



# Scottish Care

Voice of the independent care sector

## **Scottish Care response to the CMA's market study of care homes statement of scope January 2017**

Scottish Care is the representative body for independent social care services in Scotland. This encompasses private and voluntary sector providers of care home, care at home and housing support services across the country. Scottish Care counts over 400 organisations as members, which totals over 830 individual services. Our members deliver a wide variety of services and operate a range of business models, some 625 are in the private sector and 101 in the voluntary / not for profit sector.

Scottish Care is committed to supporting a quality orientated, independent sector that offers real choice and value for money. Our aim is to create an environment in which care providers can continue to deliver and develop the high quality care that communities require and deserve.

In relation to older people's care, this sector provides 85% of the care home places in Scotland and over 50% of home care hours. There are more older people in care homes any night of the week than in hospitals – as at 31st March 2016 there were 859 care homes for older people providing support to 33,301 residents any night of the year, with 84.5% of these residents located within the independent sector.

We welcome the opportunity to respond to the CMA's statement of scope in respect of its market study of care homes and look forward to further engagement with the CMA. We believe that the market study has the potential to contribute to the ongoing reform process which is currently under way in Scotland. We are pleased that the statement of scope recognises that the markets in each of the UK's constituent nations have distinct features, particularly in relation to the regulatory position, and we hope the CMA will continue to take that into account in contemplating and designing any recommendations or other remedies.

### **General comments:**

Scottish Care looks forward to working with the CMA during the course of the Market Study process, and in particular to furnishing more detailed information. The present paper is intended to describe the general context in which our members provide their services in Scotland and to respond to the specific

questions asked in the statement of scope. The timing of the call for evidence has meant that we have not been able to address the questions in as much detail as we might have liked, and we would welcome the opportunity to liaise with you further on the various issues.

The CMA has, of course, recognised that the provision of care home services within Scotland has been distinctive for a number of years in comparison to other parts of the United Kingdom. Scottish Care believes that the delivery of care home provision within Scotland, not least the close partnership and collaboration between Scottish Government, commissioning bodies, the regulator and care providers has helped to contribute both to the stability of the sector and to ensuring that the quality delivery of services is embedded in principles of individual choice and autonomy. We would present the following as illustrative of this distinctive dimension:

The nature of the social care market in Scotland is unlike that which exists elsewhere in the United Kingdom. Of the 33,000 individuals who were resident in Scottish care homes in 2016 approximately 65% of these individuals have their care wholly funded by public authorities. In effect the majority of care home providers are acting as an outsourced public service. Further, of the remaining 11,000 or so residents who are self-funders, approximately 90% of these individuals have a significant amount of their costs paid as a result of the Scottish Government's provision of free personal care for the elderly. In other words, almost 97% of care home residents in Scotland have their places paid for either wholly or to a significant extent by the state. There is therefore a very differently-constituted market within Scotland compared to the rest of the UK (particularly in relation to demand-side considerations), in which public authority commissioning practice plays a much larger and extremely significant role.

In particular a National Care Home Contract has existed for some time in Scotland, which provides a uniform commissioning and purchasing arrangement used by most (but not all) local authorities to purchase care home provision.

### **Specific comments on scope of 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?**

Scottish Care does not understand there to be a significant problem with care homes failing to comply with consumer law. While the concerns identified by the CMA may of course arise in individual cases, we believe those would be rare examples. We do not believe there are widespread or systemic issues within the sector in Scotland. For the reasons set out below, there are regulatory controls in

Scotland that we consider reinforce compliance with consumer law.

Scottish Care recognises that choice is fundamental in enabling consumer protection. A fundamental part of the social care policy landscape in Scotland is an emphasis upon increasing choice and control for those who require to access publically funded social care including care home provision. This is evident in Statutory Guidance on Strategic Commissioning, the Procurement of Care and Support Services 2016 Statutory Guidance and in particular in the Social Care (Self-directed Support) (Scotland) Act 2013. This Act is designed to give greater choice and control to people receiving care. This means care services can be 'personalised' to people's individual needs and wishes, including in relation to their choice of care home.

**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?**

As noted above, Scottish Care does not understand there to be a significant problem with care homes failing to comply with consumer law. Compliance with the general requirements of consumer law is reinforced by the fact that all registered care homes are required by social care legislation and by the Care Inspectorate to ensure appropriate regard for and behaviour to residents and their families. These expectations are set out in the current National Care Standards. At present new Standards are being consulted upon which are explicitly based upon human rights principles. They are likely to be enacted from April 2018 and will be a core element of the inspection of service delivery. Critically part of these will ensure principles of fairness and equality are intrinsic to all service delivery.

**3. Are the current protections offered by consumer law and other measures (such as sector regulations) sufficient to address these issues?**

Scottish Care believes that the present system of protection, regulation, registration and scrutiny offer robust assurances that appropriate measures exist to ensure quality provision and positive outcomes for residents.

See answer 2 in respect of regulatory considerations relevant to the treatment of residents and their families. In relation to charges, for publicly-funded placements a financial assessment will be used by the local authority to assess whether an individual is eligible for public funding and if so, the terms of the National Care Home Contract will be applied. This limits the scope for providers to impose additional charges, and so by extension the possibility of imposing unfair charges on the resident.

**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?**

In addition to the requirements of consumer law, the Care Inspectorate requires all care homes to have a clear and accessible complaints policy in place which allows concerns from residents, families and their carers to be heard and resolved. Compliance with these regulatory requirements, and the consumer law requirements they reflect, is reinforced by the possibility of complaining to the Care Inspectorate.

Scottish Care believes that the present system is effective, robust and fair.

## **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?**

There is a wide variety of both local and national information and advice available to those considering care home provision. Care home organisations seek themselves to ensure that individuals considering the selection of a home are enabled to make decisions which are in the best interests of the individual seeking care, at what is often a time of considerable stress and difficulty for the individual and their families. Scottish Care actively supports both its members and other stakeholders in ensuring that advice and guidance is not only accessible but also available in whatever formats are required and necessary.

### **6. What other factors may impede older people in choosing a care home initially or subsequently in moving between care homes (if appropriate)?**

We recognise that, while maximising choice for people is critically important, there are limitations upon choice in Scotland not least because of issues of rurality and geography. In more remote areas there will be fewer care homes and so less choice, and there may also be less overall capacity relative to demand. This is a real challenge in Scotland's remote, rural, and island communities.

A long-term policy aim of successive Scottish Governments has been an increased emphasis on enabling individuals to continue living independently in their own home for as long as possible. This has resulted over the last seven years in an increased tendency for individuals to enter care homes at a later stage in life and illness and as a consequence this has reduced the overall average length of residency. It is therefore increasingly less common for individuals to move from one care home to another. In part this is as a result of increased levels of frailty, developing co-morbidities and more complex clinical conditions.

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

#### **7. What impact do regulations have on competition in this sector, particularly on price and quality?**

The regulations under which care homes must operate are derived from the Public Services Reform (Scotland) Act 2010 and other related legislation. The existence of such regulations and the scrutiny, inspection and improvement work of the Care Inspectorate have, we believe, a significant and generally positive impact upon the provision of care on Scotland. Over the last number of years this has resulted in a significant improvement in the quality of provision as evidenced by Care Inspectorate gradings.

These gradings will take account of innovation, and the Care Inspectorate will highlight a quality and innovative care indicators in its reports. This facilitates competition between providers on quality grounds. This is relevant to all customers, given the ability of publicly-funded and self-funded residents to choose their home as set out at answer 1 above.

#### **8. How do local authorities' commissioning and procurement practices affect competition in this sector?**

Scottish Care is concerned about the extent to which local authorities' multiple roles as funders, commissioners and providers of care home services create conflicts of interest. They then pay significantly higher fees to their own care homes, which allows those homes to offer better terms and conditions to their employees (recruitment and retention of staff is one of the key challenges – and cost drivers – affecting independent providers). This conduct makes it harder for independent providers to compete with local authority care homes.

Beyond those concerns, the ability of residents and prospective residents to choose their care home and have funding follow them means that care homes are able to compete with each other for publicly-funded residents on quality grounds, particularly by reference to the Care Inspectorate's gradings.

The existence of the National Care Home Contract has ensured a necessary degree of sustainability and quality provision within the sector in Scotland. However, as a result of the Public Bodies (Joint Working) (Scotland) Act 2014 the statutory responsibility for the strategic commissioning of care home provision is now placed with local integrated health and social care boards. This places new responsibilities on integration authorities to prepare a strategic plan and to undertake the strategic commissioning of health and social care services from a range of partners.

Over the last seven months there has been a process of review under the guidance of the Scottish Ministers and involving inter alia Scottish Care, COSLA, the Care Inspectorate and the Integrated Joint Boards, with the aim of updating and reforming the National Care Home Contract. Scottish Care believes that this process, based as it is on a wider social care legislative emphasis which seeks to enhance choice and control, will serve to improve both care home delivery and quality provision. Scottish Care will be happy to furnish the CMA with further information on this reform process as it progresses.

### **9. To what extent is local authorities' 'market shaping' role affecting competition in the care homes sector?**

Local authorities in Scotland do not have a "market shaping" role equivalent to those conferred by the Care Act 2014 on local authorities in England. As such Scottish Care is unsure about the relevance of this question to the Scottish market.

Part of the responsibility of the strategic commissioning and planning functions of the new Integrated Joint Boards (IJBs) is to ensure the development of a local market to enable the IJBs to meet the necessary health and wellbeing outcomes of the local population. We are at too early a stage of development to assess the relative strengths and weaknesses of this approach, including its effect on competition.

### **Conclusion**

As stated above Scottish Care welcomes this study but would wish to underline the importance of the study team working with Scottish stakeholders to ensure that the distinctive Scottish dimension is reflected in the study report and recommendations.

The sector in Scotland is undergoing a significant process of review and reform, and we will be happy to furnish the CMA with both information on work to date and the direction of travel of that work. We would also welcome the opportunity to answer any follow-up questions you may have on any of the above issues.