Consumers' Association

Informal Super-complaint on Care Home Sector

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We are writing to submit our second informal super-complaint to the Office of Fair Trading. This informal complaint covers the Care Home Sector. The informal complaint is supported by those organisations listed in appendix 1 which are all members of the Social Policy Ageing Information Network. The intention of those organisations supporting this reference is to expose for discussion the effect of the operation of this market on some of society's most frail and vulnerable consumers. It is hoped that this may lead to the OFT using it powers to both investigate the market and assess the role of the regulatory bodies – the Commission for Social Care Inspection (CSCI) and the Commission for Healthcare Audit (CHAI).

Executive summary

Our key concerns cover the following areas:

The market itself

We do not believe that the market for care home services functions well. We think that the following areas of the market are worthy of particular investigation:

1. Whether public authority fees cover the full cost of providing the service

There is considerable research evidence that the fees paid by public bodies to private and charitable organisations do not cover the full costs, plus a reasonable margin, of providing the service. This creates a number of perverse incentives in the care home market. This is a significant concern given increased demands for service improvements and higher numbers of elderly consumers. Market analysts Laing and Buisson project a rise in demand over the next 50 years. According to Laing and Buisson closure of care homes, although declining from the peak in 2000, remains well in excess of new registrations (Laing and Buisson *Care of the Elderly Market Suvey 2003).*

2. Whether the lower fees paid by public authorities force relatives to cover the real cost

There is considerable evidence that the basic rate for care paid by the state does not cover the full cost of the service. The effects of this problem are many and varied and include cases where relatives of residents are expected to cover the remaining cost. In some cases relatives of residents are approached to sign a separate contract with the homeowner in addition to that of the local authority. There is also evidence that in some cases residents themselves are expected to meet costs of services that should fall within the care package provided by public authorities. There is also evidence that in some areas there are few if any homes available to consumers at the local authority price.

Within the analysis of the care home market we are concerned that the role of all funders, including the NHS, should also be considered. This work should focus on the adequacy of the levels of nursing payments for registered nurse care, and how the payments made by the NHS for those for whom they retain full responsibility (approximately 11 per cent of those in homes providing nursing) may affect the market.

3. Whether there are cross-subsidies between residents

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[2] *The Residential Care and Nursing Home Sector for Older People: An Analysis of Past Trends, Current and Future Demands. PRSSU*

A further problem in the funding mix in the sector focuses on the problem of a possible cross subsidy between different groups of funders. For some time there has been research evidence that that residents not paid for by public authorities pay higher fees than those paid for by public authorities. There is an obvious concern that these payments are high because of a need or desire to cross-subsidise the public authority residents. The problem of effective rent transfers from elderly consumers and their families to local authorities is a serious concern that is worthy of close investigation.

4. Whether at a local level there are dominant positions of either purchasers or providers
The market power that appears to have been accorded to local authority and NHS as customers of care home places is a subject of particular concern. We think that the Office of Fair Trading must look at the market structure for the provision of care homes more closely and review the regulatory structures that create the current distribution of market power. Some of the practices that are apparent in the sector, such as preferential services for publicly funded residents, and cross subsidies, tend to point to prima facie evidence of a potential abuse of dominance by public authorities in the market.

Conversely in some areas with only a small number of homes, particular providers appear to have market power in local areas. The manner in which market power can be exercised on the supply as well as the demand side must be assessed closely in any OFT investigation. For the person requiring a place in a care home it is the way the local market functions that is primarily important.

The consumer
The position of the consumer in the care home and nursing home markets is a peculiarly vulnerable one. The OFT looked at this sector five years ago and focused on a series of issues. We think that those issues looked at in 1998 are worthy of a second look to assess whether the recommendations made have either been implemented or worked in the manner hoped for. However, any revisiting of that analysis should be linked with wider issues that affect the care home market and how it works for older people as consumers. Of particular concern is the manner in which many consumers enter the care home market.

We think that in order to do this it would be beneficial for any investigation to present a clear statement about what an ideal market would look like from the consumers perspective. This would be useful as a yardstick against which the OFT can measure their recommendations. For those representing the interests of older people an ideal market would ensure that there was a choice of homes from within an area that would enable social/family contacts to be maintained; that consumers would receive information in a way that allows them to make an informed choice in a reasonable time-frame. Consumers must also be made aware of the present costs of that care and the likely future costs. It is important that consumers are aware of how those costs are arrived at, both in terms of overall costs and with a breakdown to show separately the housing/hotel, personal care, and nursing care costs. Care should be of a high quality that is aimed at helping the person receiving the care remain as active and as engaged as possible. However, at the same time elderly consumers should have a reasonable expectation that those who cannot return to their own homes will be able to remain in the home for the rest of their lives. In essence, regardless of whether the consumer is within the independent sector or the public sector and regardless of the source of funding of their care, they should have the same rights and protection both in terms of consumers of services and protection of their human rights.

In particular we think that the following are worthy of consideration:

1. Are information flows before and after choices sufficient?
There is considerable evidence that consumers face significant problems in accessing reliable information while looking around for a care home. For example, there is no central measure of performance, nor publicly available information that is easy to access. This is particularly important given that older people are making these important life choices often at a time of stress and with pressure on them to make those choices quickly. For people with dementia it is often not their choice, and for others it is more a question of necessity than choice that they move into the care home market.

Established databases on care homes do not contain sufficient information to make an informed choice as to whether a care home can provide the type of care they need, especially in dementia care. There is evidence that relatives often feel that they had inadequate information to make the right choice of home. It is also not clear that the information requirements implemented by the OFT in 1998, and more recently from the National Minimum Standards have fed through to better performance in the sector.

Post choice information flows are also important given the largely one off nature of the consumer decision over a care home. When the consumer has chosen a particular home it is not clear that information flows are sufficient to allow that consumer, or their relatives, to monitor performance, or compare it to rival care homes.

2. Are contracts clear and fair?
The drive under the Care Standards Acts 2000 to provide contracts for residents has been a welcome move. However, it is not at all clear that the terms upon which these contracts have been drawn up are transparent, fair or of a sufficiently high standard. In addition, care home contracts tend to be both complex and long lasting. The contract very often has to last a number of years and needs to cover the possible failing health (both physical and mental) of a resident, and balance this with the need to protect other residents. Only care homes providing nursing care are required to break down their contract to show what is paid for nursing, personal and hotel costs. Given the OFT's Unfair Contract Terms powers we welcome the move by the Office to scrutinise the contractual terms for consumers in the sector, and the recently published guide for advisers on to what to look for in a contract.

3. Is a consumers' financial independence respected?
The Office raised this issue as a factor in 1998. We would welcome the OFT looking again at this factor and assessing whether any action is needed. Of particular note is the way the implementation of the nursing payments regime has meant that in some homes residents see the effect of the payments whereas in others they do not as the home does not pass the payment on to the resident.

4 Can consumers get sufficient redress in the sector?
In a sector with so many vulnerable consumers the issue of redress has to be taken very seriously indeed. The market power that care homes and local authorities have in relation to individual consumers makes effective independent redress mechanisms a vital element of this system. The Office looked at redress mechanisms in their 1998 report. We would welcome a reassessment of the effectiveness of the resulting reforms.

5. Are consumers sufficiently protected by legislation?

Although the providers of independent care homes are offering services that used to be the responsibility of public bodies (ie the NHS or local authorities), there is discrepancy between the protection consumers receive in care homes run by the local authority and those who are in the independent sector. Even if the care is provided under contract to a local authority consumers in independent care homes, such care homes are not considered by the courts to be public bodies and therefore not subject to the requirements of the Human Rights Act 1998 (*R v Leonard Cheshire Foundation- Court of Appeal).* Additionally residents in care homes are normally licensees rather than tenants so do not have the protection of the legislation that applies to tenants.

It would be useful for the OFT to investigate whether the differential status of residents of care homes adversely affects them as consumers of housing services. A further point for consideration is the access of residents in care homes to other services they need. There is evidence that residents of care homes have more difficulty in accessing the medical services they need from their Primary Care Team, and are paying for GP and other health care services that would be free elsewhere.

6. What is the role of the regulators in helping consumers?
In 1998 the Office of Fair Trading produced a report which was the first of its kind to address issues relating to care home residents as consumers. This was the first time residents had been considered as other than passive recipients of services. However there is a concern that on a local level Trading Standards Officers are unlikely to become involved in ensuring that resident's consumer rights are protected. We think that the OFT should investigate the guidance given to TSAs in relation to care home residents as consumers and identify if further action is needed and how their regulatory role links with that of the NCSC.

Conclusion
The care home market is an enormously important one for one of the most vulnerable groups of consumers. It is essential that this market functions well and does so in the interests of resident as consumers. However, it would appear that there is a wealth of prima facie evidence to indicate that the market does not function in the best manner possible. This market failure exists on a range of fronts, from the market power of local authorities, the NHS and local care homes through to fundamental issues of consumer redress, contracting and information.

The recent Bettercare judgment at the Competition Appeals Tribunal, and other cases which have been brought by either providers or residents (ie Birmingham county Council v Birmingham Care Consortium and others and Wilson v Lincolnshire CC) regarding the fee levels paid by local authorities, illustrate the complexity of the problems facing this sector. The recent death of Violet Townsend (and its subsequent inquiry), and other cases that have received media attention recently are also indicative of the way older people are caught between the conflicting interests of care homes and local authorities over pricing.

We are submitting this informal complaint on the basis of the evidence briefly described below and with the support of a wide number of groups with a much deeper base of evidence in the sector. The OFT has the advantage of having carried out a limited review of the sector in 1998. We think that a revisiting of the 1998 work of the Office, combined with a broader look at the issue of the use and possible abuse of market power by public authorities will allow the OFT to make recommendations and take actions that will benefit exactly the sort of consumers least able to take action themselves. The need to protect residents as consumers and the impact of funding bodies, and the role of the regulatory bodies in the sector makes this a mix of issues worthy of a

complaint. The authority of the OFT to review regulations and practices of governmental authorities as well as the way providers themselves are reacting to changes within the market makes a review of this sector timely.

Background Analysis for the Complaint on the Structure and Regulation of the Market for Care Homes

Overview and brief history of the problem

The OFT report into the Care Home sector took a broad view of the problems faced by residents of care homes. It explicitly took the position of the consumer of care home services and sought to address some of the key concerns that those consumers had in dealing with care home providers.

The avowedly consumer centric view of the OFT report of 1998 had significant advantages when it came to addressing problems of the behaviour of care home providers. However, this approach did not deal very effectively with the more structural elements of the care home 'problem'. Of particular note the OFT report did not cover in detail the issue of market power by local authorities, the issue of the market being essentially a local market issue from the point of view of consumers, the issue of cross-subsidies between consumers within care homes, the financial viability of the sector and the problems which care home residents face in influencing the provision of their service, and the role of those charged with regulating care homes.

In order to look more closely at addressing the structural elements of the care home market, it may be useful to look at how we have arrived at the current situation (This is just a brief outline See Means and Smith *From Poor Law to Community Care*, and Easterbrook *Moving on from Community Care* for a more detailed analysis). The enormous growth in independent care home places took place during the 1980's in a largely unplanned way. Benefit changes in 1980 not specifically linked to care homes, meant that the rules allowed the then DHSS to pick up the bill for residential and nursing care. Until 1985 the amounts paid were decided by the local benefits office, with the amount varying depending on the local rates charged by the homes. As a result of concerns that this was open to abuse, national limits were set for different client groups and categories of care. The person's need for such care was not considered, and funding was given purely on the basis of whether the individual qualified for benefit. This meant that people with few resources were able to access private care provision for the first time, and were not longer reliant on securing a place in local authority accommodation if they needed personal care, or remaining in a long stay ward if they needed health care.

At the same time there was a significant effort to move people out of long stay hospitals. Many hospitals, in particular for those with mental health needs or learning disabilities, were closed and the patients either moved into community settings or to residential facilities. As most of these patients were unable to fund their own care, it made little difference to them financially, and represented a positive improvement away from large hospital wards. In relation to older people it was increasingly difficult for local authorities and the NHS to meet the needs of increasing numbers given the lack of funding going into providing such services. The availability of DHSS funding tended to mean that there was little incentive for investment in home care services, as it was cheaper to place someone in a care home than provide anything over a basic package of care.

It was for this reason mainly that the 1993 reforms were targeted at cutting the rising costs of state funding of care homes and to provide incentives to local authorities to provide more home

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care. Local authorities became the gatekeepers of deciding who needed to go into a care home through assessment. Those residents already in a care home by 1 April 1993 remained the responsibility of the then DSS and continued to receive higher rates of benefits towards the costs of their care home (Preserved Rights). However, there were often shortfalls between the cost of the home and the amount the person received in benefit.

Initially under the reforms there were two further incentives for local authorities to use the independent sector. Firstly, it was a condition of the funding that 80 per cent be spent on the independent sector both for care in care homes and care at home. Secondly, the benefits regime in care homes was more generous in for the independent sector than it was for local authority homes, thus making it cheaper for local authorities to place people in independent homes.

Thus between 1975 and 1993 the number of residential places in the independent sector rose from 64,000 to 218, 200, and nursing home places from 24,000 to 172,000 with the majority of the increase occurring between 1985 and 1993 (Figures taken from Easterbrook *Moving on from Community Care)*. Many of these homes were set up by small providers, often transferring from working in the public sector. It is a more recent phenomenon that large corporate providers have stepped into the market. Two thirds of capacity is still in the hands of independent small businesses (Laing and Buisson *Care of Elderly People Market Survey* 2002), although there is a significant problem approaching with a large number of the original care home owners reaching retirement age. The total market is said to be worth some £9 billion.

The growth in numbers of places across all sectors continued until 1996 with a peak of 575,600 places. Since that time there has been a decrease of 64,300 places (Laing and Buisson, ibid). Prior to 1998 the bulk of the reduction in places occurred in the public sector as local authorities either closed their homes or transferred them to the independent sector. Direct public provision of care home places now only accounts for 16.9 per cent of the places. Since 1998 the numbers of independent sector places has also declined.

Until 2002 when Preserved Rights ended, many local authorities based their fee levels on the amount paid by The Department for Social Security, and were reluctant to deviate too far from the DSS set figures which were linked to a specialised measure of inflation (the ROSSI index). There are no longer such benchmarks for local authorities to measure their increases

At the same time home care has expanded not in the numbers of households provided with care, but in the intensity of services provided to the recipient households. In the past people with such needs may well have moved into care homes rather than be helped to stay at home. There is also increased investment in extra care housing. In essence the care home market is undergoing a period of change and transition.

Market power by local authorities

The importance of the local authority as a demander of services in the care home market cannot be underestimated. It is estimated that 60-70 per cent of residents of care homes are funded by local authorities. The NHS is also a purchaser of care in full for about 11 per cent of residents in homes providing nursing care, and purchases the registered nursing element for the vast majority of residents in such homes. It should be noted that the care home sector is composed of

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a range of providers from local authority care homes, through charitable and faith based institutions to private homes, providing personal care, specialist care and intensive nursing care in some homes.

In the Competition Appeals Tribunal Bettercare Judgement much emphasis was placed on the comparative role and growth of the independent sector vis a vis the public sector, and the way that local authorities and NHS bodies have 'contracted out to the private sector the function of providing resident and nursing care. Instead of relying on providing those services itself, the public sector has relied increasingly on the private sector to do so.'

The role of the local authority in the funding of care home provision is thus centrally important for a number of reasons. The core issues outlined by the Joseph Rowntree Trust (*A Fair Price for Care* 1998 and *Calculating a Fair Price for Care* 2002) in this area include the following

Underfunding and misuse of monopsony power

'Using the illustrative example of a nursing home, the analysis suggests that around £350 per week at 1997/98 cost levels offers a reasonable return to an efficient provider of good quality amenities and care. This is some £40 higher than the DSS rate of £311 per week, as well as being higher than the fee levels that most local authorities are prepared to pay.' *A Fair Price for Care.* In 2002 the JRF suggested the shortfall per week was £74 per week for nursing care and £85 per week for residential care.

A market can hardly be said to function effectively when the providers in that market are paid prices fixed below their reasonable returns. Of course, it is up to the OFT to determine whether the costs of providing the service are fully covered by the local authority rate. However, we would point to a number of factors that would appear to support the contention that costs are not adequately covered by transfer from public authorities. The first is the fact that care homes are going out of business at a significant rate; that provision of places is declining, rather than rising to meet the demand of an increasing aging population; and the fact that cross subsidy occurs.

Since funding was made available to local authorities through the Building Capacity Grant there have, in some areas been a significant increase in fees paid by local authorities. In *Calculating a Fair Price for Care* it was stated that some authorities in the South of England committed a large part of their grant to increasing fees by substantial amounts. However the report still finds that 'even if all the extra £200 million Building Care Capacity Grants were to be spent on increased care home fees, it would still not be sufficient to service investment requirements that are clearly predictable in the medium to longer term future'.

On the issue of underfunding we think it is clear that the position of the local authority, whether acting as the agent of the national government or not, is providing funding to care homes that is simply not adequate to meet the returns necessary to keep large numbers of these providers in the market place. The fact that this funding accounts for 60-70 per cent of the market is an important measure of the scale of the issue.

The issue of abuse of monopsony power by local authorities in the provision of care home services is a difficult one to disentangle from the exercise of governmental authority as a whole. For the purposes of this analysis this does not really matter. What is important is the effect of this power on the provision of services for elderly consumers. We will deal with each issue in turn:

Cross-subsidy or transfer from outside the home

‘£80 million per annum is spent on ‘top-ups’ to bridge the visible disparities between care home fees and what state agencies are willing to pay. The bulk of this is met by residents’ families. If the state were to reduce its contribution by £5 per week, this would increase the burden for families and other agencies by £75 million per annum.’ *Fair Price for Care?*

Evidence from organisations supporting this complaint backs up this research, from the number of enquiries they receive from families who are expected to make up the shortfall in the form of a third party top-up, and complaints about not being able to find a home with a vacancy in the locality at the local authority price. Research undertaken by Which? (see below) found that 40 of the 70 homes quoted prices higher than the maximum limits the local authority would pay and in two areas all of the ten homes contacted in an area quoted prices higher than the local authority price.

If the transfers from local authorities to care homes is adequate to cover normal returns then the issue of cross-subsidies, or transfers from elsewhere, is unlikely to arise. However what is clear from the analysis of the care home sector is that cross subsidies occur both internal to the system and external to it (more properly conceived as transfers). The issue of internal cross subsidy raises a number of concerns outlined below. However, the issue of transfers from outside the care home funding model raise a number of highly specific issues:

1. Is the amount transferred from relatives required because payments from the state are too small? This may be an issue of distributional equity and more soluble by political means – however, it may also cause the following problem:
    1. Does is give the care home provider the power of a price discriminating monopolist? In essence does the local care home possess market power in relation to its residents that enable it to price discriminate or does the local authority transfer an element of its local market power to the care home?
    2. Are those consumers and their family members providing the subsidies/transfers aware of the true price of the subsidy?
    3. When are they made aware of the subsidy amount?
    4. Upon what contractual basis is the subsidy provided?
    5. How is the subsidy assessed and how is it varied?
    6. What is the effect on the resident if the subsidy is not paid? (numbering?)

Cross subsidies from within the home

‘There are ‘hidden’ disparities, where local authorities and the DSS pay fees in full (with no top-up), but at rates which are insufficient to meet all costs. In these cases, deficits might be made up from providers’ charitable funds or from ‘cross-subsidisation’ by self-payers, who often pay more for identical accommodation and care.’ *Fair Price for Care?*

With the abolition of Preserved Rights occurring after the quoted report was written the local authority has gained greater importance in funding matters. However, it is still common for those organizations running information lines to have enquiries about the additional amount resident have to pay if they are self-funders.

The issue of the internal cross-subsidy is in many ways simply a less transparent version of the problem of transfers from outside the care home. However, from the point of view of a market analysis we think that the cross subsidization of care home places by private funders of local authority residents is a clear indication of the misuse of monopsony power by the local authority. Of course, it is not unusual for providers of services to charge different prices and indeed to offer bulk discounts for big purchasers. However, the important factor here is the fact that the amount

provided by the bulk buyer does not cover the normal activities of the business. Private funders are thus not simply paying a higher amount due to lower bargaining power, but paying a higher rate to cover the fact that the bulk buyer is not paying sufficient to cover the costs.

Indeed one could argue that the local authority can only underpay providers of care home services because it knows that the losses it imposes on the business can be made up from elsewhere. This is hardly the sign of an effectively functioning market.

Inadequate returns

'The study concludes that private sector care home operators are being discouraged from investing in good quality new stock for clients dependent entirely on state funding, as there are only a few regions in the UK where expected returns are sufficient to justify commercial investment.' *A Fair Price for Care*

The importance of investment for the care home sector cannot be understated. The provision of high quality care for elderly and infirm members of society should be a priority in the area of social care. There must be adequate provision within geographical areas. However, the issue is more relevant when one considers that demand is unlikely to decrease, and that already in some areas demand is not being met currently. If that demand is to be met then investment will be needed in new premises. This can only occur if the existing players see adequate returns to encourage investment, or new entrants see an opportunity to make sufficient returns to warrant expenditure. The current performance of the market does not warrant much support for this hope. There is also concern that only the larger companies will invest in the market using economies of scale, thus moving away for the original desires of the community care reforms to provide care in more homely environments than could be achieved in hospitals.

The importance and role of Bettercare case

There has rightly been a good deal of interest in the implications of the Competition Appeals Tribunal judgment in the Bettercare case (Case No 1006/2/1/01 Bettercare Group Limited (supported by the Registered Homes Confederation of Northern Ireland Ltd) and Bedfordshire Care Group and the DGFT Neutral citation: [2002] CAT 7). The case centred on the duty of the Director General of Fair Trading to investigate complaints made against a local authority in the relationship that local authority has with the providers of statutory residential homes and contracted out social care. The DGFT declined to investigate a complaint of abuse of dominance by the Bettercare Group and was challenged. The final decision of the Competition Appeals Tribunal bears repeating:

> *290. We therefore unanimously find, on the material available to us, that North & West's activities in running its statutory residential homes and engaging in the contracting out of social care to independent providers are for the purposes of the Competition Act 1998 to be regarded as economic activities for the purpose of deciding whether North & West is an undertaking within the meaning of section 18(1) of the Act.*

The implications of this judgement are, of course, open to argument and interpretation. Our view is that the Bettercare judgement, and the fact there are now powers under the new Enterprise

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Act to analyse markets more widely, affords the OFT an opportunity to review the manner in which local authorities contract with non-state actors for the provision of social care.

The problem of the care home as price discriminating monopolist

We noted in the question of cross subsidies and transfers from relatives that there was a fear that the care home would be placed in the position of a price discriminating monopolist. This is important for the consumer, or customer (if a relative paying for an elderly parent), because it would place them at the wrong end of a relationship where the effects of the market power of the local authority was simply passed onto the relative by way of a restrained choice. A monopolist requires three things to enable them to become a price discriminating monopolist; a measure of market power; an understanding of the reserve price of the customer; and an ability to restrain arbitrage.

It is clear to us that in areas of limited provision the local care home has a degree of market power. The number of care homes in any one area tends to be limited and indeed increasingly so. Evidence points to the difficulty of finding a place for an elderly relative (see Which February 2003). The available supply of beds and rooms is such that the power of the consumer to shop around is restricted.

Even in an area with very good provision the likelihood that a consumer will engage in arbitrage is extremely limited. The severe trauma associated with transferring elderly residents from one home to another is well documented. Consumers of care home services are extremely unlikely to want to move homes on a regular basis as a means of saving money. Many are too afraid to try to move even to get a better quality of care.

On the problem of care homes knowing the reserve price of consumers, evidence provided by organizations with information lines suggests that pricing issues are presenting considerable problems for care home consumers. While only acting as a proxy measure for this purpose they are, however, indicative of a problem that the OFT should investigate.

If the problem for all consumers seeking care home places is difficult, then the problem is amplified when a consumer needs to find a home that can cope with a particular condition (especially dementia). This is particularly the case if there is a partner who wants to stay in regular contact and visit daily. Once residents are in a home the chance of them shopping around and switching residences is even lower than the wider care home populace.

Misuse of monopsony power

Given that we are looking at a market where the funds provided by the monopsonist customer are unable to generate sufficient returns to such a degree that smaller customers are forced to meet the shortfall, we have prima facie evidence of a poorly functioning market for private consumers. It is also important to look to the behavioural implications of this disparity. That is, is there a similar provision of service for the customer be they small or large? In the area of care homes and nursing homes perhaps the most important element of the service will be the accommodation and related amenities. We note from the Rowntree work that the monopsonist customer very often demands higher standards of service than those subsidizing the service that it underpays for. They are also in a position to demand more favourable terms in their contracts, for instance regarding retainers if the person is in hospital or shorter periods of payment being required if the resident dies. Some investigation of the differences between contracts entered into by local authorities and those offered to residents who fund their own care may be useful.

We also note from Bettercare that the abuse of dominance alleged by Bettercare included the following:

202. ….In this case there are several allegations of anti-competitive conduct by allegedly dominant purchasers of residential or nursing care services which occur in the papers in one form or another (although some of them admittedly do not appear in Bettercare's original complaint). These include allegations that:

(i) North & West pays significantly higher prices to its own statutory homes than it is prepared to pay the members of the Registered Homes Confederation, the difference being between about £40 to £70 a week (North & West) or £70 to £100 per week (Mrs Montgomery);

(ii) the price paid by North & West to acquire residential and nursing services does not cover the cost of providing them by Bettercare. (A similar complaint was made by the Bedfordshire Care Group);

(iii) factors (i) and (ii) make it difficult, if not impossible, for undertakings such as Bettercare and other Members of the Registered Homes Confederation to provide adequate service levels or even remain in business, not least because North & West is able to pay higher salaries to attract trained staff;

(iv) in addition, the arrangements for "topping up" whereby, it is alleged, the families of residents placed by North & West in the private sector homes are expected to contribute some £30 per week to the cost of care, tends to favour North & West's statutory homes;

(v) North & West has refused to negotiate the prices or contractual terms, or take sufficient account of rises in the cost of living, or of the different costs associated with different types of case, or to define or apply proper eligibility criteria for different kinds of patient;

(vi) according to Bedfordshire Care Group, Bedfordshire County Council has sold its statutory homes to a private operator and is now paying that private operator higher prices than it pays to other private operators of residential homes.

We have taken some care to look at the Bettercare judgement. We realise that the decision of the Appeals Tribunal has placed the case back before the OFT. We wish in no way to prejudice the outcome of that case. However, the core of the CAT Bettercare judgement raises what we think are enormously important issues worthy of further and broader consideration. The decision that local authorities in their dealings with non-state care homes are engaging in business dealings has huge implications for the future functioning of this sector. To date we have seen little indication that any authority is assessing the implications of the judgement for the sector.

The Bettercare judgement poses a challenge to the care home and nursing care sectors insofar as it challenges the existing contracting relationships within the sector. We think that the OFT is in an ideal position to analyse the implications of the Bettercare judgement for the care home and nursing home sector and recommend a way forward for the future relationship between local authorities and private sector companies.

Of course the original Bettercare complaint is still before the Office of Fair Trading and under investigation. However, the implications of this case should be taken forward in a more systematic manner by the Office. The ability of the local authority to demand higher standards of service at the expense of other customers is an issue worthy of further investigation in and of itself, irrespective of the Bettercare case.

It is interesting to note that the role of the local authority as a monopsonist demander of services has been little analysed by consumer and competition regulators. Although work on this is being undertaken within the Department of Health with a view to improving commissioning, and to ensure that decisions are made strategically, it is not clear whether this work has linked with other work undertaken by OFT. This is partly due to the fact that the regulatory power has not been available to competition authorities to review the behaviour of local authorities as customers and because there has been a general unwillingness to deal with the interface between the state and the non-state providers of services.

It is interesting to note that there is some evidence of care homes grouping together to combat the monopsony powers of local authorities. Ten homes in Lincolnshire joined together and brought a case to the High Court (8 May 2003) and it was agreed that they should enter into mediation with the local authority over price. More recently on a national basis care homes have formed a body (English Care) to address the underfunding issue facing the industry. It now represents over half of the care beds in the private sector (English Care Press Release 24 June 2003). We are concerned that the interests of the consumer of care home services is not lost in what appears to be an approaching battle between care home providers and local authorities.

Conclusion on market structure issues

We think that it is clear that the market for care home and nursing home provision is not operating in an effective manner. The poor returns and system of transfers from outside the system and cross-subsidies within are clear indicators that there are profound problems with the sector. If one adds to this the overwhelming power in local markets of local authorities then it becomes clear that the sector is one worthy of further investigation.

To this indicative list of problems can be added accountability for local authority decisions; that is the ability of the consumers of the service to influence the price that is paid for that service. In addition the inability of consumers to influence local authority decisions about closure or transfer of local authority homes to the independent sector. There is also the key issue of redress for consumers of local authority funded care home provided services.

[8] Press release 24 June 2003

[9] Haggarty and others v St Helens Council. 27 March 2003

Consumer protection issues

We note that a review of the position of consumers in the care home market is not new territory for the OFT. In its 1998 report 'Older People as Consumers in Care Homes' it focused on four main areas:

- **'information** - were residents given sufficient information to enable them to choose the best home, and was it made clear at the outset what was included in the fees?
- **contracts** - whether the residents were given contracts, and did the contracts clearly explain what services and facilities were included, the terms and conditions of the residence and how to make complaints?
- **financial issues** - how adequate was the financial protection given to residents for example, did they have control of their own money, did they have to surrender their benefit books on entering a home, would they risk losing their money if the home closed down because it had not been held in a separate account? and
- **redress** - were the existing complaint procedures sufficient, known about, and effective?'

We think that the areas of interest back in 1997/1998 are still relevant today. Indeed some of the key developments in terms of both problem and potential solution warrant further study by the OFT. However we think there are in addition other aspects to consumer protection that are also worthy of consideration.

Are information flows before and after choices are made sufficient

The provision of **information** to consumers seeking places in care homes is an area of some considerable concern. This is particularly important given that older people are often making these life choices at a time of stress and with pressure on them to make those choices quickly. For people with dementia the choice is often not theirs, and for others it is more a question of necessity than choice that they move into the care home market.

In our own work, extracted below we attempted to find a hypothetical place for a relative in a care home (Care homes – Which? Feb 2003). The hypothetical nature of the care home place, of course, provided the researcher with the luxury of making a decision in an informed and balanced manner. As we have argued above many consumers are not in that position in this market.

Extract of Which Feb 2003

What We Found

We made 70 phone calls to private care homes across Britain (see 'Our research', below). In all areas, at least seven of the ten homes we contacted were full, so the choices for anybody seeking care would have been severely limited. Of the 70 homes we contacted, only 15 were able to offer us a single room. In two other cases, we were told that the home could offer a space only if the resident was prepared to share a room.

Our research replicated what an ordinary consumer might do when trying to find a care home. Often, people are simply given a list of homes by their local authority, or have to choose a home by searching through *Yellow Pages*.

Our Research

We made 70 phone calls to 10 randomly selected care homes in each of seven areas of the country: Brighton, Bristol, Coventry, Glasgow, Liverpool, Newcastle, and the Peak District. Our researcher asked each home if they had a single room available for a female resident whose

needs would be classified as low dependency. The numbers of homes with vacancies in each area are shown on the right.

We also asked for information about the price of the room, and collected brochures from the homes, and copies of their contracts with residents. Finally, we asked the local authorities in each of the seven areas about their funding policies for older people in residential care. The research took place during November 2002.

Number of homes out of ten with a vacancy

Coventry	3
Liverpool	3
Newcastle	3
Glasgow	2
Peak District	2
Brighton	1
Bristol	1

Lack of choice In both Brighton and Bristol, we had to make ten phone calls to find a care home with an available room. We didn't visit any of the homes, but there's no guarantee that any of those with vacancies would suit your budget or meet your needs. Care homes offer varying types of care, and provide different facilities, as well as sometimes charging vastly different fees.

Waiting lists Staff at one home told us that we might have to wait as long as two or three years before a room became available. However, in most cases, home owners were reluctant to tell us the likely length of wait, as this can be so unpredictable.

Explanations Several homes told us they weren't taking in any new residents because they were either closing down or changing ownership. This suggests the pressure on places could worsen in future, as residents of closing homes have to seek new accommodation.

Some homes had no spaces because they were changing the type of care they provided, for example to offer specialist care for people with dementia.

Finding information about a care home is a far from simple task. This makes the task of the consumer more difficult. The lack of any single metric on which to base a decision leaves the consumer at the mercy of personal assessment based on a visit, word of mouth or anecdotal evidence of another kind. It is also clear from other groups working in the sector that getting information about what is available, how much is charged for services and what procedures are laid down for the sector is far from simple. Although homes now have to produce brochures, such is the pressure on relatives that there is scant chance to read them all carefully and look at a number of brochures and homes.

Are contracts clear and fair?

The areas of **contracts** has become notably more complex since the OFT report of 1998. The development of uniform local authority contracts, the requirement for individual contracts (where many previously did not exist) and the creation of Unfair Contract Terms powers for the OFT, provide ample reason to re-visit this issue in the care home sector.

The contracts in the care home sector are complex in that they have to cover a multitude of variables, while at the same time being effective for the period of the residency which can be a number of years during which the resident may have various health needs.

There are particular areas of concern, many of which have been picked up in the recent draft of the guidance on unfair terms and conditions produced by the OFT. One area that needs further consideration is that there are times when the contract has to be ended and this is out of the control of both the home and the resident. This may occur, for instance, when a resident's health needs are beyond the ability of the home to meet and so breach that part of the requirements that the home does not seek to care for people for whom they are not able to do so. There appears to be confusion about who has a duty to give notice in such circumstances. This causes problems for the resident if, as well has having to pay for care in a home providing nursing care, they have to, at the same time, pay for the notice period in the home. This payment of notice occurs precisely because the home can no longer be allowed to look after the resident.

Can consumers get sufficient redress

The issue of redress is, as always, of central importance to consumers in complex service markets. We think that the issue of an independent element to the care homes redress process needs re-assessing by the OFT. It is essential that residents in all care homes can be helped in making complaints and all too often those working with residents find that the imbalance of power between the provider and the person who relies on the provider for care is too great. Even when relatives make complaints on behalf of a person there is fear that there will be some detriment to the care the resident receives. It would be of help to look at whether the complaints mechanisms set up under the Care Standards Act and overseen by the NCSC are working and whether they could be improved to help residents get greater access to redress. It would also be useful for the OFT to study how such processes link in with more established redress mechanisms under existing consumer legislation.

Are consumers sufficiently protected by existing legislation?

A further problem in the sector is evidenced by some recent legal developments. Recent case law has indicated that consumers in independently funded homes are at some disadvantage compared to those in local authority provided homes. This is because the latter clearly come within the description of being a public body in relation to the Human Rights Act 1998, while the former do not. In the Leonard Cheshire case (Leonard Cheshire ex p Heather (2001) CCLR 211(2002) it was held that where a public body chooses a private body to exercise part of its functions, those functions are considered to be private and the private body is not responsible for compliance with the Human Rights Act. This approach has serious implications for the care home sector in of the increasing privatisation in a contracting state.

The Court of Appeal in the Cheshire case suggested that the contractual clauses between the local authority and the home should reflect the resident's human rights. This may presage a move from individual spot contracts to block contracts (which at the same time would still need to be compliant with the Choice of Accommodation Directive, Currently LAC (92)27 but currently being consulted upon). However the Choice Directive can only have a limited value to consumers if there are few homes from which to choose. This is a particular problem for people suffering

[10])
[11]

from dementia were there are areas where few homes fit for the purpose of caring for this group exist.

The problem of Local Authorities operating a waiting list system for care home places highlights another problem for consumers exercising choice in the care home market. The use of such waiting lists means that elderly consumers are often left in situations which are not meeting their needs adequately (either hospital or at home). This lack of provision indicates that the local authority is in breach of its statutory duty to accommodate a person that it has assessed as needing such accommodation. This principal was clearly established in a recent Scottish court case. (R v South Lanarkshire ex p MacGregor CCLR Vol 4 p 188 (2001). It would seem that although legislation is in place to protect residents, the market as it currently works means that these rights are not always observed by local authorities.

Consumers in care homes also face another legal anomaly when compared to residents of other forms of accommodation. In all other settings where occupation is expected to be long term the terms of occupation are usually under a tenancy agreement. Residents in care homes, although they may well be in the home for a number of years do not have the protection that being a tenant offers them. They are defined as licensees, a status that offers worse legal protection. This might be a particularly pertinent area to explore given the growth of extra care housing which will mean increasingly that the pattern of care offered to people who have their own tenancies is much the same as the care offered to those in care homes.

Other factors that can affect older people as consumer of care in care homes.
In addition to direct issues relating to the market and those in care homes, there is evidence that factors outside of the market can further disadvantage older people in care homes. For instance older people in care homes have greater difficulty in access services that people can access in their own homes. One area that has come under particular scrutiny is access to medical care. A recent report in the BMJ (15 March 2003) indicates that nursing home residents receive inadequate care compared to elderly consumers outside of the sector. Earlier reports by the organisation VOICES indicates that some older people in care homes are paying for GP services that would be free if they were in their own homes. The BMA has also issued a paper on concerns of Primary Care in coping with the demands of older frailer patients in care homes.

The role of the regulators

What is the role of the regulators in helping consumers?
In 1998 the Office of Fair Trading produced a report which was the first of its kind to address issues relating to care home residents as consumers. This was the first time residents had been considered as other than passive recipients of services. However there is some evidence that on a local level Trading Standards Officers rarely become involved with ensuring the residents' consumer rights are protected, or that they are seen as part of the panoply of services upon which a care home consumer can call. The guidance for Trading Standards Authorities on care home contracts is welcome, but it would be helpful if the investigation could consider how both the public and the regulators can be better educated about the way that consumer legislation can help protect residents and to investigate whether further legislation specific to this group is required.

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Although there is a complaints mechanism for those in care homes via the NCSC, given the imbalance of power between the provider and the consumer of the services, there is often a great fear about complaining. In many cases relative are also fearful of complaining in case there is any come back on the resident's care. It is worthy of investigation to see if any regulation could help give residents more power to seek redress.

Regional differences in regulation

There may be some merit in any investigation looking at the differences between Scotland and England in the regulation of care homes. Not only is there a difference between the amount the state funds towards the care of the person, but recent case law in Scotland has established that in all cases (regardless of the person's wealth) the local authority is responsible for arranging that person's accommodation (ie making the contract - Robertson v Fife (HL) CCLR 5 p559). There is some discussion whether this judgment has a similar effect in England given the slightly different wording of the legislation. However it is clear that in Scotland, all residents have the possibility of the local authority making arrangements for accommodation on the resident's behalf.

New legislation is due to come into force in January 2004 which may have a further impact on the care home market. Once local authorities have to reimburse hospitals for any delays in providing onward care to those ready for discharge, this may affect the price that can be commanded by care homes. The rates have been set at £100 or £120 per day (depending on the area), and this may have an inadvertent effect on pricing as it would be cheaper for local authorities to meet up to that price in a care home than pay the NHS.

Conclusion

The problems in the sector for consumers do not appear to have disappeared, and if anything have increased since the report by the OFT in 1998. However the range of tools available to the OFT for dealing with problems in this sector have increased. We think that given the economic structure issues raised in the first half of the paper, that only a thorough independent review of the care home sector, bearing in mind the extreme vulnerability of the group who depend on the market working well for them with their particular needs, can provide the necessary direction that this sector needs.

Consumers' Association
December 2003

[13] LAC (2003)7 Issued 12 March 2003 see also Community Care Market News April 2003.
[14]

Appendix 1: Members of Spain that are signatories to this complaint

Chair: Les Bright Relatives and Residents Association

Abbeyfield Society
Action on Elder Abuse
Age Concern England
Alzheimer's Society
Anchor Trust
Arthritis Care
Association of Charity Officers
Association of Retired Persons Over 50
Beth Johnson Foundation
Carers UK
Centre for Policy on Ageing
Counsel and Care
Fawcett Society
Greater London Forum for the Elderly
Hanover Housing Association
Health and Older People
Help the Aged
Hill Homes
Jewish Care
MHA Care Group
National Association of Citizen Advice Bureaux
National Pensioners Convention
Parkinsons Disease Society
RADAR
Relatives and Residents Association
Senior Citizens Forums Network
The Leveson Centre
VOICES