

# **Market Study of Care Homes**

## Statement of Scope

**2 December 2016**

© Crown copyright 2016

You may reuse this information (not including logos) free of charge in any format or medium, under the terms of the Open Government Licence.

To view this licence, visit [www.nationalarchives.gov.uk/doc/open-government-licence/](http://www.nationalarchives.gov.uk/doc/open-government-licence/) or write to the Information Policy Team, The National Archives, Kew, London TW9 4DU, or email: [psi@nationalarchives.gsi.gov.uk](mailto:psi@nationalarchives.gsi.gov.uk).

## Contents

	<i>Page</i>
Contents .....	3
1. Summary .....	4
2. Introduction .....	8
3. Purpose of the project and potential outputs.....	11
4. Background on Care Homes.....	13
Significance of the sector .....	13
Description of the sector and regulation.....	13
Overview .....	13
Previous work by CMA's predecessor and other organisations .....	18
5. Themes and possible outcomes .....	21
Themes we propose to consider .....	21
Theme 1: Consumer protection issues in the care homes sector .....	22
Theme 2: Older people's decision making on care homes .....	23
Theme 3: Regulation of care homes.....	24
Theme 4: Competition between care homes .....	24
6. The scope of the market study.....	26
Scope – Type of service/definition of 'care home' .....	26
Scope – Residents.....	26
Scope – Geographic scope.....	27
Scope – areas where we do not intend to focus .....	27
7. Next steps .....	29
Invitation to comment on our market study notice.....	29
Evidence-gathering .....	31
Annex – Use of information provided to the CMA .....	33

# 1. Summary

- 1.1 Care homes<sup>1</sup> comprise a sector worth around £15.9 billion a year,<sup>2</sup> with around 433,000 people<sup>3</sup> occupying care home places in the UK. Entering a care home is a major decision, and will have a significant impact on an individual's quality of life, often on a permanent basis. Moreover, many of the older people concerned are highly vulnerable, often taking the decision to enter a care home at a time of crisis or poor health.<sup>4</sup> It is therefore essential that the provision of care home services works well.
- 1.2 In 2005, the CMA's predecessor, the Office of Fair Trading found cause for concern in the care homes market.<sup>5</sup> It identified various issues including a lack of information and advice for prospective care home residents, a lack of transparency by care home providers around fees and terms and conditions, and difficulties for care home residents in making complaints. A range of recommendations were made to government, regulators, local authorities and other organisations to address these concerns, some of which have led to regulatory change.
- 1.3 Despite developments in the care homes sector since 2005, including significant legislative changes, there remain substantial concerns. In particular, concerns relating to:
- the extent to which care home providers are treating their residents fairly and whether they are complying with their consumer law obligations in relation to information provision, contract terms and business practices after the resident has moved in;
  - whether or not care homes (or other bodies) are providing the right kinds of information to older people and their representatives in order to help them take decisions about entering or choosing between care homes;
  - how local authorities discharge their obligations, particularly to provide information and advice in relation to care for older people, meeting the

---

<sup>1</sup> We are considering residential care and nursing homes for those over 65, and are excluding care provided in the person's own home, see paragraphs 6.1 and 6.2.

<sup>2</sup> September 2014. Source: LaingBuisson, Care of Older People UK Market Report 27<sup>th</sup> edition.

<sup>3</sup> September 2014. Source: LaingBuisson, Care of Older People UK Market Report 27<sup>th</sup> edition.

<sup>4</sup> Older people (and their families) may be facing a wide range of vulnerable circumstances or challenging conditions when taking decisions in relation to care homes. For example, making difficult decisions, possibly with impaired health, in an area where they have little or no experience and information may be difficult to obtain or be difficult to understand and interpret, where the financial position may be unclear, and they may heavily rely on the advice or decisions of others.

<sup>5</sup> OFT, [Care homes for older people in the UK](#), May 2005 (OFT780).

needs of those who require accommodation in a care home, and in respect of their market shaping function;

- the roles of competition and regulation in driving quality and value for money;
- the impact of changes in costs and regulation; and
- whether the current market structures and policy and regulatory frameworks are effective, efficient and sustainable.

1.4 Earlier this year Citizens Advice highlighted concerns that some care home providers might not be complying with consumer law, including by imposing hidden charges or giving very short notice periods for fee increases (which may mean the resident has little time to evaluate whether they are able to meet the extra costs or to make alternative arrangements).<sup>6</sup> Recently, these and other concerns have been echoed by other organisations, such as Age Concern<sup>7</sup> and Citizens Advice Wales,<sup>8</sup> as well as by Citizens Advice in a another recent report.<sup>9</sup> Concerns have also been raised about some residents and their families facing reprisals (such as visiting restrictions or the resident being forced to leave against their wishes) after making a complaint to a care home.

1.5 Public funding of adult social care is clearly of major significance. The CMA is not a policy maker and is not the appropriate body to offer opinions on levels of public spending or how local authorities or other funding authorities prioritise between many competing demands on their funding. Nor is the CMA the appropriate body to consider whether the standards for quality of care, set out in specific legislation on care, and which are regulated by quality regulators in each nation are at the right levels. Responsibility for these rests with the national care regulators. Our focus will be on consumer protection issues and how effectively the market for care homes operates within the current arrangements – given a set level of public spending, it is important that the market works as well as it can to provide the right outcomes for care home residents. However, we will consider the consequences of outcomes within the existing policy and regulatory frameworks, for example on the sustainability of care home provision and on the market for self-funders.<sup>10</sup>

---

<sup>6</sup> CiTA, [Hidden charges in care homes](#), February 2016.

<sup>7</sup> Age UK, [Behind the headlines: 'stuck in the middle' – self-funders in care homes](#), October 2016.

<sup>8</sup> Citizens Advice Cymru, [Accessing and paying for social care in Wales](#), August 2016.

<sup>9</sup> CiTA, [Taking greater care - why we need stronger consumer protections in the care home market](#), November 2016.

<sup>10</sup> Where individuals pay directly for their own care. Self-funders can approach homes in the private sector for a place, even if the local authority's assessment indicates no need for care services.

1.6 In light of the concerns, we are undertaking a market study to examine the care homes market. We are proposing to examine four broad themes:

1. **Consumer protection issues in the care home sector.** Are older people and/or their representatives being disadvantaged through the use of unfair terms and conditions? Are care home providers engaging in unfair business practices? How easy is it for care home residents and/or their representatives to complain and obtain adequate redress? Are existing protections for residents on these issues sufficient, for example does consumer law work well in this context, or are additional protections needed?
2. **Choosing care homes.** Is there sufficient information and is the information clear and easy to assess when older people and/or their representatives first choose a care home, especially in the context where they may be struggling to understand the issues and options and making these decisions under stressful and time pressured circumstances? Is anything preventing care home residents from moving, for any who are safely able to, when they wish to do so?
3. **Regulation of care homes.** How do regulations in each nation affect competition between care homes in terms of quality and price? Do existing regulations provide adequate consumer protections for residents and/or their representatives? How do local authorities and regulators affect outcomes in this sector, including through their commissioning practices and 'market shaping'<sup>11</sup> activities? Are current standards enforced effectively and how do regulators and commissioning bodies coordinate to limit the administrative burden imposed on care homes?
4. **Competition between care homes.** Is competition working well for residents and does competition drive choice, quality and value for money in this sector for both self-funded and local authority funded residents? Are there any impediments to competition such as barriers to entry and expansion and a lack of capacity? If competition is not effective in improving outcomes, what is the role of regulation? What are the key pressures for care home providers that affect their long-term sustainability (for example changes in costs and regulation)? We will also be vigilant to

---

<sup>11</sup> Market shaping (as required in England, see paragraph 4.6) refers to a range of activities where a local authority 'collaborates with relevant partners to encourage and facilitate the whole market in its area for care, support and related services'. The core activities of market shaping are to engage with stakeholders to develop understanding of supply and demand and articulate likely trends that reflect people's evolving needs, to signal to the market the types of services needed now and in the future to meet them, encourage innovation, investment and continuous improvement ([Care and Support Statutory Guidance](#)). This is intended to facilitate an efficient, effective, diverse and sustainable market for high quality care and support in their area, for the benefit of their whole local population, regardless of how the services are funded.

identify any evidence of infringements of competition law occurring in the sector.

- 1.7 We will conduct our market study over the next year, gathering evidence from a wide range of stakeholders including residents of care homes and their relatives/representatives, care home providers, local authorities and other funding authorities, NHS Clinical Commissioning Groups, sector regulators, consumer groups and charities.
- 1.8 Following evidence gathering, we plan to produce a report on the care homes market setting out any concerns we identify. Where we find issues of particular concern, we may take further action during or after the end of the 12-month market study, such as opening consumer or competition enforcement cases and/or deciding that a market investigation reference is needed. Alternatively we could make recommendations to regulators, industry or government, or decide that no further action is needed. We will publish an interim report with our initial findings and views on remedies, including whether a market investigation reference is needed, six months after the launch of this market study.
- 1.9 We welcome input at this stage, see the [case page](#) and invitation to comment. In addition to general submissions on the market study from interested parties, we have included some key themes and questions at the end of this document, see Box 1, to help inform any responses. We would welcome responses by 16 January 2017.

## 2. Introduction

- 2.1 This document sets out the themes we propose to consider and possible outcomes from the CMA's market study into Care Homes. It sets out the purpose of the market study, some background to the sector, the scope of our study, and invites submissions on the matters raised. This document accompanies the Market Study Notice: Care Homes.<sup>12</sup>
- 2.2 The CMA's mission is to make markets work well in the interests of consumers, businesses and the economy. It achieves this by promoting and protecting consumer interests while ensuring that businesses are fair and competitive.
- 2.3 Market studies are one of a number of tools at the CMA's disposal to examine possible competition or consumer protection issues and address them as appropriate. They are examinations into the causes of why particular markets may not be working well, taking an overview of regulatory and other economic drivers in a market and patterns of consumer and business behaviour. This market study will also enable us to undertake a review of providers' compliance with consumer protection law.
- 2.4 A market study begins with the publication of a Market Study Notice by the CMA. A Market Study Notice must be published where the CMA is proposing to carry out its functions under section 5 of the Enterprise Act 2002 (the Act)<sup>13</sup> for the following purposes:
- To consider the extent to which a matter in relation to the acquisition or supply of goods or services of one or more than one description in the UK has or may have effects adverse to the interests of consumers; and
  - To assess the extent to which steps can and should be taken to remedy, mitigate or prevent any such adverse effects.<sup>14</sup>
- 2.5 Market studies can lead to a range of outcomes. They may conclude that a market can be given a clean bill of health and that the initial concerns about consumer detriment are not substantiated by the information collected over the course of the study.

---

<sup>12</sup> Care Homes Market Study [case page](#).

<sup>13</sup> Under section 5 of the Act the CMA has the function of obtaining, compiling and keeping under review information about matters relating to the carrying out of its functions, with a view (among other things) to ensuring the CMA has sufficient information to take informed decisions and carry out its other functions effectively.

<sup>14</sup> Section 130A of the Act.



2.6 Generally, where a market study finds that the market is not working well, the CMA may consider several options:

- Improving the quality and accessibility of information to consumers or promoting consumer awareness.
- Making recommendations to government to change regulations or public policy.
- Taking consumer or competition enforcement action.
- Publishing guidance to businesses on compliance with their obligations under consumer and/or competition law.
- Encouraging businesses in the market to self-regulate.
- Making a market investigation reference.<sup>15</sup>
- And/or accepting Undertakings in Lieu of making a market investigation reference.

2.7 The above is an illustrative list of possible outcomes. The CMA retains an open mind as to which outcomes, or combination of outcomes, may be appropriate to address any concerns that it may identify during the course of this market study.

2.8 One potential outcome could be that the CMA identifies the need to improve compliance with consumer protection law, including through the initiation of consumer enforcement action if care home providers are suspected to be in breach of consumer protection law. For the CMA, initiating consumer law enforcement action may be particularly appropriate<sup>16</sup> where:

- breaches of law point to systemic failures in a market;
- where changing the behaviour of one business would set a precedent or have other market-wide implications;
- where there is an opportunity to set an important legal precedent;
- where there is a strong need for deterrence or to secure redress for consumers; or

---

<sup>15</sup> Where the findings of a market study give rise to reasonable grounds for suspecting that a feature or combination of features of a market or markets in the UK prevents, restricts or distorts competition, and a market investigation appears to be an appropriate and proportionate response, the CMA may make such a reference.

<sup>16</sup> See Consumer protection enforcement guidance: [CMA58](#).

- to uphold the effectiveness of the unfair contract terms regime embodied in the Consumer Rights Act 2015.

2.9 At this stage, although we have heard of a number of concerns about consumer protection issues, the CMA has not formed a view as to whether or not these are likely to amount to breaches of consumer protection law, or whether care home providers are complying with consumer protection law. Information gathered during this market study will help the CMA to determine whether further action is warranted, including enforcement action or guidance being issued to secure improved compliance across the market. In determining whether to take enforcement action, the CMA will make strategic choices and apply its prioritisation principles.<sup>17</sup>

2.10 Further information on market studies can be found in the following guidance documents: [Market Studies Guidance on the OFT Approach](#) (OFT519) and [Market Studies and Market Investigations: Supplemental Guidance on the CMA's Approach](#) (CMA3).

---

<sup>17</sup> CMA, [Prioritisation principles for the CMA](#), April 2014 (CMA16).

### 3. Purpose of the project and potential outputs

- 3.1 The overall purpose of our market study is to examine the causes of why the care home market may not be working well for consumers, leading to proposals as to how it might be made to work better. As part of this, we intend to explore the compliance of care home providers with consumer protection law.
- 3.2 In particular, our aims through the market study are to:
- (a) Identify and recommend measures to remedy the key issues that may stop the care homes market from working well including any barriers to people making well-informed initial choices on care homes, barriers to competition, and any problems in the way local authorities commission places and facilitate the market;<sup>18</sup>
  - (b) Obtain a better understanding of the extent of compliance by UK care home providers with consumer law and, as appropriate, drive better compliance and seek to embed consumer law compliance within the sector; and
  - (c) Identify any weaknesses in the regulatory framework of the care home sector, recommend any necessary changes to the regulatory framework and if necessary propose additional protections for care home residents.
- 3.3 Our market study includes consideration of consumer law compliance issues following reports of practices and contract terms being used by some care homes that may be potentially unfair. For example, we have heard from Citizens Advice<sup>19</sup> and others about key charges for care homes not always being clearly disclosed upfront to prospective care home residents and/or their representatives and a lack of transparency about what is included/excluded in fees and in contract terms and conditions. We are also aware of other concerns regarding some care homes' charging practices and the fairness of their contractual terms and complaints procedures when consumers seek resolution, including actions which may deter complaints and result in residents and their families facing reprisals (such as visiting restrictions or the resident being forced to leave against their wishes) after making a complaint to a care home.
- 3.4 We intend to explore how widespread these concerns are, whether they may breach consumer law and how they are affecting residents and their families.

---

<sup>18</sup> For example via their market shaping duties in England, see footnote 11.

<sup>19</sup> CiTA, [Hidden charges in care homes](#), February 2016.

To help us with this, we want to hear from care home residents and their relatives who have experienced these kinds of consumer protection issues, and have concerns about the fairness of the care home's contract or think the care home has behaved in an unfair way. Details of how to report concerns can be found on our [reporting page](#).

- 3.5 We would also welcome comments from any interested party on any of the issues raised in the statement of scope, see the [case page](#) and invitation to comment.

## 4. Background on care homes

- 4.1 In this section we provide some background on care homes and previous projects carried out by the CMA's predecessor, the Office of Fair Trading (OFT).

### Significance of the sector

- 4.2 Care homes<sup>20</sup> comprise a sector worth around £15.9 billion a year,<sup>21</sup> with around 433,000 people<sup>22</sup> occupying care home places in the UK. The sector is largely served by commercial providers but with some not-for-profit and local authority provision. On average, across the UK, 41% of residents are entirely self-funded (ie pay the full cost of their care), 37% are funded by the public purse<sup>23</sup> and others self-fund part of their care or receive other funding (eg from the NHS). In 2014-15, average weekly costs ranged from £483 in Northern Ireland to £628 in London,<sup>24</sup> and were higher for care homes with nursing. Self-funders on average pay more for care home places, which may to some extent reflect the homes they choose and the level of care received.
- 4.3 Entering a care home is a major decision, and will have a significant impact on an individual's quality of life, often on a permanent basis. Moreover, many of the people concerned are highly vulnerable, for example because they or their families may be making difficult decisions rapidly under very challenging conditions, possibly with impaired health, in an area where they have little or no experience and information may be difficult to obtain or be difficult to understand and interpret, where the financial position may be unclear, and they may heavily rely on the advice or decisions of others. It is therefore essential that care home provision should work as well as possible.<sup>25</sup>

### Description of the sector and regulation

#### Overview

- 4.4 Adult social care is devolved in Scotland, Wales and Northern Ireland, each with different legislation and regulatory bodies. Significant reform is underway in each nation and some of these changes are yet to be fully implemented.

---

<sup>20</sup> We are looking at residential care and nursing homes for those over 65, and are excluding care provided in the person's own home, see paragraphs 6.1 and 6.2.

<sup>21</sup> September 2014. Source: LaingBuisson, Care of Older People UK Market Report 27<sup>th</sup> edition.

<sup>22</sup> September 2014. Source: LaingBuisson, Care of Older People UK Market Report 27<sup>th</sup> edition.

<sup>23</sup> People with assets of more than £23-24,000 pay the full cost of their care.

<sup>24</sup> Laing Buisson estimates.

<sup>25</sup> It should work well for the interests of consumers, businesses and the economy [to expand to explain more about what we mean in terms of working well].

Broadly, across each nation there is a common push towards enabling people to exercise choice across care options (through obligations around provision of information and advice by public authorities), ensuring diversity of supply, and enabling people to stay in their own homes so far as is possible.

- 4.5 Across the UK, local authorities play a central role in enabling access to care home services, providing advice and an assessment of care needs for potential residents, as well as funding to those residents with assets below a particular threshold.<sup>26</sup> Residents can also receive additional services (eg a larger than average room) by paying ‘top-up’ fees. Residents are often also charged for additional services not included in the core contracted services (eg hairdressing). Residents with assets above the threshold must entirely self-fund their care,<sup>27</sup> however persons with a primary health need get funded by the NHS (NHS continuing healthcare) and patients requiring nursing care get a contribution towards the cost of their nursing home.
- 4.6 In England, the Care Act 2014 (the Care Act) places new market shaping duties on local authorities to promote the efficient and effective operation of the market for adult care and support as a whole.<sup>28</sup> The Care Act also introduces a market oversight role for the care homes regulator, the Care Quality Commission (CQC). The CQC has responsibility for assessing the financial sustainability of certain hard-to-replace care homes and must inform the relevant local authority where it believes a provider is about to fail. Similarly, in Wales, under recent reforms,<sup>29</sup> local authorities will be required to publish local market stability reports which review the sufficiency of care and support in their area. Welsh Ministers will also be required to publish national market stability reports that review the sufficiency of care and support in Wales. The aim in both England and Wales is to identify gaps in service provision, support forward planning, provide better market oversight of important providers and build public confidence in the stability of social care services.
- 4.7 In Scotland, local authorities must produce a strategic commissioning plan that sets out how they will plan and deliver services for their area over the medium term,<sup>30</sup> using the integrated budgets under their control

---

<sup>26</sup> Of between approximately £22-24,000.

<sup>27</sup> In Scotland, residents aged 65 and over are entitled to free nursing care via their local authority (capped at £170 a week for personal care and £70/80 per week for nursing care), following an assessment.

<sup>28</sup> This can be considered a duty to facilitate the market, in the sense of using a wide range of approaches to encourage and shape it (see footnote 11).

<sup>29</sup> The Regulation and Inspection of Social Care (Wales) Act 2016.

<sup>30</sup> The Public Bodies (Joint Working) (Scotland) Act 2014, sections 29 to 39.

- 4.8 Funding authorities across each nation commission care home services from a range of suppliers. In Scotland, there is a National Care Home Contract where the local authority acts as the purchaser of the care home placement for a prescribed price/fee.<sup>31</sup> In Northern Ireland, certain Health and Social Care Trusts contract with care homes and a fixed price is set by the Health and Social Care Board.<sup>32</sup>
- 4.9 Each nation has a regulator who is responsible for the mandatory registration, inspection and evaluation of care homes and adult social care services in their jurisdiction. Most focus on quality of care homes and assess them according to an inspection framework.

### *England*

- 4.10 The Care Act 2014 consolidates and reforms the framework for social care in England. It provides local authorities with general responsibilities to provide universal services to promote wellbeing; prevent, reduce or delay care needs for individuals who need support; and to promote the integration of care and support. It also provides specific duties in relation to information provision and market shaping.
- 4.11 Care homes in England are regulated by the CQC. The CQC's powers and duties in relation to the registration and inspection of care homes are set out in the Health and Social Care Act 2008 and its 'market oversight' role was established by the Care Act 2014. The CQC assesses care homes using an inspection framework and is planning to publish an amended inspection framework in 2017.

### *Wales*

- 4.12 Wales is also moving towards integrated health and social care. The Social Services and Well-Being (Wales) Act 2014 came into force April 2016 and in conjunction with the Regulation and Inspection of Social Care (Wales) Act 2016 (which will come into force in various stages), the new legislation aims to: set tighter rules of accountability; increase transparency; allow for swifter action on the part of the regulator; introduce a market stability role for local authorities and the Welsh Ministers; and reform and simplify the regulatory regime for care and support services. It will also reconstitute, rename and broaden the remit of the Care Council for Wales which will be changing into Social Care Wales from April 2017.

---

<sup>31</sup> The contract does not apply to self-funders.

<sup>32</sup> Care homes are able to charge more through 'top up' fees above regional rates.

- 4.13 The accompanying regulations are being developed in phases, with full implementation planned by 2019. The Welsh Government has recently consulted on the first tranche of regulations which will cover registration as a service provider, variation of registration, service provider annual returns, and information to be included in notifications to local authorities.
- 4.14 Care homes in Wales are regulated by the Care and Social Services Inspectorate Wales (the CSSIW). Like the CQC, the CSSIW has a registration, monitoring and enforcement role in respect of care homes. The CSSIW will also produce the market stability reports on behalf of the Welsh Ministers.

### *Scotland*

- 4.15 The Public Bodies (Joint Working) (Scotland) Act 2014 provides the legislative framework for integration of health and social care services in Scotland. It requires local integration of all adult health and social care services. It is supported by the Social Care (Self Directed Support) (Scotland) Act 2013, which gives people a range of options for how their social care is delivered, beyond just direct payments, empowering people to decide how much ongoing control and responsibility they want over their own support arrangements. This also places a duty on local authorities to offer people four choices as to how they receive their social care support.<sup>33</sup>
- 4.16 For local authority-funded residents, there is a National Care Home Contract which sets a prescribed fee for the placement in care homes. The Public Bodies Act requires Integration Authorities to publish Strategic Commissioning plans and statutory guidance requires the publication of Market Facilitation Plans.
- 4.17 Scottish care home providers are regulated by Social Care and Social Work Improvement Scotland (the Care Inspectorate). The Care Inspectorate was formed under the Public Services Reform (Scotland) Act (2010) and is responsible for the mandatory registration, inspection and evaluation of care services in Scotland. When inspecting care services the Care Inspectorate refer to the National Care Standards which are currently under review.

---

<sup>33</sup> The choices are: a direct payment by the local authority to the person requiring support who then arranges their own care; the person requiring support chooses their preferred care arrangements and the local authority pays that organisation on their behalf; the local authority chooses and arranges the support they think is right for the person requiring support; and a mixture of the above options.



## *Northern Ireland*

- 4.18 The Health and Social Care (Reform) Act (Northern Ireland) 2009 made changes to the administrative structures for health and social care, introducing a general duty for the Department of Health, Social Services and Public Safety to promote an integrated approach to health and social care, as well as a duty to set standards of care. The same Act also established the Regional Health and Social Care Board (the RHSCB). The role of the RHSCB is to arrange or 'commission' health and social services, to work with the five Health and Social Care Trusts that directly provide services to people to ensure that these meet their needs and to ensure that all services are safe and sustainable
- 4.19 In practice, there are contracts between the five Health and Social Care Trusts and care homes. The Health and Social Care Board sets a guide price for beds in care homes. Providers can charge more, and where a bed is not available at the guide price, health and social care trusts must contract at the most competitive rate. Where someone chooses a home which is more expensive than an alternative which also meets their needs, this additional charge or 'top up' must be met by the resident or a third party.
- 4.20 Providers in Northern Ireland are regulated by the Regulation and Quality Improvement Authority (RQIA). RQIA was established under the Health and Personal Social Services Order (Northern Ireland) (2003). It is an independent body and is responsible for the registration, monitoring and inspection of health and social care services throughout Northern Ireland.

## *Consumer law*

- 4.21 Consumer protection legislation is relevant to the provision of care home services to residents, in particular, in relation to the information that they must provide to prospective residents, the terms on which they agree to provide their service to residents, and how they handle complaints. This includes:
- Part 2 of the Consumer Rights Act 2015, which deals with unfair terms in consumer contracts and certain consumer notices entered into/issued on or after 1 October 2015 (and the Unfair Terms in Consumer Contract Regulations 1999, which deal with unfair terms in consumer contracts before 1 October 2015).
  - The Consumer Protection from Unfair Trading Regulations 2008, which provide consumers with protections against a range of unfair commercial practices which distort, or are likely to distort, their decision making. They introduce a general duty not to trade unfairly, and ban certain specified

practices as unfair in all circumstances, as well as providing consumers with a right to redress in certain circumstances.

- The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, which require traders, in contracts covered by the regulations, to provide certain pre-contractual information to consumers, and to do so 'in a clear and comprehensible manner'. This includes information about the main characteristics of the goods or services and the total price. This statutory pre-contractual information is to be treated as included as a term of the contract.

4.22 The CMA has produced guidance (Unfair contract terms: CMA37) for businesses setting out its views on what makes terms and notices unfair, and how businesses can make sure contract terms and notices with consumers are fair and clear.

4.23 Consumer law sits alongside any sector-specific regulatory obligations that may be relevant to care home providers, for example in relation to the provision of key information to residents. Broadly speaking, consumer law aims to ensure that businesses do not act unfairly in their dealings with consumers, for example, by including unfair terms in contracts with consumers or by failing to act honestly towards them. Consumer law applies across the United Kingdom.

## **Previous work by CMA's predecessor and other organisations**

4.24 In 2005, the OFT published a market study on care homes.<sup>34</sup> The study made a number of recommendations aimed at improving the operation of the care homes market. For example, recommendations related to improving the information available to potential residents and their families; greater transparency around the cost of accommodation and nursing fees; encouraging written contracts to be provided to residents with greater consistency of terms and conditions; and clearer complaints/redress processes.

4.25 In 2011, GHK Consulting Ltd, on behalf of the OFT, evaluated the impact of the 2005 market study and found that improvements had been made to the sector as a result of the recommendations of that study.<sup>35</sup> For example, the report found that a greater number of local authorities surveyed (45 from 52)

---

<sup>34</sup> OFT (May 2005), [Care Homes for Older People in the UK \(OFT 780\)](#).

<sup>35</sup> [Evaluating the impact of the 2005 OFT study into care homes for older people](#).

said they provide directories covering all homes in their area, thereby improving the information available to prospective care home residents.

- 4.26 The OFT, and subsequently the CMA, have continued to monitor developments in the care homes sector. Moreover, recent reforms concerning, for example, the publication of inspection reports and the provision of information about care home providers (as called for in the 2005 market study) have been included in the Care Act 2014, the Regulation and Inspection of Social Care (Wales) Act 2016 (to be implemented in full by April 2019) and in the Public Bodies (Joint Working) (Scotland) Act 2014.
- 4.27 In February 2016, Citizens Advice produced a report,<sup>36</sup> highlighting concerns about aspects of the care home sector in England, such as short notice periods for fee increases, a lack of transparency around key charges for services such as carer assistance and a failure by some care homes to reduce fees when residents are away for extended periods of time. Citizens Advice recommended greater promotion of consumer protection safeguards within the care home sector, as well as improvements to complaints processes so residents or their representatives can complain more easily about poor experiences. Citizens Advice also recommended that the CMA update OFT guidance published in 2003 on unfair terms in care home contracts.
- 4.28 Since Citizens Advice published its report in February, other organisations such as Citizens Advice Cymru<sup>37</sup> and Age UK<sup>38</sup> have highlighted similar consumer protection concerns regarding the care home sector. Citizens Advice published another report in November<sup>39</sup> which raised concerns that charging practices in some care homes can be confusing and unexpected.
- 4.29 In October 2013, the Department for Business, Innovation and Skills (BIS) produced a report<sup>40</sup> on the adult care home sector that reviewed the incentives created by the regulatory framework and the administrative burden imposed on care homes by different organisations. In March 2016, a government report<sup>41</sup> reviewed the regulatory framework of residential and

---

<sup>36</sup> CITA [‘Hidden Charges in Care Homes’](#).

<sup>37</sup> Citizens Advice Cymru, [Accessing and paying for social care in wales](#), August 2016.

<sup>38</sup> Age UK, [Behind the headlines: ‘stuck in the middle’ – self-funders in care homes](#), October 2016.

<sup>39</sup> CITA, [Taking greater care - why we need stronger consumer protections in the care home market](#), November 2016.

<sup>40</sup> Department for Business, Innovation and Skills, [Focus on Enforcement Regulatory Reviews - Review of the Adult Care Home Sector](#), October 2013.

<sup>41</sup> HM Government, [Cutting Red Tape, Review of Adult Social Care – residential and nursing care sector](#), March 2016.

nursing homes and highlighted the amount of 'red tape' currently found in the sector.

## 5. Themes and possible outcomes

### Themes we propose to consider

5.1 We are considering the extent to which the supply of care homes in the United Kingdom has or may have effects adverse to the interests of consumers, and the extent to which steps can and should be taken to remedy, mitigate or prevent any such adverse effects. In order to examine whether the market for care homes is working well for consumers, we propose to address the following four themes and questions:

1. **Consumer protection issues in the care home sector.** Are older people and/or their representatives being disadvantaged through the use of unfair terms and conditions? Are care home providers engaging in unfair business practices? How easy is it for care home residents and/or their representatives to complain and obtain adequate redress? Are existing protections for residents on these issues sufficient, for example does consumer law work well in this context, or are additional protections needed?
2. **Choosing care homes.** Is there sufficient information and is the information clear and easy to assess when older people and/or their representatives first choose a care home, especially in the context where they may be struggling to understand the issues and options and making these decisions under stressful and time pressured circumstances? Is anything preventing care home residents from moving, for any who are safely able to, when they wish to do so?<sup>42</sup>
3. **Regulation of care homes.** How do regulations in each devolved nation affect competition between care homes in terms of quality and price? Do existing regulations provide adequate consumer protections for residents and/or their representatives? How do local authorities and regulators affect outcomes in this sector, including through their commissioning practices and ‘market shaping’<sup>43</sup> activities? Are current standards enforced effectively and how do regulators and commissioning bodies coordinate to limit the administrative burden imposed on care homes?

---

<sup>42</sup> We recognise that in many cases moving care homes can be very undesirable for residents.

<sup>43</sup> Market shaping refers to a range of activities where a local authority ‘collaborates with relevant partners to encourage and facilitate the whole market in its area for care, support and related services’. The core activities of market shaping are to engage with stakeholders to develop understanding of supply and demand and articulate likely trends that reflect people’s evolving needs, to signal to the market the types of services needed now and in the future to meet them, encourage innovation, investment and continuous improvement ([Care and Support Statutory Guidance](#), paragraphs 4.5 and 4.6).

4. **Competition between care homes.** Is competition working well for consumers and does competition drive choice, quality and value for money in this sector for both self-funded and local authority funded residents, and if so whether there are any impediments to competition such as barriers to entry and expansion and a lack of capacity? If competition is not effective in improving outcomes, what is the role of regulation? What are the key pressures for care home providers that affect their long-term sustainability (for example changes in costs and regulation)? We will also be vigilant to identify any evidence of infringements of competition law occurring in the sector.

### ***Theme 1: Consumer protection issues in the care homes sector***

- 5.2 We will explore consumer protection issues in the care homes sector. We intend to examine if various contract terms disadvantage residents of care homes or their representatives. For example, this might happen if terms and conditions mean care home residents face significant fee increases that occur purely at the provider's discretion or at very short notice, or where the resident could not have foreseen the fee increase. We will also consider if care homes operate any other unfair commercial practices, such as overly long termination notice periods (including following the death of a resident), short notice of fee increases, and large deposits or upfront prepayments not being refunded if the care home closes. We will also consider if information provided on fees and additional charges (including 'top up' fees) is sufficiently clear and transparent.
- 5.3 We will explore the extent to which care home residents or their representatives can complain and obtain satisfactory resolution to their complaint. We will consider if there are any problems in complaint and redress systems, such as confusion over the appropriate complaints pathways and difficulties in accessing these pathways, a lack of support/advocates to help the complainant, long timescales, or residents being reluctant to complain for fear of the hassle and stress and/or fear of retaliation or adverse consequences in the care they receive. We will investigate the complaints and redress mechanisms at every level, including how complaints are dealt with by care homes, local authorities and other funding authorities, and regulators.
- 5.4 We will consider whether the current protections offered by consumer law and other measures (such as sector regulations) work well in the context of care home provision, or whether the nature of the services, the way in which they are offered and procured (sometimes with provision to residents procured by local authorities or the NHS) mean that additional protections might be necessary.

## ***Theme 2: Older people's decision making on care homes***

- 5.5 We will analyse the extent to which older people and/or their representatives face difficulties when choosing a care home, and also if they wish to move between care homes. There may be various factors that give rise to difficulties (apart from the issues covered within the category of consumer protection concerns in theme 1). For example, the choice of a care home is often made at a point where the person may be vulnerable, with reduced physical or mental ability that limits their ability to research and decide upon the most suitable care home. Often the move to a care home is not planned and has to be arranged quickly which can limit the opportunity to shop around and compare care homes carefully. This may also occur in distressing or challenging circumstances, such as following a medical emergency and hospital stay or in conjunction with a bereavement. The older person and their representatives may not have much, if any, experience of arranging care and may lack appropriate information, or be overwhelmed by the quantity and complexity of information they have to evaluate. The process of moving into a care home can be distressing and, once settled, very few older people may choose to move to another home. Indeed doing so could be damaging to their care and health.
- 5.6 We will explore the information available to older people and/or their representatives to inform their choice about care homes. Care homes' offerings may require older people/their representatives to consider many different aspects including location, type of care, quality, additional services, contract terms and pricing. Such difficulties in assessing and comparing options may dampen competition between care homes, as may constraints on consumer choice, such as lack of availability of a place at the time the older person needs to take up residence. Various organisations and groups have different roles and responsibilities in relation to the provision of information about care homes. These include local authorities, care homes, charities, consumer organisations and regulators. We will consider ways to make it easier for older people and/or their relatives to assess information and compare care homes.
- 5.7 We will consider the extent to which older people move between care homes and what may deter them from moving when they might be dissatisfied with an aspect of the service (such as contractual terms and a lack of availability of alternatives). A care home resident may wish or need to move because the home no longer meets their needs or they are dissatisfied with the home or it has become too expensive. A lack of switching may show the market is not working well for residents, but moving between care homes may be very limited because it can be detrimental to people's health and well-being. If so,

remediating issues of concern would be likely to require other measures rather than merely seeking to encourage residents to move.

### ***Theme 3: Regulation of care homes***

- 5.8 We will explore the impact of regulations on competition in the care home sector. We want to understand how the regulatory arrangements across the UK affect care home providers' incentives to compete on quality and price, and whether there are any unnecessary regulatory burdens on care home providers.
- 5.9 We want to understand how local authorities' different activities affect competition in the care homes market. Local authorities play a major role in this sector through: providing information about care homes; funding care home residents; commissioning care home provision; and market shaping and strategic planning obligations.
- 5.10 There are concerns about the sustainability of the provision of care homes spaces under the current public funding regime. While we will not be looking directly at funding issues, which are for government to determine, we will consider how care homes set fees for both local authority and self-funded residents.
- 5.11 We also want to understand whether existing regulations provide adequate consumer protections for residents and/or their representatives.

### ***Theme 4: Competition between care homes***

- 5.12 We intend to examine the nature and extent of competition between care homes, and the consequences for choice, standards of care, quality and charges. We want to understand if operators of care homes face any barriers to entering the care home market or expanding their activities, and how this affects capacity in the sector. In considering how competition works, we will bear in mind the impact of factors such as the current funding system, labour costs, ease or difficulty of recruiting care home staff, capital investment, economies of scale and population density.
- 5.13 It is crucial for the provision of care home services that efficient, fairly competing businesses of different types and sizes are able to operate and invest for the future with confidence. In assessing how competition is working, we will also strive to understand whether any of the key pressures faced by care home providers may affect their long-term sustainability.



5.14 We intend to examine the occupancy rate in care homes. We want to understand if there are any local/regional variations and any differences across types of care services and between local authority and self-funded care home residents, and if so whether this affects choice and competition. We will also examine how occupancy can be measured and whether variation in occupancy rates has an effect on price or quality.

## **6. The scope of the market study**

### **Scope – type of service/definition of ‘care home’**

- 6.1 We will focus on the provision of residential care for older people (65 years old or more) in care homes and care homes with nursing (‘nursing homes’). Generally care homes provide residential accommodation with personal care for persons who, by reason of old age, illness or disability are unable to provide it for themselves.<sup>44</sup>
- 6.2 The adult residential care sector is a segment of adult social care services along with support such as home care, day care, sheltered-housing and care villages. The borders between different care services may not be neatly delineated but in order to be able to explore the issues and evidence in depth, we intend to focus on continuing care that is provided to older people in residential care homes and nursing homes.

### **Scope – residents**

- 6.3 Our market study will cover all older people in care homes and care homes with nursing, regardless of their funding arrangements. This includes care home residents who fund all the care themselves (self-funders), residents who are entirely funded by local authorities (health and social care trusts in Northern Ireland) or the NHS, and residents who partly fund themselves.
- 6.4 We will consider the particular characteristics of residents of care homes. Some older people may ‘plan’ their move to a care home, taking time to research their options. For others, the move to a care home may be ‘unplanned’ with the decision taken in a hurry, aggravated by an urgent need such as leaving hospital or suffering the bereavement of their spouse or partner so they are no longer able to live in their own home. Such people may be particularly vulnerable and often may not take decisions on their own or even directly, as their relatives or other representatives may play a role.
- 6.5 We will also consider if certain residents of care homes face further difficulties such as limited options and increased vulnerability because of actual discrimination or the anticipation of discrimination on the grounds of ethnicity, religion, sexual orientation and/or other factors. If so, the market may not work

---

<sup>44</sup> For example in England this corresponds to: the provision of residential accommodation together with nursing or personal care, a ‘regulated activity’ prescribed under section 8 (listed in Schedule 1 to the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014) involved or connected with the provision of health or adult social care in, or in relation to, England.

well for such individuals.<sup>45</sup> To date, we are not aware of much reporting on equality and diversity issues affecting care home residents and welcome receiving further information on this matter, if there is any to be shared.

## **Scope – geographic scope**

- 6.6 Our market study will cover the whole of the United Kingdom. Adult social care is a devolved policy matter, we will therefore consider the provision of care homes in England and each of the devolved nations: Northern Ireland, Scotland and Wales.
- 6.7 While issues relating to care homes are likely to be similar across all four nations, we will take into account the differences in relation to each nation's policy framework, local authority and funding authority rules and responsibilities, and quality inspection structures relating to care homes as part of our study. Consumer protection law applies throughout the UK and is not a devolved matter.
- 6.8 Care homes appear to compete primarily at the local level for residents as the majority of them will stay close to where they used to live and/or where their friends and family live. We will explore the provision of care homes across all areas of the United Kingdom, including urban and rural areas. Across the United Kingdom as a whole, the care homes sector may be very fragmented and characterised by low levels of concentration, there may be significant geographical variations in level of supply. In any highly concentrated local markets or markets with high occupancy rates, competition may be weak, resulting in higher prices, poorer quality services and a lack of innovation.

## **Scope – areas where we do not intend to focus**

- 6.9 There are some areas which we intend to exclude from the scope of the study:
- (a) Funding for the care homes sector. We intend to focus on issues that may stop the market from working well within the current overall funding levels and arrangements.
  - (b) Issues about the minimum standards for quality of care, set out in specific legislation on care, and which are regulated by specific quality regulators in each nation.

---

<sup>45</sup> The CMA is not an equality regulator, our focus is on whether the market is working well for consumers.

- (c) Leasehold and self-contained independent living properties for older people. Although they may involve a provision of domestic and nursing care, these will be excluded from the study because they are forms of care being provided in the elderly person's own home.
- (d) Respite care. While this may be an important element of a care home's activities we are focussing on the issues around permanent residency in care homes rather than those around temporary respite care.

## 7. Next steps

### Invitation to comment on our market study notice

- 7.1 The CMA welcomes submissions on the market study from interested parties by no later than 16 January 2017, see the [case page](#) and invitation to comment. In addition to general submissions, we particularly welcome responses to the following key themes and questions set out in Box 1, which we expect may vary between sectors and/or each nation.

#### Box 1: Our themes and key questions

##### Theme 1: Consumer protection issues in the care home sector

1. What are the main consumer protection issues in the care home sector? How widespread are these issues and what harm do they cause to residents and their families?
2. To what extent are care homes complying with consumer law, in particular in relation to the fairness of their contracts and their behaviour towards residents and their families?
3. Are the current protections offered by consumer law and other measures (such as sector regulations) sufficient to address these issues?
4. Are there barriers to residents and their families raising complaints when something goes wrong, and how effective are the current complaint and redress systems for care home residents?

##### Theme 2: Older people's decision making on care homes

5. What information and advice is available for older people and their representatives when deciding about entering or moving between care homes? Is it easy to access and understand this information? How can existing information/advice be improved? What further information would be useful?
6. What other factors may impede older people in choosing a care home initially or subsequently in moving between care homes (if appropriate)?

##### Theme 3: Regulation of care homes

7. What impact do regulations have on competition in this sector, particularly on price and quality?
8. How do local authorities' commissioning and procurement practices affect competition in this sector?
9. To what extent is local authorities' 'market shaping' role affecting competition in the care homes sector?

#### **Theme 4: Competition between care homes**

10. How well does competition work between care homes?
11. What are the key pressures for care home providers that are affecting their long-term sustainability?
12. What, if any, barriers exist to care home providers entering the market and/or expanding their activities? Is there a lack of capacity in some geographical areas?

7.2 To respond to this invitation to comment, please email or post your submission to:

**Email:** carehomes@cma.gsi.gov.uk

**Post:** Care Homes Market Study  
Competition and Markets Authority  
7<sup>th</sup> floor  
Victoria House  
37 Southampton Row  
London WC1B 4AD

- 7.3 In providing responses, please say whether you are an individual or a business (or represent consumer or business interests) with a brief summary of the interests you represent.
- 7.4 We particularly want to hear from residents and their relatives if they have concerns about the fairness of a care home's contract (terms and conditions) or if they think a care home has behaved in an unfair or misleading way. For example, we are interested in concerns relating to 'hidden' charges, demands for large deposits without explanation, unexpected fee increases or changes to the service, long notice periods, confusing requests for 'top up' payments, and not handling complaints fairly. Details about how to report concerns can be found [here](#).
- 7.5 Please note that while we are interested in hearing about consumer issues in the care and nursing home sector, we are unable to provide consumers with advice on individual complaints. The [reporting page](#) provides links to sources of advice, information and support.
- 7.6 For transparency and to help debate, we intend to publish on our website summaries of the evidence we receive. We may also include such information in our interim and final report.
- 7.7 Our intention is to publish an aggregated and anonymised summary of submissions by individuals relating to personal experiences and specific

complaints (for example if you are a resident of a care home or a relative of someone who is, and are telling us about your experiences and dealings with care homes). However, if you prefer, you can indicate if you would like your response to be published in full.

7.8 We intend to publish responses from businesses or other organisations. If you are responding on behalf of a business or other organisation (including those representing consumer or business interests), in providing responses:

- Please supply a brief summary of the interests or organisations you represent, where appropriate.
- Please consider whether you are providing any material that you consider to be confidential, and explain why this is the case. Please provide both a confidential version and a non-confidential version (for publication) of your response.

7.9 The Annex sets out how the CMA may use information provided to it during the course of this market study.

7.10 A possible outcome of this market study is enforcement action using either our consumer or competition powers. Therefore, the information provided to us will help us to assess whether care home providers are complying with the relevant consumer and competition law and determine whether enforcement action is appropriate or not, and may potentially be evidence that we use in specific enforcement work that we commence.

## **Evidence-gathering**

7.11 In addition to considering responses from interested parties to this statement of scope document, we currently intend to gather evidence through the following methods:

- Case studies.
- Data available from regulators and market research firms.
- Drawing together and evaluating existing research on care homes especially existing consumer survey evidence.
- Commissioning qualitative research of care home residents and/or their representatives.
- Reporting web page for residents and their families to tell the CMA about their experiences of consumer protection issues.

- Obtaining and reviewing care home contracts.
- Meeting key interested parties including through roundtable meetings.
- Issuing information requests to key parties.

7.12 As the study progresses, we may choose to use other means of seeking additional information.

7.13 We are proposing to undertake some case studies looking at the provision of care home services, market structures, local authority actions and outcomes in several geographic areas, probably corresponding to a single local authority area or smaller. We would welcome any suggestions for suitable areas of the UK as case studies to demonstrate the range of issues raised, either because they represent good practice and successful outcomes, or the reverse.

7.14 Information and updates about this study will be added to the care homes [case page](#) on a regular basis.



## **Annex – Use of information provided to the CMA**

1. This note sets out how the CMA may use information provided to it during the course of this market study.

### **Why is the CMA asking for information?**

2. The information you provide will help us better understand how well the care home market is working for residents and their representatives, and for fairly-competing businesses (for further details of the issues considered see the statement of scope).

### **What will the CMA do with the information I provide?**

3. Your information will inform our final market study report. The report will set out our findings and any proposed remedies to any problems we find.
4. Where appropriate, we may also use information you provide to take enforcement action, using our competition or consumer powers, against a care home provider(s) or may share your information with another enforcement authority (such as local authority Trading Standards Services) or with another regulator for them to consider whether any action is necessary.
5. We may only publish or share information in specific circumstances set out in legislation (principally Part 9 of the Enterprise Act 2002). In particular, prior to publication or any such disclosure, we must have regard to (among other considerations) the need for excluding, so far as is practicable:
  - a. any information relating to the private affairs of an individual which might, in our opinion, significantly harm the individual's interests; or
  - b. any commercial information relating to a business which, if published or shared, might, in our opinion, significantly harm the legitimate business interests of that business.
6. We will redact, summarise or aggregate information in published reports where this is appropriate to ensure transparency whilst protecting legitimate consumer or business interests.
7. **If you wish to submit information either in writing or verbally that you do not wish us to publish or share, please let us know when you contact us with your reasons.**

8. Any personal data you provide to us will be handled in accordance with our obligations under the Data Protection Act 1998 and with other legislation designed to protect individual privacy.
9. Further details of the CMA's approach can be found in [Transparency and Disclosure: Statement of the CMA's Policy and Approach](#) (CMA6).