

# Consultation Response

## Competition and Markets Authority: Care Homes Market Study Update paper

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## **About this consultation**

The CMA is carrying out a market study into care homes for older people, to review how well the market works and if people are treated fairly. They have invited views on the update paper they published in June 2017, setting out findings so far, their future focus and possible recommendations. Separately they have also initiated a consumer protection case.

## **Key points and recommendations**

- Although much can be done to improve the care home market by ensuring compliance with consumer protection legislation, improvements in the market as a whole are fundamentally constrained by the crisis in local authority funding. We urgently need a sustainable funding system, and clarity on the future direction of public policy. We hope that any Government consultation on care funding will also consider how reform could help to improve transparency and consumer protection in this marketplace.
- An agency should be charged with ongoing enforcement of consumer protection legislation in the care home market. In the short-term, an industry code of practice should be developed, and it should be given teeth either through the Trading Standards Institute Codes Approval Scheme, which includes monitoring, or (preferably) through requiring membership of an approved scheme as a condition of CQC registration. CQC Fundamental Standards could also be amended to deal with the issues raised by the CMA investigation and to mirror any new Code.
- The lack of security of tenure for care home residents makes their position very vulnerable and reduces the likelihood of complaints. While there may be cases where the resident's current care home is not the right place for them to be, providers' rights to evict are far too broad at present, and we would support a change in the law to give them greater security and better rights to contest an eviction, or a standard contract term in a model contract giving them stronger rights.
- We would support development of a model contract and a model complaints process, and a deposit protection scheme.
- Even with improved complaints processes, advocacy and support services are needed to help people make complaints. One idea that might be worth considering is whether providers whose complaints handling is found to be poor might be required to appoint an independent advocate or 'complaints champion' from outside the organisation. We also suggest creating a separate named 'Social Care Ombudsman' within the Local Government and Social Care Ombudsman, to give this function more visibility.

## **1. Introduction**

Age UK welcomes the CMA update paper, and we broadly agree with the CMA's analysis of the issues affecting the care homes market. In particular the paper helpfully highlights the ways in which the market differs from 'normal' consumer markets – e.g. the difficulty of switching provider, the complex interaction with state provision, and the importance of clarity on long-term public policy.

## **2. Choosing care homes**

We agree that charges and services need to be much clearer and would like to see action to improve transparency, including by putting indicative prices on websites (see Section 4 below) and using standard formats for information. This is normal in other regulated markets, particularly financial services, and it should be normal in the care home market.

Age UK works hard to provide clear information, and we are working with the Money Advice Service 'Older People in Retirement' group to look at how preparing for financial decisions in retirement can be promoted – we would be happy to discuss this work further with you. However, research has consistently shown the difficulty of increasing consumer engagement with this marketplace, as we are all disinclined to think ahead to a time of disability and limiting long-standing illness. Engagement is made still more difficult by regular bad-news stories in the media, so improving quality is a vital step to improving engagement and providers must earn the public's trust. We are not convinced that having insurance products available would encourage engagement – these products have been marketed in the past, without any noticeable increase in engagement. The last UK provider exited the market in 2010 citing a lack of demand, and recent research in the US has shown the limitations to a voluntary insurance model (see [www.convergencepolicy.org/wp-content/uploads/2016/02/LTCFC-FINAL-REPORT-Feb-2016.pdf](http://www.convergencepolicy.org/wp-content/uploads/2016/02/LTCFC-FINAL-REPORT-Feb-2016.pdf)).

Therefore, we think the focus should be on improving the support available to individuals and families at the time of decision-making. We strongly support advocacy services such as 'care navigators', and many local Age UKs offer similar services. However, such services must be properly funded, and the current pressure on local authority funding is such that this will be a challenge. Indeed, local authorities already have duties to provide information to help self-funders choose care and yet there is strong evidence, although anecdotal, that they are too often being deterred from getting care and support assessments to which they are entitled. Local authorities' focus tends to be on those eligible for funding support, which comes with public law protections, whilst self-funders merely have civil contract law protections, backed up by CQC standards.

### **3. Complaints and redress**

The CQC published a thematic review on complaints-handling in December 2014, so it is worrying that the CMA is still finding such variable standards. In other regulated markets, regulated organisations are required to meet minimum standards in relation to complaints and we believe the same should apply for care homes. We therefore support the suggestion of a model complaints process. However this on its own is not enough, and we agree that advocacy and support services are needed to help people make complaints – although similar considerations about the funding of such services applies as in ‘Choosing a care home’ above. One idea that might be worth considering is whether providers whose complaints handling is found to be poor (or who insist that they ‘have no complaints’) might be required to appoint an independent advocate or ‘complaints champion’ from outside the organisation.

We agree that signposting to the Ombudsman should be improved and suggest that one consideration should be creating a separate named ‘Social Care Ombudsman’ within the Local Government and Social Care Ombudsman, to give this function more visibility. Although that term is sometimes used, the role is not very explicit.

An underlying problem, and one reason why residents may be reluctant to complain, is the lack of security of tenure for care home residents. This places them in a worse position than even a private tenant. While there may be cases where the resident’s current care home is not the right place for them to be, providers’ rights to evict are far too broad at present, and we would support a change in the law to give them greater security and better rights to contest an eviction, or a standard contract term in any model contract that gives them stronger rights. The situations in which people may be asked to move could be restricted, for example only in relation to specific issues such as individual and general resident safety so arbitrary evictions aren’t allowed. There should be a presumption against eviction for complaining about certain things such as safety and wellbeing issues.

### **4. Consumer protection**

We are very pleased that the CMA is undertaking enforcement action in relation to some issues. However, monitoring and enforcement needs to be ongoing, and should lead to a programme of continuous improvement. The Local Government and Social Care Ombudsman has an important role to play in the process of continuous improvement, and we have welcomed the reports it has produced on systemic issues such as abuse of top-up fees, but these reports do not have their full impact if there is nobody charged with monitoring the outcome on the market as a whole, from the consumer perspective. The CQC does have some powers, e.g. in relation to complaints and transparency of fees, but overall these powers fail to address the breadth of issues raised in the CMA inquiry.

In the longer term we think there is a strong case for giving a sector regulator the power and duty to enforce compliance of consumer protection law in this market, but we question whether this is an area where the CQC is best-placed to take the lead, and there is no other body with the specialist knowledge of care or the capacity to undertake it. This is a gap that should be filled, and urgently. At the very least we would like to see a code of practice set up under the Trading Standards Institute consumer codes approval scheme, which requires ongoing monitoring of compliance. This could be given statutory backing by requiring care homes to subscribe to such a code, perhaps as a condition of CQC registration. CQC Fundamental Standards could also be amended to deal with the issues raised by the CMA investigation and to mirror any new Code.

Specific changes we would like to see, either through a voluntary code or regulatory action, are shown below.

- We can see no justification for holding large deposits without protection. If care homes want to ask for large deposits, a compulsory deposit protection scheme should be set up, similar to the Tenancy Deposit Scheme.
- There should be a requirement for care homes to provide benchmark fee rates online and in response to enquiries. We acknowledge that choosing the benchmark may not be straightforward, but there are many other industries that are required to do something similar, for example the credit card industry manages to provide a 'summary box' of indicative rates which makes it clear that actual rates will depend on individual assessment.
- We would support the development of model contracts, setting an expectation of what might be 'standard' and what is 'extra', and improving clarity on the circumstances in which fees may be increased.
- There should be a requirement on homes to provide contracts in good time.

We are pleased that the CMA is further exploring the use of guarantees. At the very least, care homes should inform guarantors that, by giving the guarantee, they may have to pay instead of or as well as the customer, and they should also tell the guarantor the extent of their liability, including the addition of interest and charges after demand has been made. This is a standard requirement in other industries, for example under the Lending Code.

We welcome the CMA's intention to look further at the direct payment of top-up fees and agree that 'multiple contracts cause confusion': they also further reduce transparency in this marketplace. The CQC should ensure that the expectations set out in Care Act guidance are met.

While it would be difficult to limit fee increases given the impact that this might have on capacity, the CMA is right to point out that in this marketplace there is a risk of abuse. We suggest that routes the CMA might like to explore are:

- exploring whether ‘fixed term’ fee offers, guaranteeing fixed or limited-rise fees for a set term, and a limit on the number of increases in a particular period, might have a beneficial impact on this marketplace,
- including minimum notice periods in a model contract,
- giving the Ombudsman or a sector regulator the power to look at whether fee increases are ‘reasonable’.

## **5. State procurement and Investment in future capacity**

As stated above, it is difficult to improve state procurement and future capacity at a time when the organisations responsible (ie local authorities) are struggling with funding pressures. We are not sure it would help to have another body to provide support and guidance to local authorities in this context, as suggested. Nor do we think that the idea of independent body to develop a framework to estimate reasonable fee rates is a panacea for the underlying problem of a system that is starved of funding.

However, we strongly agree that local authorities should be required to be more transparent in relation to fee rates for care home places. The Care Act Guidance on providing choice is also quite weak and could be strengthened.

Our final thought relates to the cap on care fees set out in the Care Act 2014 (but not yet implemented). This would have provided useful transparency between State and self-funded fee rates as the local authority would have had to assess the cost of meeting eligible needs, in order to establish an individual’s spending against the cap. A related proposal was that an individual should have the right to request the local authority to arrange their care. This would have had the beneficial effect of pulling self-funders into a supportive system which may not now be provided. We hope that any Government consultation on care funding will consider how reform could help to improve transparency and consumer protection in this marketplace, and also recognise the difficulties and lack of advice, advocacy and support faced by self-funders.