02 August 2017

Competition and Markets Authority's Care Homes Market Study

FOLLOW US ON SOCIAL MEDIA
Marwood Group LinkedIn

In December 2016, the Competition and Markets Authority (CMA) began a market study into care homes. The purpose was to explore how well the care home market works for residents and their families, and to review providers' compliance with consumer protection law. They recently published their interim findings and where they intend to focus their investigation ahead of the final report publication by December 2017.

As a result of information received during the market study, the CMA has opened a separate consumer protection case over concerns certain care home providers are imposing large upfront fees and charging families for extended periods after the death of a resident.

Adult social care provision operates in a highly complex landscape of interlinking national and local policy and funding objectives. It is a mixed provision market, including a high proportion of private sector providers. The majority of adult social care users are either public-funded placements or individuals who pay for their own care (self-funders).

This note explores the key findings and next steps of the CMA market study and the consumer protection case primarily as it relates to the self-funded market.

Key Findings:

- Care home contracts with self-funded residents risk breaching consumer protection laws
- Self-funders pay more for their care but the extent they cross-subsidize publically-funded placements remains unclear
- Local factors can make choice an illusion for many consumers

Exploring the issues:

Care home contracts with self-funded residents risk breaching consumer protection laws

The CMA has announced they have opened a consumer protection case into a number of care home providers due to concerns that some of the contract terms and/or practices they use may breach consumer law. The case is focusing on self-funded residents and the specific issues of charging large upfront fees, and also the fees charged after the death of a resident. Currently, the providers under investigation are unknown. This case has arisen because of information discovered through the care home market study but will be considered a separate activity for the CMA.

Separate to the consumer protection case and raised in the market study interim report, the CMA has also highlighted a number of wider areas of concern in relation to potential breaches of consumer protection law. These include:

- Providers holding substantial residential deposits, and no current requirement for these to be ring-fenced against insolvency.
- Fees liable after the death of a resident often being substantially less favourable for self-funders than local authorities. Typically a local authority will state that council fees stop immediately or up to four days after death. However many self-funders are charged between fourteen days and four weeks, with no pro-rata refund if the room is re-let in this time.
- Management fees not explained clearly in advance, or for the service being provided.
- People given insufficient time to review contracts, with reports that people are only receiving contracts after a resident had moved in, or not at all.
- A lack of clarity in contracts around what is included in a guarantor's liability.
- Very general clauses around circumstances for increasing fees, which make it difficult to challenge the grounds for an increase or evaluate the implications for the resident.

The ability to improve compliance in these areas through the use of existing tools and published guidance will be considered in more detail ahead of the final report publication.

Self-funders pay more for their care but the extent they cross-subsidize publically-funded placements remains unclear

The CMA reports that self-funders (those residents that must pay for their own care) can be paying more than state-funded residents (those where a public authority is paying for the cost of care). A sample across 12 English counties found self-funders were paying 40% more on a like-for-like basis. The discrepancy in some cases may be due to improved facilities or different service levels. However, the perception is one that self-funders subsidize state-funded residents.

The average rate per week paid by local authorities fell from £673 to £611 between 2010/11 and 2013/14. The CMA found that providers with more than half of their turnover coming from local authorities were generating almost 28% less profit per bed than other providers, and Care Quality Commission (CQC) have highlighted examples of providers handing back local authority contracts.

Local factors can make choice an illusion for many consumers

Despite residential social care being a mixed provision market, many consumers will find that choice is little more than illusion due to the need to make care home decisions at speed, rather than as part of a long-term planned move. People are under pressure to locate a suitable home with capacity that is affordable and in the right place. It reports that residents rarely move homes; a 2016 Citizens Advice survey found that less than 10% of residents had moved even when they had concerns about a home.

Whilst care home fees clearly set an upper limit on what is affordable, they are rarely what determines choice. The right home for a resident is seen to outweigh cost. Location is a key factor, along with the ability to manage specific needs (such as dementia care). Choice, often in rural areas, is limited and so good homes may have very limited availability. This increases pressure on consumers to secure a place in the first acceptable home.

Impact on the sector

Consumer protection case

The CMA has been proactive in opening a consumer protection case. It is focused on two specific issues; charging families for extended periods after a resident has died, and homes charging large upfront fees. In these two areas, clear concerns have been identified that the CMA feels would most effectively be addressed by a consumer enforcement action. The outcome from the consumer protection case will have specific impact on the providers under investigation.

There will be a more general impact on the sector depending on the case outcome, and the result of any enforcement action. It may require providers to change current operating practices, or risk facing similar enforcement action. The CMA has stated that it could extend the scope at a later date to cover other issues of concern. This will impact on the sector to the extent that it exposes more providers to potential enforcement action.

Increased provider costs through improved compliance

Ensuring improved compliance is likely to lead to increased provider costs, whether it's through self-regulation or regulatory oversight. The CMA are considering voluntary codes of conduct, and the use of best practice guides. However, they will also examine whether there needs to be legislative or regulatory changes. The duty to hold anyone to account would likely fall to local authorities, or the CQC in their role as quality regulator. However, it is not clear that this role would currently fall within the remit of either organisation.

Independent body for estimating reasonable fee rates

The establishment of an independent body to estimate, or even set, reasonable fee rates would mark a major change in current practice for commissioning social care. Scotland is in the process of developing a cost of care calculator, and the National Commissioning Board in Wales is considering a similar move. Across England, social care commissioning is locally agreed and providers often suggest that local authorities use their buying power to keep local authority-funded places at a level that does not reflect the true cost of care. The establishment of an independent body may help to improve local authority commissioning, but may also put pressure on providers to lower the cost of care for self-funders.

Next Steps for the CMA

Consumer protection case

- Opened a consumer protection case to investigate concerns about certain care homes charging families for extended periods after a resident has died and homes charging large upfront fees.
- Use of consumer law investigatory powers to obtain further evidence from providers under investigation in order to determine whether enforcement action is required.
- Retains ability to extend the scope to cover other issues of concern as investigation continues.

Continuing the Care Homes Market Study ahead of final report publication by 01 December 2017

- Identifying gaps in consumer law protection specifically in this sector that could be addressed through new legislation or changes to regulatory rules.
- Exploring how to use existing tools to protect against unfair contracts and business practices, and to drive improved compliance across the sector.
- Considering whether an independent body could develop a framework to estimate fee rates that include a reasonable return on investment.
- Considering how local authorities, providers and investors could gain greater clarity on key costs.
- Exploring the different systems for monitoring the financial health of significant operators across the United Kingdom.

Wider policy context

The CMA is an independent non-ministerial department and its recommendations are independent of individual government departments. However, any proposals for legislative change would require the government to find time in the legislative agenda, and so it is important to be aware of the wider policy context around social care. The Conservative manifesto contained proposals for adult social care that were dubbed the ‘dementia tax’ during the general election campaign. The Queen’s Speech saw only a short reference to social care with the promise that proposals will be brought forward for consultation. It is expected that the Green Paper consultation on adult social care will be laid before Parliament in December 2017. This consultation could well include key recommendations from the CMA’s care home market study.

We will follow sector developments as they emerge, and will continue to provide timely insight and relevant analysis into the complex issues that are impacting upon the sector.

Contact Us

For more information on any of the content in this publication or to learn more about Marwood Group Advisory's capabilities, we encourage you to please contact us.

Kayleigh Hartigan
Managing Director, UK and European Healthcare Advisory
Office: +44 (0)20 3443 7054
khartigan@marwoodgroup.com
FOLLOW US ON SOCIAL MEDIA
LinkedIn