



CCC – working together for better care of older people

CCC Care Policy Insights

Paying for Care: Third-party top-ups and cross-subsidies

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Paying for Care: Third-party top-ups and cross-subsidies

Foreword by Dr Clive Bowman, Chairman, CCC

What is CCC?

CCC was founded in 1992 as the Continuing Care Conference. Uniquely, CCC draws its members from across the entire spectrum of care provision, commissioning, advice and advocacy and funding, and from across the commercial, charitable and public service sectors. CCC's members have a shared interest in improving the care of older people in the UK based on an equitable and sustainable structure of funding.

CCC's mission statement is as follows:

"We believe that all older people in Britain should live their lives in dignity, comfort and in a place of their choosing. We want all elements of society to make the necessary individual and social investment to ensure that happens. Our task is to ensure that policy-makers pursue this goal and to encourage the public to join with us in our mission to persuade them to do so.

CCC has always sought to make constructive contributions to policy debates, based on the experience of our members. While campaigning to end the notorious complexity of the care system, we recognise that many of the issues we describe are themselves complex. We aim to present our concerns clearly and transparently – and not to over-simplify, scaremonger or create easy scapegoats.

Why is CCC publishing this?

Quite simply, CCC is publishing this paper because third-party top-ups and the hidden cross-subsidy of care costs are matters of deep concern to – and a top priority for – our members. Why? Because the current practices are inequitable and they have evolved by stealth from a position where top ups are paid for "extra services" over and above needed care to a point where they are becoming necessary to secure care. Fundamentally, the way that top-ups are now required is symptomatic of the chronic under-funding of care and a cause of distress to care recipients and their families and to many of those who have to adopt such practices.

What does CCC want?

CCC seeks an extensive development of policy on funding for and access to care, on the principle that the provision of care is based on the needs of the individual rather than the method by which an individual's care is funded, or their ability to pay. Only those who have genuinely exercised choice should expect to pay "top-ups".



Paying for Care: Third-party top-ups and cross-subsidies – key points

Concerns across the spectrum

This *Insights* paper presents the issues and dilemmas surrounding third-party top-ups and cross-subsidy of care costs from the point of view of a policy adviser, a care-home owner, a local authority commissioner of care, a lawyer, a specialist financial adviser and a provider of charitable funding to those seeking care. The contributors are CCC members and non-members alike. What is remarkable is the similarity of many of the points they raise, though much insight can be gained from the differing perspectives they bring to the debate.

The problem in brief

Care fee top-ups

A care fees top-up should only apply for services or facilities in excess of those identified in a professionally assessed statement of need e.g. a view of the ocean or facilities for a pet. However, the need for a third-party top-up is often confused with whether or not a local authority can afford a placement in a particular home.

Care costs are increasingly falling on friends and relatives, both in terms of the number and the amounts, where residents require someone to top up the difference between the actual fees of the care-home and what the local authority will agree to pay.

According to Laing & Buisson, in the late 1990s about 14 per cent of residents funded by local authorities received third-party top-ups. By 2004 an Office of Fair Trading (OFT) Market Study found that 33 per cent of residents interviewed who were funded by a local authority had a third party making up the difference. Worryingly, 40 per cent of local authorities responding to the survey thought that more top-ups were being paid than they knew about because they were being negotiated directly between the home and the relatives, outside the terms of the local authority contract.

The payment of third-party top-ups is far from transparent, because individuals do not know whether they are paying for services genuinely over and above their assessed needs or merely making up for inadequate local authority payments.

Care fee cross-subsidies

A fair proportion of 'self-funders' are paying substantial amounts extra for the same level of care as local authority funded residents – in effect, paying a hidden cross-subsidy other residents and, ultimately, to the state.

Care-homes that accept the local authority fee level argue that to remain viable they need to charge more to those funding their own care. The OFT found that about 20 per cent of homes had different charges for 'self-funders' than for similar care provided to local authority-funded residents. Laing & Buisson put the difference at between £50 and £100 a week. The King's Fund report, *Securing Good Care for Older People*, was given information from one provider in the south where the differences between what the LA pays and the fee level for self-funders ranged from £133 to £219 per week.

Care funding: evidence of distress

Counsel and Care reports that in the last six months of 2006 some 22 per cent of its helpline enquiries related to care-home funding and that this was an increasing trend. Age Concern, whose helpline receives calls on a wide range of topics, reports a similar experience. Evidence from a community care lawyer cites “a significant increase” in the use of top-ups to pay for basic assessed care by local authorities in the past ten years and calls attention to the resulting hardship suffered by family members who are often retired and on low fixed incomes themselves. NHFA care advice line reports that many callers are stating that it is not possible to find a care home place in their local authority without paying a top-up. This clearly contravenes the binding Directions on Choice which state that local authorities should not set an arbitrary rate for the amount they are prepared to pay for a care home place if places are not available at that rate.

What can be done? What must be done?

CCC's full *Insights* paper sets out a range of proposals, as a contribution to the wider debate on the funding of long-term care.

Asked what one change would make a much-needed difference, our contributors offered the following key points.

From the policy adviser's perspective

Only those who have genuinely exercised choice should be expected to find top-ups for the fees. It should not matter to the homes, in any way, how the person is funded. The price charged must be based on the cost of running a home and meeting that person's needs rather than on how the person is funded.

From the commissioner's perspective

Where homes do require a top-up, additional services will be clearly priced and publicised (as per OFT recommendations). The only gap between a statutory fee and a non-statutory fee will be for items on the third-party top-up list. This will not preclude prices a) being established at a local level and b) reflecting individually assessed levels of need.

From the legal adviser's perspective

Local authorities should arrange the accommodation for all care-home residents who want it and then charge individuals according to the statutory means test. This would enable self-funders to benefit from block contracting or other local agreements and would end the current cross-subsidy.

From the care-home owner's perspective

Somewhere, the shortfall in funding has to be met; the way it is met MUST become regulated to prevent this institutional abuse being perpetrated by the state.

From the financial adviser's perspective

There is an obvious need to increase the funding to local authorities, ring-fenced for purpose with strict guidance on what is a fair rate to pay. To be rid of both third-party top-ups and cross-subsidies local authorities need to pay a commercial rate for a care-home place. This could be determined by the Commission for Social Care Inspection (CSCI) or equivalent taking into account regional variations of costs and capital requirements. It should not be the current self-funding rate but lower – because as local authorities pay more, private payers should pay less. Perhaps a median rate should be set as the standard. Alternatively, in order to facilitate choice, the funding for care-homes could be passed back to central government, leaving local authorities only with the responsibility of assessing need. Once a need was identified, the service user would apply directly to the Department for Work and Pensions (DWP) for the funding.

From the charity / benevolent funder's perspective

What is needed is for realistic care assessment and for funding to be adequate to meet assessed needs. Cross-subsidies should not be required and neither should charity grants be routinely needed for a statutory service. Charities providing discretionary charitable grants should not be put in the position of being asked to sign contractual third-party agreements.

Conclusion

CCC seeks to persuade the Government and all those with an interest in developing a sustainable care funding system to recognise the endemic problems we highlight and to work towards ending the abuses described. With the exhaustive research work on care funding undertaken by the Wanless Review of Social Care and the Joseph Rowntree Foundation and the ideas being contributed by many organisations to the Comprehensive Spending Review, now is the time to act to address the deep-seated funding issues of which the inappropriate use of third-party top-ups and cross-subsidies are growing symptoms.

One outcome of the next Comprehensive Spending Review and any debate on funding for long-term care **must** be that people should be expected to find top-ups for fees *only when they have been given a genuine choice between care options* and have chosen the more expensive one. The price charged must be based on the cost of running a home and of meeting the person's needs. It should not be based on how that person is funded.

Acknowledgements

Thanks are due to all those, CCC members and non-members alike, who contributed views, statistics and case studies to this paper. CCC is pleased to bring together such a forceful body of evidence to support its case; however, it should be noted that the views expressed in the perspectives contributions remain the views of the individual authors rather than CCC policy.

Insights from differing perspectives

Third-party top-ups and cross-subsidy: a policy-adviser's perspective

There is much discussion in the media about the costs of care, especially in care-homes, normally followed by the much-vaunted statistic of 70,000 people having to sell their homes to pay for care. But there are two other areas that the public might find equally shocking which are far less often mentioned. First, the costs are increasingly falling on friends and relatives, both in terms of the numbers and the amounts, where residents require someone to top up the difference between what the local authority will agree to pay and the actual fees of the home. Secondly, a fair proportion of those residents who fund their own care are paying substantial extra amounts for the same level of care when compared with local authority-funded residents – in effect, paying a cross-subsidy to the state.

The Choice of Accommodation Directions, introduced in 1992 ready for local authorities taking over the gate-keeping role for funding care in care-homes in 1993, had the laudable intention of making sure that individuals would continue to have as much choice as possible over which care-home to live in. In essence, local authorities can set a level they are prepared to pay for a person, having regard to his or her assessed needs. But if an individual wishes to move into accommodation that is more expensive than that amount will cover, then he or she can do so if there is a third party (and since 2001, in strictly limited circumstances, the person himself or herself) to make up the difference.

In responding to the consultation on the Directions in 1992, Age Concern stated:

'It will be important to ensure that the possibility of choice does not evolve into creation of a moral obligation on relatives or charities to top up inadequate arrangements by local authorities.'

Sadly, all too often this is exactly what is happening and it appears to be increasing. Market analysts Laing and Buisson report that in the late 1990s about 14 per cent of residents funded by local authorities received third-party top-ups. By 2004 a Market Study undertaken by the OFT found that 33 per cent of residents they interviewed who were funded by local authority had a third party making up the difference. Worryingly, 40 per cent of local authorities responding to this survey thought that there were more top-ups being paid than they knew about because they were being negotiated directly between the home and the relatives outside of the local authority contract. As Laing and Buisson put it *'Some local authorities which were in the past resistant to fees being subsidized in this way are now willing to accept that there is a real shortfall in fee levels and do not interfere with top-ups being negotiated with family members.'* The amount that is paid by friends, relatives and charities in topping up the levels paid by local authorities is unknown.

The payment of third-party top-ups is far from transparent as individuals do not know whether they are genuinely paying for services over and above their assessed needs or making up for inadequate payments from the local authority. Even less transparent is the element of cross-subsidy that has crept in over the years.

'The difficulty of the shortfall led to what I consider an immoral two-tier charging system in some care-away-from-home establishments. Residents with assets – usually the proceeds of the former family home – who can therefore fund themselves for a few years until their assets run

out are charged between £40 and £90 a week more than other residents so that the proprietors can balance the books. That is immoral, but Ministers never refer to that cross-subsidy. Ministers cannot stay silent about the problem much longer.'

This comment was made in a debate in Parliament by Jeff Rooker MP (now Lord Rooker) as long ago as 4 June 1992. It is not a problem that has gone away – but it is still one that is largely met with silence.

Care-homes that accept the local authority level, argue that in order to remain viable they need to charge those funding their own care more. The OFT found that about 20 per cent of homes had different charges for those who funded their own care, than for similar care provided to local authority funded residents. Laing and Buisson put the difference at between £50–£100 a week higher. The King's Fund report *Securing Good Care for Older People* was given information from one provider in the south where the differences ranged from £133–£219 per week.

The OFT report suggested, perhaps naïvely, that if people had more information about fees *'The ability to raise prices for self-funders will be limited if older people and their representatives have enough information to identify and avoid homes that do this'*.

New regulations that came into force in September 2006 now require homes to state in their service-user's guides whether the terms and conditions (including fees) would be different where the care is funded in whole or in part by someone other than the service-user. However, it remains to be seen how clearly this is stated and whether it does enable prospective residents to avoid these homes. After all, they are rarely in a position to shop around. And the regulations certainly do not address the question of what happens if someone is already in a care-home which is then taken over by a different proprietor who operates differential pricing. As one relative whose mother now pays roughly £100 more for her care than local authority residents following a change of owner, has put it to us, *'Let me make it clear: negotiation is not a word that exists in the vocabulary of nursing home owners – it's a case of accept the rises or find another home. To quote an employee "she is a self-funded resident and we can charge her what we like." My mother's facilities at the home are exactly the same as the state-funded residents, she receives nothing extra for her higher fees. ... She, as are all self-funded patients, is treated as a veritable honey-pot for nursing homes who use them to subsidise state patients. Is this just?*

So where does this leave us in policy terms?

We have a "choice agenda", but what is the choice if relatives cannot find a home at the local authority price, some not even realizing that local authorities are required to provide homes that are suitable within their fee levels? They are left with little choice but to top up.

We have a "dignity agenda", but is it dignified for residents to be left knowing that they are reliant on others to make up the difference in fees? In many cases relatives have kept from the resident the fact that they are making extra payments, in order to spare their relative's feelings, but the care-recipient would be horrified if s/he found out.

We have a "well-being agenda", but often residents who have run down their capital through paying their fees are put through months of worry when they are settled in a home but fear they might have to move because the local authority refuses to meet the price of the home, or because their family can no longer meet the ever-increasing amount requested in top-ups.

New tensions are developing as local authorities move to more block booking of beds, in some cases restricting choice further for local authority-funded residents. It can also leave those funding their own care less choice as spaces are already allocated to local authorities, in some case forcing those funding their own care into homes away from their area or only the more expensive local options. On the other hand, the new individual budgets (if extended to residential care) could mean that more people will be purchasing their own care using this money and the market may need to adjust to far less local authority purchasing. But we must not forget the problems that existed before the community care changes when individuals purchased their care in care-homes using social security benefits that were often inadequate and left residents or relatives paying the difference.

It looks as if we are about to enter into a debate about long-term care funding and yet still have very little information about how much is being met from individuals through top-ups and cross-subsidy. One thing that must come out of the next Comprehensive Spending Review and any debate on funding for long-term care is that only those who have genuinely exercised choice should be expected to find top-ups for the fees. It should not matter to the homes, in any way, how the person is funded. The price charged must be based on the cost of running a home and meeting that person's needs rather than on how the person is funded.

Pauline Thompson
Policy Adviser, Age Concern England
October 2006

Third-party top-ups: the care-home owner's dilemma

As a care-home owner (and formerly manager) of many years standing, I have thought long and hard about ways to maintain the viability of my care-home now that state funding is so far below the actual costs of running the home. Historically, before the Care Standards Act and the National Minimum Wage, costs could legally be kept low enough to just about run a home to a pretty basic standard which allowed state funding to be held down. Nowadays, average resident dependency is increasing; and better trained, higher paid staff in greater numbers are necessary to run a good quality home – which should be the only standard acceptable.

I deplore the necessity for homes up and down the country to have to find ways to raise the extra income needed but know from personal experience as well as local and national research that government funding falls significantly short of that which is needed, ie a 'fair price for care'. In my own area the local authority price is estimated to be about £38 per bed per week¹ short of the real costs involved, and this would be even more if I did not live in an economically-deprived area with historically low wages. Our own local research was calculated using standardized loan repayments. (Homes which have paid off their mortgages are in a better operational position – but a home in this position is not viable for sale as a going concern when owners retire, as the income from state fees alone is insufficient for bank lending.)

So what choices do I have? I could refuse to take people who are funded by the state, and I could then charge 'a fair price for care' across the board. This is an option being increasingly considered by home owners who risk bankruptcy on local authority fee levels.

Another option could be to reduce staff numbers and/or wages (the biggest cost) until the books balanced. However, if you accept that it is not possible to run a quality care-home today on reduced staffing numbers then this is not an option – nor would the home meet the new national minimum standards of regulation. Reducing the hourly rate is not possible: the national minimum wage and national insurance increases have raised the wages bill considerably, and for the sort of work that care staff do, even this is well below the level staff deserve. Owners of very small homes often put in huge numbers of hours themselves – over 100 hours per week is not unusual – in order to save on staff costs.

That really only leaves two possibilities. One is to levy the shortfall on the families of state-funded service users – but in this country, unlike some of our European counterparts, this is not a social responsibility enshrined in law, and may not be achievable. The second way to cover the total costs of the home is to increase substantially the fee charged to the private fee-paying resident in order to cross-subsidise the state-funded ones.

I regularly hear people deplore the charging of top-ups from families and others, and find a lack of willingness properly to consider what cross-subsidy actually means. I believe that cross-subsidies constitute a form of financial abuse, or exploitation, of the private fee-payer, unless a very transparent system is in place and individuals enabled to understand and agree this additional cost.

I was once a manager of a very big luxury home (over 100 beds), where most of those who were recipients of cross-subsidies were largely people whose funds had run out. They were few in number (less than 10%) and had themselves previously made a contribution to the cross-subsidy of others, and in their turn they were now beneficiaries of the internal system. They

¹ 2005 figures

were also the residents who had no family able to meet the full fee with a top-up. There was therefore a barely-noticeable shortfall being passed on to others, but in the full knowledge that if their own funds should run out, their occupancy in the home was secure.

However, the system in smaller homes and in homes that do not (or because of their location cannot) set out to attract a solely private fee-payer, is that a sizeable percentage of individuals contribute to the homes' overall shortfall which then has to be found from sometimes very limited numbers of private payers. This means that the higher fees paid by the private payers are far in excess of a 'fair price for care' as they could be paying for at least two others. Where the average state-funded numbers are at 70 per cent of the total (the national average), the extra amount charged onto the remaining 30 per cent is extreme.

My care home is in Cornwall, where average incomes and GDP are well below the national average, despite a few wealthy pockets. We have slightly higher than national average numbers of home-owners. I regularly come across examples of frail working class widows in their 80s or 90s who have scrubbed floors (for example) for most of their lives and in retirement have lived only on a state pension. They live in small one up/one down terraced miners' cottages (which they actually own) with a toilet downstairs or still, in a few cases, outside. Under the present rules, this house has to be sold to pay for their care. It seems to me the height of abuse to rely on people like this to take *further* financial responsibility for supplementing the state-funding of others. Private payers are not always rich! Nowadays, even these houses sell for over £100,000; but the proceeds of a sale may not last for their remaining life in long-term care. The money will clearly last a much shorter time if it also has to pay for others. When the money runs out and they are no longer able to pay their own fees there is always the possibility that they will have to move – and this could be because their own money has been utilised for others! Such a move can often lead to an earlier death.

Residents in care are not normally, for example, allowed to give away any of their money when the house is sold. They are not allowed to use it for major expense that is not related to their own care needs without being charged with "committing waste" (that is, deliberately giving away their money in order to become eligible for state funding sooner than would otherwise be the case). But it appears that they *are* required to use it to pay for the support of unnamed, unknown others through their own fees which have been artificially increased for this purpose. The cross-subsidy system is heavily relied on by central and local governments alike and, since it means that for many older people their own funds will run out at a greater rate than would otherwise be the case, as well as leading to a possible increase in morbidity it is also, surely, "committing waste" on a massive scale – but this is colluded with by those same governments. It is often said that we pay more than once in many areas of society – we pay for a state education system but have the right to pay again to educate our children privately. The same applies with health. However, I cannot think of another area like long-term care where we pay again for others, without having a choice and often without knowing anything about it.

Whether we like it or not, we all accept that we contribute through general taxation and are then means-tested for our own long-term care. We should not expect a very limited number of people at a very vulnerable time of their lives to be further charged to pay for the care of others. And in which other system is this 'taxation' so unregulated, unmonitored and uncontrolled? Governments, by failing to pay a fair price for care, stick their collective heads in the sand and rely on (indeed, require!) home-owners to raise this extra 'taxation' and to distribute it to others on demand. And this burden of paying for the vulnerable poor is falling on a very small proportion of society, at a time of high vulnerability themselves.

At least where the sums required to run the home are raised from third-party top-ups, fees are completely transparent and are utilised only for the family member needing the long-term care; everyone in the home pays only a 'fair price for care' on a level basis – ie the long-term care costs the same, varying only according to levels of need, regardless of who pays. Homes operating a system of top-ups have lower fees (for the private payer) than homes operating a cross-subsidy. Conversely, of course, they will be more expensive for the state-funded client, hence the need for the third party.

Social workers routinely expect homes to operate two levels of fees. Thus they allow and expect private payers to subsidise the state. Departments for Adult Social Care are given 'star ratings' for keeping their budgets low. But there should be no need for two tiers of fees in homes. Nationally applicable means-testing protects the needy and should be the only mechanism for redistribution of wealth. There should not be a hidden, further redistribution on entry to long-term care.

With cross-subsidies, no checks can be made as to the use of their money by the service user without asking for confidential financial information about the funding sources of all the other residents in the home. They cannot check what their money is being used for.

It is not unheard of for social workers, many of whom disapprove of family contributions, to refuse to place people in homes where top-ups are sought, thus forcing the home into operating a cross subsidy (I have personal experience of this).

Even when accepted, homes will still have to find ways to cover the shortfall of those lesser numbers of service users with either no family, or families in financial distress themselves. They may decide 'no top-up, no placement', because they do not accept cross-subsidies from others. They may be knowledgeable and forceful enough to persuade the state to pick up the difference – but risk the state moving the resident to another home where the difference will be paid for by the service user in the next bed. Where the home owner refuses to allow the resident to be moved and backs down on the fee, they are then forced into beginning to apply cross-subsidies to their other residents.

As costs continue to rise at a higher rate than funded increases, the cost of top-ups is increasing, and is rapidly ceasing to be an option as fewer families are able to fund the rising top-ups from their own income – which often coincides with their own children entering university, and often as they themselves become pensioners. Thus, financial exploitation of vulnerable older people by cross-subsidy becomes a state-enforced necessity.

Somewhere, this shortfall has to be met; the way it is met MUST become regulated to prevent this institutional abuse being perpetrated by the state. The way we pay for care in this country MUST be debated nationally through the democratic process. Whether we like the outcome or not, it has to be better than the statutory abuse we accept today.

Mary Anson MSc RGN
Care-home owner
September 2006

Third-party top-ups: the commissioner's perspective

The hotel industry offers a global star-rating system that indicates the quality of rooms, service and location. Websites provide interactive tours of facilities on offer and prices are stated accordingly. For an older person accessing a care-home the price, room type, location and sometimes level of service will vary according to who pays the bill. This paper seeks to explain this bizarre predicament from the viewpoint of a Local Authority buyer.

In 2004 William Laing identified that £1 billion a year would be needed across England to pay for a fully modernised independent care-home sector. (*Calculating a fair price for care: A toolkit for residential and nursing care costs* (2nd edn)). While elements of Laing's report remain subject to challenge, the truth of the matter was that care had been under-funded by the statutory sector – sometimes referred to as the “statutory gap.” Today, the cost of room in a care-home will vary according to whether the enquirer is self-funding, health-funded or local authority funded. A fourth category could be added to the list whereby a care-home asks for a bolt-on fee or “third-party top-up” (TPT) typically funded by relatives or friends of the service user (ostensibly for additional services.)

In simplistic terms, a top-up should only apply for services or facilities *in excess* of those identified in a professionally-assessed statement of need e.g. a view of the ocean or facilities for a pet. However, the need for TPT is often confused with whether or not a Local Authority can afford a placement in a particular home. The term “usual price” is frequently bandied around to justify what constitutes a reasonable price; however, across the South East alone there is significant variance in terms of what usual price means in pounds and pence. By the same token, service providers do not have a consistent approach to differentiating services that come as standard and those that require additional fees.

The statutory gap, variance in application of TPT and the patchwork of prices in homes causes a confusing and often unfair position for service users. The long-term funding of placements is also undermined by the annual inflationary process. Commissioners undertake budget building processes and frequently consult with service providers about cost pressures. However, there is no guarantee that “fair price” can be consistently met year on year as factors such as low central government settlements and Council Tax capping make the process heavily politicised. In the long term, inflationary awards must keep track with salary costs which alone account for 60-70 per cent of weekly fees otherwise the statutory gap will widen. It is difficult for commissioners to sustain strategic and meaningful long-term relationships with service providers when the culture of the annual inflationary process is unpredictable and frequently unscientific.

Commissioners can use contractual mechanisms to prohibit the application of a top-up except where agreed by all parties at the point the placement is made. Commissioners should contract for the gross fee inclusive of top-up and subsequently reclaim the balance from the third party responsible (as per OFT recommendations). However, it is a paradox that it is neither in the local authority's financial interest to assume the risk for non-payment of a top-up nor for it to audit all placements to discover hidden top-ups. It is relatively straightforward to ensure top-ups are precluded in block-contracts, but most commissioners do not have an accurate view of the true volume of relatives who have a direct TPT funding arrangement with the home.

There are significant pressures on commissioners to secure cashable efficiencies with block contracts that also secure market capacity. However, the more resource that is tied up at a specific home, the less choice is available to the service user.

There are competing agendas at play: the service provider will rightly seek to attract the best possible price for the services provided. The purchaser is obliged to seek the best deal and as a consequence the choice and influence of the service user can be marginalised.

In order for the situation to improve:

- Local authorities should scrap the concept of “usual price” and identify the average market rate for beds in conjunction with service providers (to continue the opening metaphor, the “rack rate”). Commissioners will highlight the resulting funding gap as a cost pressure at a local and national level. This rate must include a sustainable profit margin, but the trade off will be that no additional costs or charges will be levied upon the service user (i.e. the default position is no TPT.)
- Commissioners and service providers should continue to spell out the consequences of under funding the market to local and central government.
- Where homes do require a top-up, additional services will be clearly priced and publicised (as per Office of Fair Trading (OFT) recommendations). The only gap between a statutory fee and a non-statutory fee will be for items on the TPT list. This will not preclude prices a) being established at a local level and b) reflecting individually assessed levels of need.
- Councils should seek to award an inflationary settlement that acknowledges the costs of employing care staff (e.g. Average Earnings Index/ Health and Social Care Salary Index.)

**A local authority commissioner
October 2006**

The illegal funding gap: a lawyer's perspective

Choice has become an increasingly fundamental principle of social care: evidenced in the significant expansion of direct payments to enable people with social care needs living in the community to exercise autonomy in how their care is delivered. It also underpins care-home provision – or does it?

The National Assistance Act (Choice of Accommodation) Directions 1992 (“the Choice Directions”)² apply to people for whom the arrangements are brokered by the local authority. They do not apply to anyone receiving fully-funded continuing NHS health care. Under the current understanding of the scope of the National Assistance Act duty, they also exclude self-funders.

The starting-point is that a potential care-home resident should live in the accommodation of her or his choice – “preferred accommodation” – but this right to choose is subject to important provisos:

- that the preferred accommodation appears to the local authority to be suitable to meet the assessed needs (suitability);
- that the arrangement ‘would not require the authority to pay more than they would usually expect to pay **having regard to his assessed needs**’ [emphasis added] (usual cost);
- the preferred accommodation is available (availability);
- that the proprietors will contract on the authority’s ‘usual terms and conditions’ (conditions);
- if the cost is greater than the authority would usually expect to pay having regard to the individual’s assessed needs, that a third party is willing and able to pay the difference (the top-up).

In most situations the top-up can only be made by a third party; the resident is by law prevented from funding his/her own top-up. The resident can pay the top-up from his/her own funds only during the initial 12 week period of permanent residency when the value of the home is disregarded, and in cases of deferred payments

New guidance under the Choice Directions was issued in 2004³. It is statutory guidance, under section 7 of the Local Authority Social Services Act 1970, which means that local authorities are required to follow it unless there is a very clear reason not to in an individual case. Otherwise non-compliance is likely to render any action taken unlawful.

The guidance makes a number of helpful points, including the following:

1. If, in order to meet an assessed need, it is necessary to place an individual in another area at a higher rate than the council’s usual costs, the placing council should meet the additional cost.
2. Individual residents should not be asked to pay more because of market inadequacies or commissioning failures.
3. Where there are insufficient places available at the council’s usual cost, the council should place in more expensive accommodation and bear the additional cost burden.

² For effect in Wales, see WOC 12/93 and WOC47/93

³ LAC (2004) 20

4. Councils should not set arbitrary ceilings on the amount they expect to pay, and have a statutory duty to provide residents with the level of service they could expect if the possibility of 'top-ups' did not exist.
5. Councils must never encourage or imply that care-home providers can seek further contributions from individuals to meet assessed needs.

In ten years as a community care lawyer and legal trainer I have seen a significant increase in the unlawful use of top-ups by local authorities. The victims are often retired family members on a low fixed income themselves who can suffer real hardship as a result.

(1) Misunderstanding of the relationship between the usual cost and the top-up provisions: individual assessed needs

What are the funding implications if the community care assessment finds, for instance, that a person needs to live in another (more expensive) locality in order to be close to a significant relative or friend, or that cultural requirements indicate a need for accommodation in a particular (more expensive) home?

All too often 'usual cost' is defined only by reference to a particular figure for a general category of resident – £425.00 for a high dependency residential placement etc. Provided the figure reflects the negotiated cost of care in the location, this is fine as a general policy, but not as an inflexible rule. The test for usual cost is an individual one, not a general one: the usual cost *'having regard to his assessed needs'*. So, in my examples, if the only home that is in the required location or offers the necessary culturally specific facilities costs £440 per week, that cost is, in law, the usual cost having regard to the individual's assessed needs and should be met in full by the local authority.

The same legal principles often apply when self-funders' assets have decreased and they are eligible for local authority funding. If they have been in the home for some time, are attached to it and, in many cases, could not make a successful move, then it is difficult to sustain a lawful argument that their care needs could be met anywhere else. In that situation, the usual cost is the rate the local authority has negotiated with the home in question, and no top-up is payable.

Misunderstanding of the relationship between the usual cost and the top-up provisions: availability

The Choice Directions and guidance are clear. If there is no home place available that will meet the individual's needs at the usual cost at the time the need is assessed, then the local authority should fund more expensive care. There is no legal justification for charging a top-up in this situation, nor can the provision of a care-home place be delayed for resource reasons.

If choice is to mean anything, the local authority must be able to offer an available bed in a care-home able to meet the individual's needs when that need is identified. The choice for the individual and his/her family then is whether to accept the offer or to choose a more expensive home that the individual /family prefer.

All too often families are simply told that they must make a contribution at a time when they are already undergoing the anxiety and stress of moving an older relative from hospital to a care-home. For instance, a typical case came to me while I was writing this. An older woman's savings are already below the then £12,750 lower capital limit (NB: £13,000 at May 2007). A

third-party top-up is in place, which she is paying out of her savings [also unlawful], although the Council chose the home she would go to on discharge from hospital and offered her no choice.

(2) “The council doesn’t charge a top-up, but the homes do”

I have been told this by individual local authority staff and have just seen it in a draft standard contract between a local authority and care-home providers, “Any third-party payment sought by the Service Provider must be negotiated between the Service Provider and the potential Third Party...”. In this particular contract the information was then to be given to the council who would draw up a third-party contract with the council. This would not bring the arrangement within the law.

The contract between the council and the care-home must be for the full cost of meeting the individual’s assessed needs. The legal framework allows some flexibility about whether the resident’s contribution and the top-up are paid to the local authority or directly to the home, but that is all. The *responsibility* for negotiating the fee with the home rests with the local authority; it is part and parcel of arranging the care. As the guidance puts it, “Councils must never encourage or otherwise imply that care-home providers can or should seek further contributions from individuals in order to meet assessed needs”.

The only circumstances in which a care-home may make independent charging arrangements with a third party is for services that are *genuinely* additional to the assessed needs of the individual, for instance for a larger room with access to the garden in circumstances where such direct access is not an assessed need. That is not a top-up, but an arrangement made between the home and the family for additional services over and above those lawfully required to be provided under the contract with the local authority to meet all the individual’s assessed needs.

The dividing line may be difficult to draw in individual cases and local authorities should be alert to ensure that homes do not exploit this by charging third parties for services that, properly construed, form part of their care plan. Instead, some local authorities are putting in place systems that directly or indirectly encourage malpractice and exploitation. In the process they fail to fulfill their own legal duties.

Recommendations

The widespread illegal conduct of local authorities in relation to top-ups and of PCTs in relation to continuing health care decisions are testimony to a failing system no longer ‘fit for purpose’. A comprehensive review of the funding of long-term care is long overdue.

In the short term, funding levels must be increased to enable the inequity of cross-subsidy (described by other contributors to this paper) to be addressed. Help the Aged believes that local authorities should arrange the accommodation for all care-home residents who want it and then charge individuals according to the statutory means test. This would enable self-funders to benefit from block contracting or other local agreements and would end the current cross-subsidy.

Jean Gould
Solicitor and legal officer with Help the Aged
October 2006

Third-party top-ups v cross-subsidy: the care fees adviser's perspective

NHFA Care Fees Advice provides advice and information to all, regardless of means; consequently, approximately 70 per cent of callers to the advice line are state-funded and 30 per cent self-paying care-home residents.

Third-party top-ups

Third-party top-ups appear to be regarded in the care-home sector as the norm and in recent years have become far more widespread and common as local authorities continue to peg their standard rates at levels that are not commercially viable. Third-party top-ups obviously only affect those requiring state funding; but these may also be people who were previously paying privately until their capital diminished to the means-test limit. Much of the confusion and many of the issues we have to deal with surrounding third-party top-ups arise because care managers do not explain clearly what they are. For example:

- They are only payable when more expensive “preferred accommodation” is chosen.
- That there is no “fait accompli” i.e. that a third-party top-up should not be requested if alternative care at the local authority standard rate is not available.
- Care managers and care-homes do not always make clear that although the contract is with the local authority, they still require a top-up payment.
- A reason why this payment cannot be taken from the resident's disregarded capital is not explained.
- Exceptions to the above rule i.e. during the 12-week/deferred loan period are not explained. The constant threat to relatives that a resident will be moved to cheaper accommodation by the local authority even when they have self-funded initially.
- The above occurs even where other residents are being local authority funded without top-up agreements meaning the person having been penalised through cross-subsidy is again penalised for previously being a self-paying resident.
- The issue arises as to who is ultimately responsible for and in control of the level of the third-party top-up if the local authority is using a four way contract imposing the negotiation of the top-up on the third party.

The whole issue of top-ups places relatives in a very precarious situation. Many are themselves retired and can ill afford them but, on the other hand, they want care that is appropriate to their relative's needs, including their emotional needs, which could be about location. Whilst it is reasonable for local authorities to put ceilings on the rate they pay for care, we are finding that is commonplace that care for these rates is not readily obtainable and families are being put under enormous pressure to make top-ups. This clearly contravenes guidance, which states that local authorities should not set an arbitrary rate for care if care cannot be purchased in their locality for that rate.

Recent calls to the NHFA help line

It appears that local authorities automatically demand a top-up before even trying to renegotiate contracts with homes:

- Caller's Aunt, aged 93, had been self-funding in residential care 2 years 9 months. Capital reduced to £21K and local authority funding sought. Assessment indicated there would be a 3^d party top-up required of £44 per week. (There was no explanation of why Aunt's

disregarded capital could not be used.) Caller was himself a pensioner and unable to meet this payment from his limited resources but did not want his Aunt moved which was the alternative.

- Caller's Mother, aged 89, sold her property and self-funded in care-home for 4 years. Capital reduced to £21,000 and local authority funding sought. Told there was a £25 per month top-up required this was then increased to £99 pcm and then to the current £150 pcm. Caller is having difficulty in keeping up such payments and faces threat of Mother being moved to cheaper accommodation.
- Caller only informed that a top-up would be required in telephone call from social worker 7.00 pm previous evening to Mother being discharged to care-home. Feeling that they could not let Mother remain in hospital or disappoint her they felt pressured to agree to top-up because they were told that, unless they agreed, Mother could remain in hospital indefinitely until a place at the local authority rate became available.
- Client called worried about third-party contract. Council has a contract that is four-way between local authority/resident/third party and care provider. Caller is prepared to sign only if all negotiations are conducted through the local authority in order to offer her some protection on future top-up increases however, the local authority refuses to be responsible.

How this affects financial advice

NHFA experience is that care-homes are becoming less willing to reduce their rates when someone who has been self-funding then requires care at the local authority rate. NHFA care fee funding reports examine people's eligibility to state funding, assess income and capital and affordability of chosen care over periods of three and five years assuming a 5 per cent annual increase in fees. Consequently, such a report will identify if capital is going to diminish to the level requiring local authority funding in the future: in which case, the issue can be addressed right at the outset with the care-home and the local authority and a course of action agreed. This sometimes fails if the care-home changes ownership.

Cross-subsidies

Once self-paying clients become aware that they are paying a far higher fee than those receiving the identical care funded by the local authority there is an incredible amount of resentment both towards the care-home for adopting this practice and the local authority for causing the problem by not paying an adequate amount. Most clients resent having a two-tier charging system and often do not come to the realisation until it becomes a real issue at the end of the 12 week property disregard period or sometimes the loan period that follows. Up until this time, many don't realise there is a difference. Similarly, when faced with the traumatic time of placing a relative in a care-home, often on discharge from hospital, they do not question how much the fees are likely to be. Once they do, they realise that they just have to accept it, or else the alternative is to move their relative, which usually is the more difficult, if not impossible option for all concerned. The majority are distinctly unhappy about paying a cross-subsidy. Their comments are usually along the lines of 'Why should my (relative) subsidise those who don't pay for themselves and in turn help out the Government (i.e. Social services).

How this affects financial advice

The main challenge for the Care Fees Adviser is to provide the care-home resident and their family with the peace of mind that the cost of their chosen care can be met for the duration of need and where possible to preserve capital for the inheritance many older people wish to

leave. NHFA has been providing this advice since 1991; however, over recent years it has become increasingly difficult to meet this challenge because of the unpredictable nature of care-home fee increases. Fee increases have been attributed to the higher costs of regulation and overheads etc. but underlying this are the increases necessitated by having to cross-subsidise local authority funded care-home residents. Across the UK, fee increases reported by NHFA advisers have ranged from 5 per cent to 21 per cent per annum.

Financial Product and Advice Case Study

One of the financial products specially designed to meet care-home costs are 'Immediate Need Care Fee Payment Plans'. In return for a lump sum, perhaps part of the proceeds of a former home, they undertake to deliver a regular monthly income covering the shortfall between the care-home resident's income and the fees at the outset of care being required. There is the option to receive payments increasing at 5 per cent compound per annum but the difficulty arises when fee increases, as they often do, substantially exceed this. In planning for fee increases we do retain a contingency fund to meet any surplus over and above the 5 per cent but setting the level of this becomes increasingly difficult. In some circumstances where the fee increases have been so significant it has been worth considering the purchase of a 'top-up' plan.

NHFA has designed a fee increase limitation agreement or a fee enhancement agreement whereby the care-home signs up to agreeing not to increase its fees by more than 5 per cent per annum. This works well in conjunction with care fee payment plans but, again, in recent years care-homes have been reluctant to enter into such agreements.

In other circumstances as a client's health deteriorates, clients are advised of the possibility of a higher RNCC or NHS continuing care funding to combat the shortfall. However, often with the RNCC any increase is absorbed by the care-home and not taken off the cost.

Recommendations

The funding of care-home places was transferred to local authorities in April 1993. In announcing the funding levels the then Secretary of State, Virginia Bottomley, said

"The Government is fully committed to ensuring diversity and choice in community care provision" – "For this reason, we have decided to issue a binding direction on local authorities which will enshrine the right of individuals to choose the location and character of their residential or nursing home" – "Choice is common sense and an individual right. The elderly and handicapped must not be denied their right to choose how they wish to be cared for at perhaps the most vulnerable stage of their lives."

Passing the responsibility of funding care-homes to local authorities was a response to an obvious need to control spending where it may have been deemed unnecessary or able to be met from the equity in a person's property; however, evidence to date has clearly shown us it has not worked.

Neither 'third-party top-ups' nor 'cross-subsidies' are of help to anyone other than local authorities. Care-home residents and their families are put in very difficult financial situations and many care-home proprietors are unhappy about being forced to make these charges. There

have been a number of 'Fair Rate for Care' campaigns, none of which has been successful. The solution lies with central government which needs to address the issue. There is an obvious need to increase the funding to local authorities, ring-fenced for purpose with strict guidance on what is a fair rate to pay. To be rid of both third-party top-ups and cross-subsidies, local authorities need to pay a commercial rate for a care-home place. This could be determined by CSCI or equivalent, taking into account regional variations of costs and capital requirements. It should not be the current self-funding rate but lower, because as local authorities pay more private payers should pay less – perhaps meeting in the middle.

Alternatively, in order to facilitate choice, the funding for care-homes could be passed back to central government leaving local authorities with just the responsibility of assessing need. Once a need is identified, the service user applies direct to the DWP for the funding. This solution

- removes the financial burden from local authorities;
- places the purchasing power with the users of care-homes;
- removes the disparity between the funding different local authorities receive compared with the variable demand for care services from area to area;
- removes the disparity between how much each authority will pay for accommodation;
- promotes the freedom of choice of accommodation; and
- facilitates a level playing field between public, private and voluntary sector accommodation.

Philip Spiers
NHFA Care Fees Advice
September 2006

Third-party top-ups: the charity perspective

The Association of Charity Officers (ACO) is the national network of charities and benevolent funds that help individuals. Our 200+ members, all registered charities, together spend some £125 million each year on some 200,000 people, living in their own homes and in registered settings.

Many ACO member charities provide residential and nursing care, and/or give grants towards the cost of care. Thus they make an enormous contribution to the welfare and quality of life of hundreds of thousands of people every year.

ACO members are routinely approached to help beneficiaries with the costs of their care both in their own homes and in registered care-home settings. In many cases family members are also helping or have been put under pressure to sign third-party agreements that they can ill afford or cannot sustain. This paper relates to those beneficiaries who are resident in registered homes providing residential or nursing care and the part our member charities pay in funding that care.

Each year ACO considers the costs of members who are providers of residential and nursing care, the experience of those member charities who are “topping-up” fees and the rates Local Authorities pay when entering contracts. The information is used to assist charity trustees who must consider carefully all grant aid to make sure it is in accordance with their governing documents and that it is actually helping the beneficiary rather than relieving the state. Why would people donate to charities if they felt their gifts were simply going to replace taxes?

ACO is thus well placed to see the wider picture:

- the dilemma for charitable providers – how far can/should they subsidise a statutory service when it is not a stated object in their governing documents to relieve rates and taxes;
- the problems for charities asked to top up unrealistically low local authority payments that do not take full account of all the assessed needs but assume that the standard rate can be applicable across the board.

To add insult to injury, ACO sees that local authorities regularly ask member charities to sign third-party agreements, demonstrating a startling lack of understanding about the difference between a charitable grant and a contractual payment. In a recent survey ACO found that 17 per cent of members had been asked by a local authority to sign a third-party agreement – for a charity grant! A grant is given at the discretion of the trustees, is regularly reviewed and can be withdrawn at any time. A contract is a contract!

In 1991/2 ACO undertook research about the extent of charitable top-ups for older people. The amounts routinely requested from charities were from £20 to over £100 per week. When the funding system changed in 2002 for those people with Preserved Rights to Income Support (PRIS) ACO agreed it was right that older people should have their needs assessed and that adequate funding should be provided by the state to meet those assessed needs. At that time Ministers stated that no ex-PRIS person should have to leave their care-home due to inadequate local authority funding on transfer. Should the fees charged at the time of transfer be higher than those the local authority normally paid this was not to be a reason for eviction. ACO therefore advised member charities at that time to cease “top-up” funding for these people for whom adequate statutory funding should have been available with effect from April 2002. There

were difficulties in some areas where local authority rates were inadequate and did not take adequate account of individual circumstances, whilst in other areas local authority rates were more realistic. Some charities were faced with hard decisions about “topping-up” fees and this situation remains unchanged.

ACO believed that it was not possible to provide quality care for older people for less than the then DSS/DWP former Preserved Rights to Income Support levels. With the cessation of central government guidance regarding fees and the constraints upon local authority finances, unrealistic standard rates have continued to be set by some local authorities. ACO maintains that local authorities must undertake thorough individual assessments and fund care for each individual according to their specific care needs and local market rates.

In 2006 we are still asked to find charitable funding for care-home fees for older people and the amounts are staggering – from £50 per week to over £150 and sometimes over £200 per week. In some cases the families, overwhelmed with guilt and anxiety, approach charities for amounts above the local authority contracted rate – how can local authorities monitor the true costs of care in the absence of comprehensive knowledge about these practices in their areas?

ACO will continue to make the case for realistic assessment resulting in adequate funding. Cross-subsidies should not be required and neither should charity grants be routinely needed for a statutory service. This is not the impression given by local authority literature provided to older people and their families about entering a care-home. We find people directed to charities by local authority staff. Some local authorities now expect contributions from families and charities as a matter of routine. Frequently, people are misled by statements that the local authority may provide some help with the cost of care but it is normal to seek a top-up. It is true that the older person must pay for their care according to their means. However, the amount the local authority pays should depend upon their assessed needs and the costs of local services and it should not be the norm, and neither should it be presented as the norm, that top-up is routinely required. Families are left with the impression that this is the system. They are told by statutory staff to contact charities and often given ACO’s contact details – this is how the system works! Surely this is not what Ministers intended?

Many charity providers of care regularly subsidise those people who are funded by the state. Our research has suggested that income deficits vary between 16 per cent and 20 per cent. In some cases enhanced subsidies of up to 27 per cent have been reported. This is not sustainable in the long term. It places pressure on charitable fund raising for services which the general public believes to be totally funded by the state and will surely impoverish our society in the long term if charities cease to operate in this field – or indeed at all. It is tragic that those charitable providers who wish to provide services on the sole basis of need increasingly find themselves having to accommodate a proportion of residents who can fund themselves at the full economic fee, in order to sustain the service. Over time, this risks distorting services and seeking to stick to targets – perhaps, 70 per cent state-funded and 30 per cent self-funded residents – can conflict with the values and objects of the charity to provide services to those in need.

Some charities will help with fees only in private care-homes and refuse help to beneficiaries in charitable homes. This is for a variety of reasons. Some have their own charitable provision and seek to accommodate their own beneficiaries and may already be subsidising the cost of fees in these homes. Others, struggling to raise funds for non-statutory services, believe that the provider charity should fundraise to cover its own deficits or charge economic fees. This creates still more problems for older people and their families.

Fee levels that exceed local authority standard rates, although often justifiable, exclude many frail older people from accessing the care that they need unless additional funding is provided by relatives or charities. This creates a dilemma for grant-aiding charities that recognise the needs of beneficiaries but do not wish, and neither do they have objects which include this, to perpetuate statutory under-funding of residential and nursing care by continuing to “top-up” fees.

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