



# Competition and Markets Authority - Market Study into Care Homes for Older People

**Report to:** Board  
**Date:** 17 January 2018  
**Report by:** Gordon Paterson, Chief Inspector, Adult Services  
**Report No:** B-34-2018  
**Agenda Item:** 18

## PURPOSE OF REPORT

To advise Board members on the findings of the Competition and Markets Authority's study into care homes for older people.

## RECOMMENDATIONS

That the Board;

1. Notes the findings of the Competition and Markets Authority study.
2. Considers the specific recommendations that are made in relation to the Care Inspectorate's regulatory role.

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**Consultation Log**

Who	Comment	Response	Changes Made as a Result/Action
Senior Management			
Legal Services			
Corporate and Customer Services Directorate			
Committee Consultation (where appropriate)			
Partnership Forum Consultation (where appropriate)			
<b>Equality Impact Assessment</b>			
Confirm that Involvement and Equalities Team have been informed	YES <input type="checkbox"/>	NO <input type="checkbox"/>	
EIA Carried Out	YES <input type="checkbox"/>	NO <input checked="" type="checkbox"/>	
If yes, please attach the accompanying EIA and appendix and briefly outline the equality and diversity implications of this policy.			
If no, you are confirming that this report has been classified as an operational report and not a new policy or change to an existing policy (guidance, practice or procedure)	Name: Gordon Paterson Position: Chief Inspector, Adult Services		
Authorised by Director	Name: Kevin Mitchell	Date: 8 January 2018	

## **1.0 BACKGROUND**

The Competition and Markets Authority (CMA) has concluded a year-long market study into care homes for older people. On 2 December 2017 the CMA published its findings, with recommendations.

The scope of the CMA's study included; consumer protection issues in the care home sector; older people's decision-making on care homes; funding issues; regulation of care homes; and competition between care homes.

### **1.1 The Care Inspectorate's Contribution**

The Care Inspectorate provided written comment on the scope of this study (Appendix One) and on the CMA's Interim Report (Appendix Two). We were also interviewed during the study and we made comment on the recommendations in the final draft report.

Our contribution sought to clarify for the CMA the specific operating conditions here in Scotland. In doing so we referenced, for example; the National Care Home Contract; Free Personal and Nursing Care; the new Health and Care Standards; the move to integration and the role of Health and Social Care Partnerships in assessment and care management, contracting and commissioning.

Similarly, we sought to ensure that the CMA appreciated our role and responsibilities as the national regulator for Social Work and Social Care in Scotland, as distinct from those of other regulators. We highlighted, in particular, our duty for furthering improvement, our collaborative approach, our role in investigating complaints and the new responsibilities that we have for carrying out joint scrutiny of strategic planning and commissioning.

## **2.0 CMA MARKET STUDY FINDINGS**

The CMA's headline findings included;

- The current system for providing care is not sustainable without additional funding. The CMA identified a funding shortfall of £1 billion a year across the UK because councils are paying fee rates for the residents they fund which are below the costs care homes incur. This, they determined, has led to care homes propping up their finances by charging self-funding residents higher rates.
- To meet the demographic challenge the sector must grow substantially. However, uncertainty about future funding, including whether council fees will cover the full costs of care, currently means that there is not enough investment in new accommodation for council-funded residents.

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- The basic information and support needed to help people navigate the system and to make informed choices is not available, at what can be a traumatic time in their lives.
- There needs to be greater protection in place for people in care homes. Residents and their families often find it difficult to raise concerns or make complaints, and the systems for redress and feedback need to be improved. There is also too great a risk of residents being treated unfairly and in breach of their rights under consumer law.

## **2.1 Actions being taken by the CMA**

In response to their findings, the CMA has initiated enforcement action against a number of care providers who they believe may be infringing consumer law. This focusses on the examples that they have found, in England, of care homes unfairly charging upfront fees, or continuing to charge after a resident has died.

Further, the CMA intends to issue guidance next year on the actions care home providers should take in order to promote consumer law and to also produce guidance for residents on their consumer rights.

The CMA is recommending that sector regulations be introduced requiring care homes to publish their fees and terms and conditions on their websites and that providers should be required to safeguard residents' deposits against the risk of insolvency.

The CMA is recommending that model contracts be developed that ensure consumer rights are protected. However, they recognise that this is less relevant in the Scottish context where the National Care Home Contract might be developed to achieve this.

## **2.2 Recommendations specific to Scotland**

The CMA has produced a short summary report referencing their general concerns and highlighting matters specific to Scotland (Appendix Three). This recognises the Scottish context (as described in 1.1 above), in particular, IJB's duties to develop local commissioning strategies, as well as the Care Inspectorate's statutory responsibilities for investigating complaints.

The report recognises the benefits for state-funded residents of the National Care Home Contract and the work that is being undertaken to reform this. However, it also raises concerns about the differential in the rates charged to self-funding service users.

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The report contains a number of recommendations for the Scottish Government, IJBs and the NHS in Scotland which include:

- the need to provide better information to prospective residents on how the care system works and on choosing a care home
- the provision of information, advice and support through a range of means to assist people to understand their care options
- awareness raising to encourage people to plan ahead and consider potential care options in advance.
- a review of the availability of advocacy support to care home residents

### **2.3 Recommendations for the Care Inspectorate**

The CMA study makes specific recommendations for the Care Inspectorate, and for the Scottish Government to consider in relation to our role as the national regulator.

- a) The CMA recommends that the Scottish Government introduces regulations to ensure that consumer law is embedded into the existing regulatory framework and is monitored by the Care Inspectorate as part of our inspection regime.
- b) The report also recommends that care providers be required to notify the Care Inspectorate when residents are asked to leave or when they have imposed a visitor ban.
- c) Finally, there is a recommendation that the Care Inspectorate should assess the effectiveness of complaints procedures and ensure that providers are proactively promoting and listening to the feedback that they receive from residents.

### **2.4 Responding to the CMA Report and findings**

The Care Inspectorate will now give fuller consideration to the relevant points in the CMA report and will discuss with our Sponsor Branch in the Scottish Government their intended response and their views on each of these three recommendations. Our initial views are outlined below.

- a) In inspecting care homes for older people our focus is always on the quality of care being provided and the outcomes being achieved. We have not seen it as appropriate to consider contractual and financial matters in either our inspection activity or in responding to complaints. This being a shared responsibility of those contracting for places (the Health and Social Care Partnership), those providing the services (the registered care provider) and those benefitting from these services (the resident, or their representative).

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However, the new Health and Care Standards invites us to consider people's experiences of care services, their human rights and their quality of life, more holistically. As well as considering the extent to which the service is improving outcomes for the people using the service, the Standards also invite us to consider whether this is 'the right service'. So, in developing a new quality framework to support scrutiny through the lens of the Health and Care Standards, we can consider whether this lends itself to considering consumer rights and whether aspects of this can be incorporated into our scrutiny activity.

b) Again, as this is a contractual matter and as the Health and Social Care Partnership has a locus in placing a contract, which contains terms relating to eviction and notice periods, the Care Inspectorate has not seen it as appropriate to become involved in individual situations when a resident is asked to leave a care home.

This position also recognises that the Care Managers in the HSCP continue to have a responsibility for supporting individual residents and that they have a 'duty of care', which extends to advocating on their behalf or ensuring that they have a proxy to act for them, including when their placement is at risk.

For these reasons, the Care Inspectorate is not supportive of the proposal that we should be notified and involved when a resident has been asked to leave a care home.

Similarly, we have taken the view that it is for a care provider to reserve the right to refuse entry to their premises. While we would not wish to be make any determination in these situations, we have and will continue to receive complaints from family members who are being denied access to the service. In these matters our focus is limited to ensuring that the residents' rights and safety are being maintained and that appropriate measures are in place to provide advocacy, mediation or protection, including through the provisions of the relevant legislation.

We believe this is an appropriate and proportionate approach and are not convinced of the need for care providers to be required to notify the Care Inspectorate when banning visitor to their premises.

c) We already ensure that care providers have effective complaints procedures in place. Our own revised Complaints Procedure will involve an increasing number of complaints being referred back to care providers, where appropriate. This recognises that most providers are well equipped to address these matters satisfactorily and that complaints are best dealt with as close to the point of service delivery as possible.

We are also hosting a number of development sessions with providers to enable them to consider the effectiveness of their complaints handling procedures and to promote best practice in this regard.

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We are content to continue to progress the actions that we already have in hand and which will ensure that we address this recommendation from the CMA report.

### **3.0 RESOURCE IMPLICATIONS**

Any developments that we undertake in response to the CMA Report recommendations will be achieved within existing resources. Should the Scottish Government be minded to action the CMA recommendations and introduce regulations that place additional demands on our regulatory activity, we will assess the likely impact of this, report to the Resources Committee and discuss the need for additional resource with the Scottish Government.

### **4.0 CUSTOMER SERVICE IMPLICATIONS**

There are no customer service implications at this stage.

### **5.0 BENEFITS FOR PEOPLE WHO EXPERIENCE CARE**

The CMA Report will result in guidance being produced to ensure that care home providers understand their responsibilities for protecting consumer rights, as well as guidance for people who are moving into a care home service. We welcome this guidance and will promote it.

The CMA Report also invites us to review the extent to which we have a role in supporting consumer protection and to consider the extent to which we can contribute more in this regard, in line with our corporate objective of providing assurance and improving care, to the benefit of people accessing care services.

### **6.0 CONCLUSION**

The Board is invited to note the findings from the CMA Market Study into Care Homes for Older People and consider those recommendations relevant to the Care Inspectorate's regulatory activity.

### **LIST OF APPENDICES**

- Appendix 1** - Care Inspectorate Response to the CMA Market Study Statement of Scope
- Appendix 2** - Care Inspectorate Response to the CMA Update Paper
- Appendix 3** - CMA Care Homes Market Study Final Report – Short Summary for Scotland

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