



Department
of Health &
Social Care

Government Response to the Competition and Markets Authority's 'Care homes market study, final report'

March 2018

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Author: Social Care Oversight, Care and Transformation Directorate. Cost Centre: 18277
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1. Overview

- 1.1. On 30 November 2017, the Competition and Markets Authority (CMA) published the [final report](#) of its market study of the care homes market. The report set out a series of recommendations for Government, Local Authorities, sector regulators and the adult social care industry to address the issues identified.
- 1.2. This response is in relation to recommendations made for the provision of adult social care in England, as adult social care is a devolved matter. The Devolved Administrations have each been asked by the CMA to respond to the report.
- 1.3. The Government welcomes the CMA's comprehensive market study into care homes. Whilst the CMA's report focusses specifically on the care home segment of the adult social care market, Government recognise that many of the issues identified by the CMA apply across the whole sector and to different types of provision, including care for disabled people, both elderly and working age. Where appropriate, our response has considered the market as a whole.
- 1.4. The CMA is clear that recommendations have been made in the context of current arrangements for the funding, commissioning and provision of adult social care. This response takes into account the continuing trends away from residential care and towards more care provided in people's homes.
- 1.5. On 16 November 2017, Government announced plans to publish a Green Paper by summer 2018, setting out proposals for improving care and support for older people and how to tackle the challenge of an ageing population. The Government also committed to complementary work on social care for those of working age. Through the Green Paper, our intention is to consider the support needs of our ageing population in the round, and to develop plans for long-term reform of our care and support system which commands the support of the public. The work will include looking at many of the issues identified by the CMA.
- 1.6. The CMA's report has provided an important evidence base and recommendations for improvement that will feed in to the Green Paper. We want people to exercise greater choice over their care and to have the option of being cared for closer to home. The domiciliary care market is growing rapidly, evidenced by the significant growth in homecare agencies and number of workers in recent years. Government recognises that there will be issues particular to the domiciliary care market and would welcome a CMA market study into domiciliary care given some of the unique issues for that segment of the market.

Background

- 1.7. The Care Act 2014 set out the Government's policy framework for the adult social care market in England. It is intended to support a responsive and sustainable market which enables people to choose from a range of high-quality and personalised adult social care and support options, whether that is for care in people's homes, residential care, or services in the community. We want to see high quality adult social care, which means person-centred, safe, effective, well-led care, resulting in a positive experience for individuals and relatives.

- 1.8. Government recognise the capacity and sustainability issues raised by the CMA and the principles of the Care Act were designed to address them. The Care Act placed duties on local authorities to shape their local provider market by facilitating and promoting markets for their whole local populations to meet the needs of people who are eligible for state funded care and support, and also ensure services are available for those who pay for their own care. Through effective local market shaping, we want to see a sustainable market, one that is attractive to investment and ensures high quality care provision now, and in the future.
- 1.9. Despite the Care Act, there remains unacceptable variation in performance between local authorities across a range of measures, including fulfilling market shaping duties as evidenced by the Care Quality Commission's [Local System Reviews](#). We want to see consistent high quality commissioning and delivery of care, and supporting local authorities with existing market shaping duties provides an important opportunity to address and reduce variation in the system.
- 1.10. The 2015 Spending Review settlement factored in the need for local authorities to increase fees paid to providers where necessary as part of their Care Act duties to maintain a diverse market for care. The government has continued to monitor and listen to the social care sector, and received many representations calling for additional support to address particular funding challenges in 2017/18. That is why we provided an additional £2 billion of new money to social care in March 2017, with £1 billion of the additional funding in 2017/18.
- 1.11. This additional money is being distributed to local authorities between 2017/18 and 2019/20 specifically to sustain a diverse care market, as well as supporting more people and easing pressures on the NHS. The Local Government Finance Settlement for 2018-19 also announced an additional £150m for local authorities to support market stability.
- 1.12. In total, Government has given local authorities access to up to £9.4 billion more dedicated funding for social care over three years, and local authorities will be able to increase spending on social care in real terms in each of the next three years. Given this, we would expect to see an increase in the fee levels paid to providers over the remainder of the Spending Review period.
- 1.13. Whilst we largely accept CMA's findings, their financial analysis of the care home market took place over the summer of 2017 and so it was too early to be able to take into account the impact of the additional £2bn announced in the Spring Budget 2017 and the outcome of the Local Government Finance Settlement.

2. The Government response

- 2.1. The CMA identified two broad concerns about the care homes market. Firstly, that those requiring care need greater support in choosing a care home and greater protections when they are resident. Secondly, that the current model of service provision cannot be sustained and that the sector is not positioned to attract investment to meet future needs.
- 2.2. The CMA's recommendations to address these issues can be grouped thematically:
 - **Capacity:** to ensure that planning is sufficiently good quality to provide confidence that the capacity will be in place to meet future need
 - **Consumer protection:** to improve compliance and ensure consumers are better protected when choosing a care home and when resident
 - **Consumer information:** to improve the way in which people interact with care homes
- 2.3. This response takes each of the recommendations in these areas in turn, setting out Government's response to each.

Capacity

Recommendation 1

Capacity planning

Government to set up a new independent function to:

- Review and report on the planning by local authorities of all types of social care for the elderly, and whether plans are sufficient to meet the objective of providing care to all those with eligible needs;
- Provide guidance to local authorities as to what is required for market planning statements to be effective and to provide information to support local authorities in developing plans; and
- Report on where local authorities are, based on evidence provided, not planning to a standard required by their duties, or are not taking appropriate actions to ensure that their plans are then met.

Accept in principle

- 2.4. We accept the principle of this recommendation – that care capacity should be planned to meet the needs of all service users, which in line with local authority market shaping duties means that local authorities pay a reasonable, sustainable rate to providers.
- 2.5. The Government has always been clear that local authorities should have regard to the cost of care when setting fee rates. The Care Act 2014 set out a duty on local authorities to have regard to the importance of ensuring the sustainability of the market overall in order to meet the needs of local people.
- 2.6. We recognise that there is variation in the capacity and capability of local commissioning and it is important the structures and accountabilities are in place to support effective capacity planning. Where local authorities are paying rates which meet the full cost of care, we agree with the CMA that this will not necessarily result in downwards pressure on self-funder rates.
- 2.7. The Department of Health and Social Care has already taken action to support commissioners meet their duties and understand the costs of care. All guidance related to market shaping and commissioning responsibilities is collected on a [markets Hub](#) available on GOV.UK
- 2.8. On 16 November 2017, Government announced plans to publish a Green Paper by summer 2018, setting out plans for improving care and support for older people and how to tackle the challenge of an ageing population.
- 2.9. As part of the developing the Green Paper, the Government is looking carefully at the issues identified by the CMA and how we can build on the CMA's findings and recommendations to help shape an improved social care system that works for all. The Green Paper will consider the fundamental issues facing the care system, including the future sustainability of the market, capacity planning and market shaping responsibilities.

Recommendation 2

Cost assessment and commitment

To establish a process to provide independent advice to government, to be updated periodically:

- To provide evidence to government on the expected cost of different forms of care over that period;
- To provide evidence to government on the need for different types of care (including residential care, nursing care, domiciliary care and other options) over the foreseeable future, perhaps 5 to 10 years.

Accept in principle

- 2.10. We recognise the CMA's analysis and accept the rationale for this recommendation – that it is important there is investor confidence across the adult social care market to provide capacity to meet the needs of service users.
- 2.11. Local authorities are best placed to understand and plan for the care needs of their populations, and to support market capacity in local care markets. Many different types of providers operate in each area, ranging from small businesses, charities, to large corporate providers. Each local area has unique cost pressures and demographics, which is why the Care Act 2014 requires local authorities to shape their local markets to ensure that they are sustainable, diverse and offer high quality care and support. It will be important we continue to work with sector partners to support local authorities to discharge their market shaping duties.
- 2.12. We accept that there are complex issues involved in planning for the future care needs of service users, and in growing investor confidence in the sector at a national level. In terms of understanding overall needs and costs for the system, there is a well-established national role in assessing national funding requirements as part of Spending Reviews, which includes independent representations from Local Government and providers.
- 2.13. Whilst at this stage we are not convinced the function described by the CMA sits best independently at a national level, the Government will take account of the CMA's findings in developing proposals for long-term reform as part of the Green Paper on adult social care.

Recommendation 3

Extended market oversight across the Devolved Administrations

- Mechanisms are set up for the sharing of critical information and market intelligence among the relevant national regulators and other bodies to facilitate continuity of care for residents.

Accept in principle

- 2.14. In England, the Care Quality Commission have a market oversight role for the largest providers of adult social care, however the regulators in the Devolved Administrations take different approaches in accordance with their assessment of local levels of risk.
- 2.15. On market risks which span national borders, all of the regulators maintain regular channels of communication. The Department of Health and Social Care is confident that this is an effective, proportionate and pragmatic approach.
- 2.16. In order to future-proof the existing relationships between the regulators across the UK, the Department will explore setting these arrangements out in a Memorandum of Understanding between the national regulators, to ensure current best practice is maintained. Following the publication of the Devolved Administration's individual responses to the CMA's care homes report, we will explore this option with them.

Consumer Protection

Recommendations 4-11

Consumer Protection

- Sector regulators should take a greater role in helping to embed a culture of consumer law compliance across the sector.
- Sector specific regulations strengthened to require registered care homes to publish indicative fee information for self-funders online together with what is included in that rate e.g. upfront fees, hidden costs.
- Sector specific regulations strengthened to require registered care homes to provide a copy of standard self-funder contract and summary of T&Cs online. Where there is no website, info needs to be included on information packs and marketing materials.
- Sector specific regulators review and where necessary strengthen existing guidance to make clear a copy of the contract and T&Cs should be given to residents and representatives at an early stage of the decision making process
- To help facilitate the provision of clear pre-contract information, existing regulations are strengthened to ensure providers use a standard template in summarising their most important T&Cs
- Sector specific regulations strengthened to require registered care homes to protect residents' deposits in full against risk of insolvency
- Sector specific regulations are strengthened to require care homes to notify regulator when a resident is evicted
- Sector regulators develop specific guidance for registered care homes on high quality practice when asking residents to leave and when imposing visitor bans and restrictions processes are fair and transparent

Accept

- 2.17. We agree with the CMA that there is a need to support those entering care to make informed decisions, to ensure that those in care are sufficiently empowered, and to protect care home residents and families from unfair practices. We share the CMA's objective to embed consumer law compliance in the sector.
- 2.18. Government want to take forward a package of immediate action to improve consumer protections in the sector. We are clear that where improvements are not seen, we will look to bring forward legislation. Alongside action the CMA is already taking through consumer law enforcement and guidance to help embed a culture of consumer law, government will now:
- Support the Care Quality Commission to understand how they can better hold providers to account through existing powers.
 - Start drafting strengthened regulations where appropriate.
 - Work with industry to provide assurance for consumers. Alongside the CMA, we will support industry to develop model contracts and will explore developing a robust accreditation scheme to embed good practice.

2.19. Government have announced plans to publish a Green Paper by summer 2018 where we will set out the next steps for this work.

Recommendations 12-14

Complaints

Feedback culture

- Sector regulators include in their inspections an assessment of the effectiveness of feedback processes within the home, including whether a feedback champion is required, so that a culture of listening to and acting on feedback prevails within care homes

Advocacy services

- Central government in consultation with relevant bodies undertake a review of the coverage of advocacy services for residents in care homes with a view to ensuring all residents have access to adequate advocacy services which are sufficiently targeted at care home residents
- Sector regulators include in their inspections an assessment of the level of awareness of and access to advocacy services

Signposting

- Sector regulators should carry out their inspections so as to include a qualitative assessment of how providers make residents and relatives aware of services that could support them in complaints.
- Recommendation to introduce a statutory requirement for providers to signpost to the LGSCO.

Accept

- 2.20. We agree with the CMA that it is important that effective feedback processes exist to ensure the perspectives of service users and families are heard and that feedback is acted upon to improve care. It is also important that residents and relatives are aware of bodies outside care homes that could assist with, or hear their complaint, and that people feel that it is safe to give feedback or make a complaint about their care.
- 2.21. Improving feedback culture and improving access to complaints processes are areas in which the Department of Health and Social Care is already taking action, via the sector quality initiative, Quality Matters which was launched in July 2017. Quality Matters is a cross-sector shared commitment to achieve high quality adult social care. It prioritises a number of actions including 'Acting on feedback, concerns and compliments'. Action in this area is coordinated by Healthwatch England and the Local Government and Social Care Ombudsman.
- 2.22. As part of this work, Healthwatch England published 'Complaints about social care - an appendix to the Complaints Toolkit for local Healthwatch' in July 2017. This is intended to support local Healthwatch organisations to scrutinise their local complaints systems for adult social care providers and commissioners.
- 2.23. The Local Government and Social Care Ombudsman and Healthwatch England are also developing 'Comments, feedback and complaints about adult social care' a statement setting out what people can expect from providers and commissioners in response to their feedback or complaints This is due for publication in April 2018. It will act as a prompt and reference of good practice in complaint handling and is designed to support a common and consistent understanding of handling of complaints and builds on [previous work](#) setting out what people can expect if they complain about the care they have received.

- 2.24. Through the sector led work to implement Quality Matters, the Department will also take action to improve signposting to the Ombudsman (rather than wait for an opportunity for legislation).
- 2.25. Finally, the Department of Health and Social Care will work with the new Complaints Improvement Partnership for health and social care, a government led forum to improve complaints and feedback handling across the health and care system, to:
- carry out a review of advocacy services
 - improve the culture of feedback, including considering the role of feedback champions.
- 2.26. The Complaints Improvement Partnership will enable consideration of arrangements across health and social care rather than consider adult social care in isolation.

Recommendation 15

Top-ups

Stronger protection and clearer policy and guidance on third party top-up fees for local authority funded residents

- We recommend that the Department of Health in England consider updating the Care Act statutory guidance so that it is clear that local authorities must explain to prospective care home residents and their families and people arranging their care that:
 - Care home providers should not approach them or their representatives such as relatives directly to demand a top-up, or without the involvement of the local authority; and
 - There are significant benefits in arranging a top-up through the local authority.
- We are recommending that that the Department of Health in England consider making it a requirement that when a local authority arranges the preferred accommodation with a third party top-up, the provider agrees with the local authority that its payment and other conditions will be the same, irrespective of whether the third party contribution is paid to the provider via the local authority or directly by the third party.
- We also recommend that the Department of Health in England consider updating the Care Act statutory guidance to make it clear that where it is agreed with the third party and provider for a top up to be paid directly to the care home, the local authority will include a provision in its contract with the provider to ensure that the third party will not be subject to less advantageous terms and conditions than if they had paid the top up through the local authority.

Accept in principle

- 2.27. We are aware of the concerns highlighted by the CMA that top-ups may be being agreed inappropriately and without local authority knowledge and that individuals contracting directly with providers for top-ups are doing so on less favourable terms than if the local authority was involved.
- 2.28. As set out in our guidance the Government's view is that top-ups should be agreed between individuals, local authorities and providers and should be included as part of the local authority contract with the provider. We will work with local authorities and representatives of service users to seek to understand the extent of the issue; how our guidance might be strengthened to ensure that the position on top-ups is clarified; and any impact this may have on local authorities. We expect to have completed this by October 2018.

Recommendation 16

Funded Nursing Care (FNC)

Clearer guidance on the relationship between Funded Nursing Care and self-funders own contribution to fees

- DH revises, the NHS Continuing Healthcare framework and Funded Nursing Care and practice guidance to clarify how the Funded Nursing Care payment affects self-funding residents' fees

Accept in principle

- 2.29. Government will publish an updated National Framework for Continuing Healthcare and Funded Nursing Care by April 2018. The CMA shared their findings and recommendations to help inform the review and was fully involved in the stakeholder engagement process.
- 2.30. The updated framework and guidance aims to provide greater clarity, by including a new section on the Funded Nursing Care rate, and we are looking at whether this can say more on how the Funded Nursing Care rate interacts with the remainder of a self-funder's overall care fees.

Recommendation 17

Continuing Healthcare (CHC)

Clearer guidance on the permissibility of top-up payments for NHS Continuing Healthcare residents

DH to revise the National Framework for NHS and Funded Nursing Care and practice guidance to further clarify:

- The types of additional services that can be permissibly topped up via private payments to a care home under NHS rules, and
- How DH and NHS rules on top up payments are monitored, applied to and enforced against CCGs and providers

Accept

- 2.31. Government will publish an updated National Framework for Continuing Healthcare and Funded Nursing Care by April 2018, as prescribed by the CMA. The CMA shared their findings and recommendations to help inform the review and was fully involved in the stakeholder engagement process.
- 2.32. The updated framework and guidance will address the points raised by the CMA, which will include a new section on 'top-ups' for Continuing Healthcare packages of care.

Consumer Information

Recommendation 18

Consumer information

We recommend that a working group is established to develop and agree a plan for substantially improving the provision of supported decision-making services in the UK. This group should develop and implement:

- An approach to give people access to better information on care homes and other services in their local area
- Measures with the objective of encouraging and helping people to think and plan ahead for care they may need in later life.

Accept

- 2.33. Government welcome the CMA's recommendation to establish a working group to improve the provision of supported decision making. It is important we work with local authorities, the NHS, care providers and the third sector to develop actions to help people make good decisions about their care needs. We will fully support the working group and will work with the CMA over the coming weeks to establish the group.
- 2.34. We want the public to be informed and empowered consumers of care and to be able to access trustworthy, advice, support and information about care providers that enables them to compare providers on quality and on price. We want these informed consumers to drive competition between providers on quality leading to quality improvement and reduced quality variation across the sector.

3. Next Steps

- 3.1. Government will publish a Green Paper by summer 2018, setting out plans for improving care and support for older people and how to tackle the challenge of an ageing population. The CMA's findings about how the care home market is operating are a critical contribution to the Green Paper, particularly in relation to the sustainability of current arrangements. Ahead of the Green Paper, we will continue to work with the CMA and the adult social care sector to implement the CMA's recommendations to improve consumer information and protections.

4. Recommendation summary

1. Capacity	
<p>Government to set up a new independent function to:</p> <ul style="list-style-type: none"> Review and report on the planning by local authorities of all types of social care for the elderly, and whether plans are sufficient to meet the objective of providing care to all those with eligible needs; Provide guidance to local authorities as to what is required for market planning statements to be effective and to provide information to support local authorities in developing plans; and Report on where local authorities are, based on evidence provided, not planning to a standard required by their duties, or are not taking appropriate actions to ensure that their plans are then met. 	Accept in principle
2. Cost assessment and commitment	
<p>To establish a process to provide independent advice to government, to be updated periodically:</p> <ul style="list-style-type: none"> To provide evidence to government on the expected cost of different forms of care over that period; To provide evidence to government on the need for different types of care (including residential care, nursing care, domiciliary care and other options) over the foreseeable future, perhaps 5 to 10 years. 	Accept in principle
3. Extended market oversight across the Devolved Administrations	
<ul style="list-style-type: none"> Mechanisms are set up for the sharing of critical information and market intelligence among the relevant national regulators and other bodies to facilitate continuity of care for residents. 	Accept in principle
4-11. Consumer Protection	
<ul style="list-style-type: none"> Sector regulators should take a greater role in helping to embed a culture of consumer law compliance across the sector. Sector specific regulations strengthened to require registered care homes to publish indicative fee information for self-funders online together with what is included in that rate e.g. upfront fees, hidden costs. Sector specific regulations strengthened to require registered care homes to provide a copy of standard self-funder contract and summary of T&Cs online. Where there is no website, info needs to be included on information packs and marketing materials. 	Accept

<ul style="list-style-type: none"> • Sector specific regulators review and where necessary strengthen existing guidance to make clear a copy of the contract and T&Cs should be given to residents and representatives at an early stage of the decision making process • To help facilitate the provision of clear pre-contract information, existing regulations are strengthened to ensure providers use a standard template in summarising their most important T&Cs • Sector specific regulations strengthened to require registered care homes to protect residents' deposits in full against risk of insolvency • Sector specific regulations are strengthened to require care homes to notify regulator when a resident is evicted • Sector regulators develop specific guidance for registered care homes on high quality practice when asking residents to leave and when imposing visitor bans and restrictions processes are fair and transparent 	
12- 14. Complaints	
<p>Feedback culture</p> <ul style="list-style-type: none"> • Sector regulators include in their inspections an assessment of the effectiveness of feedback processes within the home, including whether a feedback champion is required, so that a culture of listening to and acting on feedback prevails within care homes <p>Advocacy services</p> <ul style="list-style-type: none"> • Central government in consultation with relevant bodies undertake a review of the coverage of advocacy services for residents in care homes with a view to ensuring all residents have access to adequate advocacy services which are sufficiently targeted at care home residents • Sector regulators include in their inspections an assessment of the level of awareness of and access to advocacy services <p>Signposting</p> <ul style="list-style-type: none"> • Sector regulators should carry out their inspections so as to include a qualitative assessment of how providers make residents and relatives aware of services that could support them in complaints. • Recommendation to introduce a statutory requirement for providers to signpost to the Local Government Social Care Ombudsman. 	Accept

15. Top-ups	
<p>Stronger protection and clearer policy and guidance on third party top-up fees for local authority funded residents</p> <ul style="list-style-type: none"> We recommend that the Department of Health in England consider updating the Care Act statutory guidance so that it is clear that local authorities must explain to prospective care home residents and their families and people arranging their care that: <ul style="list-style-type: none"> Care home providers should not approach them or their representatives such as relatives directly to demand a top-up, or without the involvement of the local authority; and There are significant benefits in arranging a top-up through the local authority. We are recommending that that the Department of Health in England consider making it a requirement that when a local authority arranges the preferred accommodation with a third party top-up, the provider agrees with the local authority that its payment and other conditions will be the same, irrespective of whether the third party contribution is paid to the provider via the local authority or directly by the third party. We also recommend that the Department of Health in England consider updating the Care Act statutory guidance to make it clear that where it is agreed with the third party and provider for a top up to be paid directly to the care home, the local authority will include a provision in its contract with the provider to ensure that the third party will not be subject to less advantageous terms and conditions than if they had paid the top up through the local authority. 	Accept in principle
16. Funded Nursing Care	
<p>Clearer guidance on the relationship between Funded Nursing Care and self-funders own contribution to fees</p> <ul style="list-style-type: none"> DH revises, the NHS Continuing Healthcare framework and Funded Nursing Care and practice guidance to clarify how the Funded Nursing Care payment affects self-funding residents' fees 	Accept in principle
17. Continuing Healthcare	
<p>Clearer guidance on the permissibility of top-up payments for NHS Continuing Healthcare residents</p> <p>DH to revise the National Framework for NHS and Funded Nursing Care and practice guidance to further clarify:</p> <ul style="list-style-type: none"> The types off additional services that can be permissibly topped up via private payments to a care home under NHS rules, and How DH and NHS rules on top up payments are monitored, applied to and enforced against CCGs and providers 	Accept

18. Consumer Information

We recommend that a working group is established to develop and agree a plan for substantially improving the provision of supported decision-making services in the UK. This group should develop and implement:

- An approach to give people access to better information on care homes and other services in their local area
- Measures with the objective of encouraging and helping people to think and plan ahead for care they may need in later life.

Accept