and could work against all Government is attempting currently to address these issues.
- Any administrative model introduced, would need to address these issues so as not to put off any business regardless of size from challenging CMA decisions.

- The Government should also consider whether, given the nuances we cite, the adult social are sector should be carved out of with a separate process.
- Members have cited to us the extremely nuanced nature of the judgments required in the consumer protection field relative to the competition field. For example, the operation of the adult social care market is itself extremely localised and context dependent. The recent decisions for Care UK and Barchester have, therefore, by no means provided providers with the faith that an administrative system would impose sanctions before considering the extremely nuanced nature of the social care sector. In turn, the Government must pay regard as to whether the proposed system is fit for purpose within the context of adult social care, and whether care should be carved out separately to businesses that cater more for the 'online environment' or service markets such as transport, telecoms, utilities and property services etc.

Delays:

Clarity and evidence are needed with regards to whether the new system will, in fact, result in less delays than currently process. Members have raised concerns that the examples given in the consultation document, to evidence delays in the current system, do not recognise the specific nuances of the cases involved, and why such delays were experienced. Rather, members have said that the examples have been misapplied to evidence delays within the current system. Ultimately, more system and overarching evidence is required to prove such points, rather than isolated examples.

The delays within the current system, are deemed by members that the current system does in fact offer a more attractive outcome than an incorrect outcome being imposed administratively. A decision that may lead to the reputational and financial degradation of the business involved.

Question specific answers:

Q4. Should the CMA be empowered to impose certain remedies at the end of a market study process?

Members have raised serious concerns about the very essence of market studies and whether they are robust enough to warrant the imposition of such remedies, for example:

- The market study process insufficiently safeguards to appropriately test, and challenge CMA conclusions being influenced, only by the evidence the CMA sought.
- Some businesses may fail to challenge the CMA on the evidence not sought, or fail to understand the significance of evidence required, which could impact on the CMA conclusion, given the often narrow focus of market studies, which could lead to pivotal evidence omitted that would serve a business's defence, and lead the CMA to an incorrect conclusion as in the Care UK and Barchester High Court ruling.

Members have suggested the market study into the care home sector illustrates these concerns whereby, the CMA determined there was a breach of consumer law in respect of upfront administration fees due to a very small number of consumer complaints, which supported that assumption. The independent tribunal determined it was not safe for the CMA to rely on only the information it considered to be relevant. Mrs Justice Bacon explained that extensive pre-action inquiries during a market investigation should not mean that there are not likely to be serious disputes of fact. Those disputes should be resolved by an independent tribunal before remedies are imposed and Care England members would wish to see such a process be considered in the future development of the CMA's regime, to ensure that that this is part of the process to initially resolve these principles prior to remedies being proposed.

Q6. Should government enable the CMA to impose interim measures from the beginning of a market inquiry?

No, for the very reason laid out in the previous question. Instead, interim remedies should be sought from a court.

Q7. Should government enable the CMA to accept binding commitments at any stage in the market inquiry process?

Care England members would question whether the CMA should be able to seek any remedies (even voluntarily) before it has concluded an investigation as otherwise, it would be a conclusion on the basis of incomplete inquiries and.

Q55. Do you agree with government's proposal to empower the CMA to enforce consumer protection law directly rather than through the civil courts?

No, we would reiterate the comments above regarding the unintended and negative effects that this may have within the context of the adult social care sector. We would echo the views of our members that this may have an adverse effect upon:

- The ability of smaller organisations to engage in the appeals process that is laid out under the administrative system.
- It is the burden of the asserting party to prove the breach of consumer law. The proposed model would see the burden and cost on businesses to prove otherwise.
- Challenges may be disincentivised within the context of this new appeals system. This could lead to misinterpretations of consumer law, that are incorrect as a result of the lack of scrutiny encouraged by the administrative model.

Q56 What would be the benefits and drawbacks of the CMA retaining the same or similar enforcement scope under an administrative model as it has under the court-based, civil enforcement process under Part 8 of the EA 02?

We would reiterate the previous sections regarding the misgivings we have heard regarding the implementation an administrative model withing the context of the care sector, as it would relieve the CMA to prove its findings and put the burden on businesses to prove they had not breached consumer law rather than the regulator proving they had, which would be after the CMA has imposed financial penalties, which could prove irreparable reputational damage to the business.

Should the government wish to pursue this model, then total reform to address the aforementioned would be essential before the care sector could engage with it.

Q57. What processes and procedures should the CMA follow in its administrative decision-making to ensure fair and proportionate administrative decisions?

Care England members consider that a fair and proportionate administrative process, determines that the business must be deemed not to have infringed consumer law and no financial remedies or fines shall be made, until a breach of such consumer law is proved otherwise, and must be given the opportunity to understand all allegations, and permitted the appropriate time to gather evidence, and provide a suitable defence, so that any allegation can be fairly determined by an impartial tribunal according to the law

Q58. What scope and powers of judicial scrutiny should apply in relation to decisions by the CMA in consumer enforcement investigations under an administrative model?

If an administrative model were introduced, Care England members feel that any review body should be required to review the law and the facts, permit new evidence, and be able to overturn any decisions on a legal or factual basis applicable to the appeal, be able to substitute any prior decision of the CMA and, that any appeals should require a full rehearing, so as not to leave consumers at risk of receiving refunds, only to have to repay with interest after a successful appeal.

Q59. Should appeals of administrative CMA decisions be heard by a generalist court or a specialised tribunal? What would be the main benefits of your preferred option?

Given the recent Care UK and Barchester ruling, Care England members believe that consumer law is not a technical matter and that all appeals should refer to the High Courts to determine legal and factual issued arising from an appeal.

Q63. Should there be a formal process for agreeing undertakings that include an admission of liability by the trader for consumer protection enforcement?

Care England members believe that it would be more cost effective for undertakings with no admission of liability for businesses to avoid enforcement proceedings. Forcing an admission of liability may require costly court proceedings where disputed and, that smaller businesses may be incentivised to settle with smaller fines with an admission of liability. Care England members believe that no business should be forced to admit a breach of the law, if it believes this not to be the case, which could lead to irreparable reputational damage and financial hardship.

Q64. What enforcement powers should be available if there is a breach of consumer protection undertakings that contain an admission of liability by the provider, to best incentivise compliance?

Care England refer to our comments in response to questions 62 and 63.