

Response to the super-complaint on care homes made by the  
Consumers' Association on 5 December 2003

3 March 2004

OFT 703

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**BACKGROUND**

- 1 On 5 December 2003 the Consumers' Association (CA) submitted an informal super-complaint to the Office of Fair Trading (OFT) about care homes. The super-complaint is supported by most members of the Social Policy Aging Information Network (SPAIN) which includes Help the Aged, Age Concern, and the Alzheimer's Society. The CA has subsequently provided further information in support of its super-complaint in response to requests from the OFT.
- 2 The right to submit super-complaints was created by section 11 of the Enterprise Act 2002 (EA02). A super-complaint is defined under section 11(1) of the EA02 as a complaint submitted by a designated consumer body that 'any feature, or combination of features, of a market in the UK for goods or services is or appears to be significantly harming the interests of consumers'. The CA's application for designated consumer body status was being considered by the Secretary of State when the super-complaint was submitted, and has yet to be determined. We decided, nevertheless, to treat the super-complaint as if the CA had been a designated consumer body, and to respond accordingly.
- 3 Section 11(2) of the EA02 requires that the OFT must, within 90 days of receiving a super-complaint, publish a reasoned response saying what action, if any, it proposes to take. This document represents the OFT's response to the CA's super-complaint on care homes.

4 In its super-complaint, the CA states that it does not believe that the market for care home services is working well. The key concerns that the CA recommend we investigate are:

- whether the fees paid to care homes by public authorities cover the full cost of providing the service
- whether the lower fees paid by public authorities force relatives to cover the real cost of care (through top-up fees and payments for extras)
- whether there are cross-subsidies between residents (with self-funded residents having to pay higher fees in order to cross-subsidise publicly funded residents)
- whether either purchasers (public authorities) or providers (care homes) have dominant positions at a local level
- whether information flows before and after residents' choice of a care home are sufficient
- whether contracts are clear and fair
- whether consumers' financial independence is respected
- whether consumers can get sufficient redress in this sector
- whether consumers are sufficiently protected by legislation
- the role of regulators in helping consumers
- regional differences in legislation.

5 This response addresses the key issues raised by the CA, albeit in a different order to that in their super-complaint and sometimes using different terminology. We have, with the agreement of the CA, considered the super-complaint to apply to all of the UK and to care homes (both residential and nursing) for older people.

6 In considering this super-complaint we have consulted interested parties throughout the UK, conducted background research, and drawn upon previous work and expertise within the OFT. In particular, the OFT published a report in 1998 on *Older people as consumers in care homes* (the 1998 OFT report), in which some of the issues raised in the super-complaint were considered.

## Principles applied

- 7 In assessing the issues raised in the super-complaint we have applied the following principles:
- whether any feature, or combination of features, of the market for care home services in the United Kingdom is or appears to be significantly harming the interests of consumers
  - whether any of the issues raised would be better dealt with using the OFT's enforcement powers
  - whether the issues raised have been considered previously by the OFT and, where appropriate, have already in our view been adequately addressed
  - whether other government departments or regulators are better placed in our view to address any of the issues raised.

## Consumers and care homes

- 8 The provision of care home places is a particularly complex area where health and social policies interact with market provision. The market has also recently undergone significant statutory and regulatory change.

### CHARACTERISTICS OF CONSUMERS

- 9 The following characteristics of the consumers involved are particularly relevant in the assessment of this super-complaint:
- residents and prospective new residents of care homes can be particularly vulnerable, especially as they are often frail and suffer ill health. The initial commitment to choice of a care home may also have to be made hurriedly and at a time of great stress
  - many older people have a strong preference for remaining close to either their former residence or their friends and family, which effectively reduces choice
  - established residents may be reluctant to move homes once they are settled in, sometimes for health reasons. This adds to their vulnerability, in that to some degree they may be considered 'captive customers' in the sense that they cannot exercise consumer choice in the normal way.

## FUNDING ARRANGEMENTS

- 10 The funding of care home places is a combination of private and public provision. Those residents who have assets above a set threshold are required to pay for themselves, while those below this threshold are entitled to funding by public authorities. 'Top-up' fees may be payable when the full cost of a place in the home chosen by a publicly funded resident is higher than the rate which the funding body is prepared to pay. Additional charges may also be made for extras such as a personal television or telephone.
- 11 Residents who are no longer able to pay for themselves may move from private to public provision. In these circumstances, where there is a difference between the rate being paid by self-funded residents and that which the funding authority is willing to pay, residents or their representatives may need to choose between paying top-up fees or moving care homes.

## REGULATORY REGIMES

- 12 Under section 23(1) of the Care Standards Act 2000, the Department of Health in England (DoH) and the Welsh Assembly Government have both issued National Minimum Standards for Care Homes for Older People. Regulators - the National Care Standards Commission (NCSC) in England, (scheduled to be replaced by the Commission for Social Care Inspection (CSCI) in April 2004), and the Care Standards Inspectorate for Wales (CSIW) - were established to regulate care homes in England and Wales. In assessing whether a care home conforms to the care homes legislation, the regulators must take these standards into account.
- 13 In Scotland, National Care Standards were established under the Regulation of Care (Scotland) Act 2001. They describe what each resident can expect from the care home provider. As in England and Wales, these standards are taken into account when assessing whether care homes have complied with the relevant care homes legislation. The care home regulator in Scotland is the Scottish Commission for the Regulation of Care, commonly known as the Care Commission.
- 14 Minimum standards are currently being taken forward in Northern Ireland under the Health and Personal Social Services (Quality, Improvement and Regulation) Order 2003. In 2005 the Health and Social Services Regulation and Improvement Authority (HSSRIA) is expected to be established to inspect and regulate care homes in Northern Ireland.

## ANALYSIS AND CONCLUSIONS

15 In this section of the response, the issues raised by the CA are grouped under three headings:

- issues that the OFT plans to examine further through a market study under the EA02
- issues being addressed by other means (by the OFT or others)
- issues not warranting further action.

### Issues that the OFT plans to examine further through a market study

16 Having considered the super-complaint and conducted preliminary enquiries, analysis and research, we consider that the following features may be significantly harming the interests of consumers and should be examined further by the OFT through a market study under the EA02:

- lack of transparent information about prices
- contracts in relation to current or future fees.

#### LACK OF TRANSPARENT INFORMATION ABOUT PRICES

17 Our concern here is whether prospective new residents or their representatives are able easily to obtain the information they need in order to make informed choices about care homes. The focus is on price information because our preliminary research and analysis of information sources, such as inspectors' reports and guidance from charitable organisations and local authorities, suggests that sufficient price information is more difficult to obtain than more general information and advice. While concerns have also been raised by the CA about the availability of information more generally, improvements currently being taken forward by regulators and the DoH, as outlined in paragraph 34, should be capable of addressing these.

18 The provision of clear and accurate information facilitates effective choice and hence competition. We believe that the level of transparency will be of particular importance in this sector if:

- *Older people or their representatives are often under pressure to choose a care home quickly, for example because of a sudden deterioration in health or the loss of a carer.* The 1998 OFT report found this to be the case. There is no reason to suppose that the situation has changed for the better, and the

super-complaint asserts that it has not. If still true, this would mean that older people and their representatives would have little time to research the possible options, increasing the need for readily available and easy to understand information on prices for care home services

- *Consumers' choice of care home is often a 'one-off' decision.* The CA suggests that this is the case, and some of those we have consulted have confirmed that older people are unlikely to want to change care homes once they have settled in. In some cases medical factors may inhibit them from moving. This suggests that the initial choice of care home often develops into a long term relationship between a care home provider and resident, which increases the importance of getting the initial choice right.

- 19 The OFT proposes to conduct research to examine the extent to which such factors may have a bearing on the level and nature of competition amongst care homes and, in particular, whether they may afford care homes a degree of market power. The possibility that care home providers have, and may exploit, market power was also a concern held by the CA.
- 20 We will examine the ease with which prospective new residents and their representatives can obtain sufficient clear information about fees and extra charges, and on the scope for these fees and charges to change over time. For example, are they well informed about contractual price variation clauses and about care home providers' pricing policies for self-funded residents who later become eligible for public funding?
- 21 The 1998 OFT report found that care home brochures 'frequently did not provide potential residents with adequate information about the level of fees and specifically what they included, what factors affected the fees and what charges were made for extras'. Under new regulations and standards introduced in England, Wales and Scotland since the OFT report, care homes should provide residents or their representatives with information about fees. However, there is a lack of knowledge about the quality and quantity of the information being provided, when, and to whom. The CA suggests that it is still difficult to find out how much is charged for the range of services offered and provided.
- 22 The OFT therefore intends to conduct research to examine the availability of sufficient clear information on prices. In view of the consumer behaviour discussed above, if the relevant price information was not readily available, it would be difficult for prospective new residents or their representatives to take prices into account when choosing a care home. As a result price

competition amongst care homes could be weaker than would otherwise be the case, potentially leading to higher fees and other charges.

#### TOP-UP FEES AND ADDITIONAL CHARGES FOR EXTRAS

- 23 Our concerns relate not only to fees for self-funded residents, but also to top-up fees and charges for extra products and services that care home providers may expect publicly funded residents and their representatives to cover. We therefore propose to look at transparency issues in relation to top-up fees paid by representatives of publicly funded residents and additional charges paid by self-funded and publicly funded residents and/or their representatives. Whether representatives of publicly funded residents should or should not be able to pay top-up fees or additional charges in order to increase the level of service above that funded by public authorities is, however, essentially a policy issue.

#### PRICE DIFFERENTIALS BETWEEN SELF-FUNDED AND PUBLICLY FUNDED RESIDENTS

- 24 The CA expresses concern that price differentials exist between self-funded and publicly funded residents and that the extent of the differential indicates that cross-subsidisation between these two categories of resident is taking place. This would imply that self-funded residents were being charged excessive rates by care home providers.
- 25 As the CA notes, it is not unusual for service providers to charge different prices, nor to offer discounts for bulk purchasing. Price differentials often exist without cross-subsidisation taking place, particularly where there are differences in the quality of service. For price differentials to be a cause for concern here, care home providers would need to be able to charge self-funded residents 'excessively high' rates. This would then enable them to use high profits to subsidise publicly funded residents.
- 26 As outlined above, we intend to conduct research to assess the degree of price transparency in the sector because of our concerns that a lack of transparency may enable care home providers to set higher prices than would otherwise be the case. This concern relates not just to prices for self-funded residents, but also to the charging of top-up fees and additional charges for extra services for publicly funded residents.
- 27 For this reason we do not propose to focus on whether a price differential exists between self-funded and publicly funded residents. Rather, we will look at price transparency in respect of *all* residents and their representatives. If there is a lack of transparency, then improving the quantity and quality of

price information available before a choice of home is made should increase price competition. This could in turn reduce the scope for care home providers to set excessive prices for new residents and their representatives.

#### CONTRACTS IN RELATION TO CURRENT OR FUTURE FEES

- 28 If, as suggested at paragraph 18, residents are reluctant to change care homes, they will be particularly vulnerable to increases in prices and reductions in the level of service provided. This increases the importance of ensuring that sufficient safeguards are in place to protect them.
- 29 We are concerned whether sufficient safeguards are in place in relation to changes in prices. In principle, contracts can offer protection from unreasonable and unexpected changes in prices, provided they are clear about the charges that will be levied and the circumstances under which those charges may be changed. Contracts between care home providers and residents (including any price variation terms included) must comply with the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs) in this and other respects. As the super-complaint notes, this is a complex issue, because the contracts may be in place for long periods of time and need to cover a range of different situations. They may need to provide for changes not only in health, but also in financial circumstances, most notably when self-funded residents become eligible for funding by public authorities.
- 30 The 1998 OFT report found that contracts between residents and care homes were not always in place. Where contracts did exist, there was often a lack of clarity in relation to financial issues. Improvements have been made since then. Under new regulations and national minimum standards introduced in England and Wales since the 1998 OFT report, all self-funded residents should now be provided with a contract. Publicly funded residents should be provided with a statement of the terms and conditions under which their care is being provided. In Scotland the National Care Standards require that all residents (irrespective of their funding arrangements) should be provided with a written agreement which clearly defines the service that will be provided. Details of fees payable and by who should be included in all of these. Notwithstanding these requirements, we believe that further work is necessary to determine whether a sufficient degree of transparency and protection exists in practice.



- 31 In view of these concerns we propose to investigate the following issues:
- whether contracts are in place, both in relation to self-funded residents, and the payment of top-up fees and additional charges by publicly funded residents or their representatives
  - where contracts are in place, whether they contain clear and fair clauses about charges levied, what they cover and how they might change
  - where contracts do contain such clauses, whether they are adequate and reasonable.

### **Issues being addressed by other means (by the OFT or others)**

#### CONTRACTS MORE GENERALLY

- 32 The CA asks whether contracts are clear and fair. While the OFT will examine contracts in relation to fees through a market study, we do not propose to look at the other contractual issues raised by the CA. This is in part because, as noted earlier in relation to fees, significant regulatory improvements have been made recently in England, Wales and Scotland, and are currently being taken forward in Northern Ireland. Furthermore, action, by the OFT and others, is already in hand, as follows:

- The OFT recently issued guidance on unfair terms in care home contracts and we are currently taking enforcement action against unfair contract terms used by a number of care home providers. These are contracts entered into by private care home providers and consumers. Once these contracts are successfully revised, we intend to publicise this to alert other providers to the need to review their terms to make sure they comply with all the relevant legislation.
- The OFT recently issued a consumer leaflet, entitled *Fair terms for care*, designed to help people considering entering a care home to assess whether the terms in a care home contract are fair.
- The DoH is currently working to improve commercial contracts. They are considering producing example contract clauses in partnership with representatives from local authorities and care home providers. These terms can then be used as a useful guide and a basis for discussions between interested parties. Where these example contract clauses may be used in consumer contracts, we have offered to advise the DoH about any unfairness. The DoH also plans to produce a list of overarching principles for both groups to follow and is working to produce a website that

signposts further useful information, for example the OFT's own contract guidance. The Welsh Assembly Government will consider whether there is a need for further action in the light of the guidance the DoH is planning to produce. The Scottish Executive has told us that they would consider launching a similar initiative if local authorities and care home providers were to indicate the need.

#### INFORMATION FLOWS MORE GENERALLY

- 33 The CA is concerned that consumers face significant problems in accessing reliable information while looking around for a care home. For example they say that 'there is no central measure of performance nor publicly available information that is easy to access'. While the OFT will examine the information provided to older people (and/or their representatives) in relation to fees, including contract terms, through a market study, we do not intend to look at information flows more generally. This is in part because significant regulatory improvements have been made recently. In England and Wales, care home providers are required to provide all residents with (amongst other things) a 'service users' guide' (which includes the home's Statement of Purpose), the most recent inspection report, and a summary of the home's complaints procedure. In Scotland, all service users should be given an introductory pack that includes (amongst other things) a brochure, the most recent inspection report on the home, and the complaints procedure. (Related regulatory improvements are currently being taken forward in Northern Ireland.)
- 34 We also believe that other government departments and regulators are better placed to consider whether further improvements may be necessary and, if so, in what form. Indeed, we understand that a number of improvements are already planned or underway. For example:
- The CSCI has told us that, through their website and through printed copies of inspection reports, they will provide the general public with easy to understand information about the quality of social care services in local areas. They are planning to improve the structure and content of care home inspection reports, and plan to work with care home providers to identify criteria that can be used to assess who is providing services at or above the minimum standards. This information will be made publicly available. Consumers will also be able to use the CSCI's website to search for all the care homes in their local area and find out more about the homes they are interested in.

- The DoH in England is currently working to improve and update its guidance booklet entitled *Moving into a care home*.
- The CSI in Wales is currently working to make care home inspection reports more accessible by publishing copies on their website. (Hard copies are already available). CSIW also plan to make these reports more consumer friendly by improving their structure.
- The Care Commission in Scotland is currently examining ways of making care home inspection reports more valuable to consumers and are working towards publishing these reports on their website. (Hard copies are already available.) The Commission is also committed to producing an internet based register of care homes in Scotland, together with details of the services offered by each.

### **Issues not warranting further action**

#### WHETHER PUBLIC AUTHORITIES HAVE BUYER POWER AND SET FEES THAT FAIL TO COVER THE COSTS OF PROVIDING CARE HOME SERVICES

- 35 The CA is concerned that public authorities may be abusing their market power when purchasing care home services by paying excessively low fee rates, resulting in self-funded residents and representatives of publicly funded residents being charged more than would otherwise be the case.
- 36 During the meetings we held with interested parties, we encountered concerns about the level of government funding available for care home services, and about the lack of ring-fencing of funds provided for this purpose. Total funding levels have implications not only for the level of service available to publicly funded residents, but also for the number and type of care homes prepared to accept publicly funded residents. We recognise that these are important public policy issues, but they are principally for the funding departments to determine, rather than for the OFT to address through a market study under the EA02.
- 37 We therefore focus specifically on the concern that public authority fee rates may be too low. Of relevance here is the OFT's BetterCare decision under the Competition Act 1998<sup>1</sup> which covered, among other things, the alleged practice of setting excessively low purchase prices by North & West Belfast Health and Social Services Trust. In this decision the OFT stated that 'paying excessively low purchase prices is likely to amount to an abuse under Chapter

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<sup>1</sup> No CA98/09/2003.

of the CA98 only in exceptional circumstances', and the OFT had no reason to believe these were present in the BetterCare case.

- 38 The OFT believes that its conclusions in the BetterCare case are relevant to its assessment of this super-complaint. Independent care home providers are not legally obliged to accept publicly funded residents. They can therefore choose whether to accept new residents at public authority rates or not. If they consider public authority rates to be too low, they can refuse to accept such residents and are likely to do so if such low rates persist.
- 39 Public authorities, however, have a statutory duty to ensure that older people assessed as in need of care and who are eligible for funding are able to find a care home willing to accept them. Public authorities also need to secure value for money, ensuring that taxpayers' money is spent as effectively as possible.
- 40 The combination of these factors suggests that public authorities are unlikely to persist in setting excessively low prices for care home services over the medium to long term, because independent care homes will refuse to accept older people at such rates. Care home providers could instead re-position themselves away from publicly funded residents or may choose to leave the care home market altogether. Therefore, it is not in public authorities' interest to persist in paying prices that are too low.
- 41 There is recent evidence to support this view. For example:
- In 2001 the Scottish Executive established a review team (including representatives of care home providers) to look at care home costs, and recommended significantly increased rates for publicly funded residents. Further research is currently being undertaken and the rates for 2004/2005 are currently being negotiated.
  - The Welsh Assembly Government has funded the Welsh Local Government Association to commission a methodology for local authorities and care home providers to use at a local level to identify their costs to inform negotiations on fee levels. This 'tool kit' should be in place from this spring.
  - The Department of Health and Social Services in Northern Ireland has commissioned PricewaterhouseCoopers (in liaison with care home providers) to identify the true economic cost of residential and nursing home provision by the independent sector. The findings are due to be published this summer.

- In England, numerous local authorities have on separate occasions independently instructed PricewaterhouseCoopers to carry out research to establish a fair rate for care home providers in their area. The CSCI also plans to examine local authority commissioning practices in England.
- Laing and Buisson (Care of Elderly People Market Survey 2003) report that 23 per cent of local authorities (excluding Scotland) increased their rates by more than 10 per cent in 2002/3.
- Data collected by the OFT in relation to the BetterCare case also suggests that, in the area of Northern Ireland covered by the complaint, the rates paid by local health trusts to care homes rose markedly between 2000/1 and 2002/3.

#### REVISITING THE ISSUES RAISED BY THE 1998 OFT REPORT

- 42 The CA says that the issues examined in the 1998 OFT report (covering information, contracts, financial issues of residents and redress) are worthy of a second look 'to assess whether the recommendations made have been implemented'. The CA goes on to ask the OFT to assess whether the recommendations implemented 'have worked in the manner hoped for'.
- 43 National Minimum Standards for care homes have been established in England and Wales, and National Care Standards in Scotland. These standards address many of the recommendations made by the OFT in 1998, albeit with slight differences across the devolved administrations. (Similar standards are currently being developed in Northern Ireland). In addition, as described in paragraphs 12-14, regulators have been established to inspect care homes and to enforce the necessary standards.
- 44 Further change is planned. From next month (April 2004) the CSCI in England will become fully operational. It will bring together the work currently undertaken by the NCSC, the Social Services Inspectorate (SSI) and the SSI/Audit Commission joint review team. In addition to transferring these existing functions, the CSCI will have other new and enhanced powers and responsibilities. For example, we understand that it will be able to take enforcement action when services do not meet minimum standards, to look at eligibility criteria, and to examine the impact of different commissioning policies on the development of services. In 2005 the HSSRIA is expected to be established in Northern Ireland. It will be a separate authority with its own more extensive powers of registration, regulation and inspection. It has been designed to be more independent than the existing Registration and Inspection Units attached to each of the four Health and Social Services Boards.

45 The response to our consultation with interested parties indicated widespread acknowledgment that significant improvements have occurred. In any event the OFT believes that the new care home regulators are potentially better placed to monitor care homes' compliance with the care homes legislation, and the overall effectiveness of the standards introduced. We also take the view that the new regulatory regime has not been in place for a sufficiently long time for a proper assessment of its effect to be made.

#### *Financial issues*

46 The CA asks whether 'a consumer's financial independence is respected'. We do not find the reasons given for us to re-investigate the financial independence of older people in care homes sufficient and we have not been shown evidence to suggest that the interests of consumers are being significantly harmed.

47 This is an area in which minimum standards now exist. For example, the minimum standards in England and Wales require that the registered care home provider 'ensures that service users control their own money except where they state that they do not wish to or they lack capacity'; that 'safeguards are in place to protect the financial interests' of the resident; and that a written record of all transactions is kept. The Scottish National Care Standards require that 'where staff are involved in any financial transactions, it will be witnessed and recorded'. In summary we have been shown no evidence to suggest that the issue is not being dealt with adequately by the National Minimum Standards in England and Wales and the National Care Standards in Scotland. We believe that the care home regulators are best placed to check whether these standards are being met during their regular inspections of care homes.

#### *Redress*

48 The CA said that they would 'welcome a reassessment of the effectiveness of the recent reforms', in particular the 'independent element to the care homes redress process,' and whether the complaints mechanisms are working and could be improved.

49 Care home providers are now required by law to have an established complaints procedure. Every care home resident should be supplied with a copy of the complaints procedure and the copy must include the contact details for the relevant independent care home regulator. Improvements have already been made to assist potential complainants to make a complaint.

50 In our view the concerns expressed and information considered by us do not indicate that consumers are or may be being caused significant harm by a feature of the market. The OFT considers that the current mechanisms contain an adequate independent element. The OFT has not been shown evidence to suggest that the relevant standards are not being enforced by the regulators. In any event we feel that this issue is one which care regulators are better placed to oversee, including consideration of any possible reform.

#### WHETHER CONSUMERS ARE SUFFICIENTLY PROTECTED BY EXISTING LEGISLATION

##### *Human Rights Act 1998*

51 The CA says that recent case law has indicated that older people in independently funded (private) homes are at some disadvantage compared with those in local authority funded (public) homes because the former do not have to comply with the Human Rights Act. Having considered the cases cited,<sup>2</sup> and other material, we disagree with the CA's view. The cases which they cite are about publicly funded residents of private care homes. These cases confirm that it is the local authorities which have to comply with the residents' human rights, not the private care homes.

##### *The Choice of Accommodation directions and waiting lists*

52 The CA argues that the National Assistance Act 1948 (Choice of Accommodation) Directions 1992 (as amended), which concerns the right of individuals to choose where they receive residential care, is of limited value if there are few homes to choose from. This may be true, but the level of choice available to individuals is not something which could be directly influenced by an OFT market study.

53 The CA asserts that local authorities are operating waiting lists for care home places. They say that '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'. The local authority would be in breach of their statutory duty if they fail to provide (or there is an undue delay in providing) the necessary care to meet the individuals 'assessed need'. We have been shown no evidence that local authorities are failing to meet this duty.

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<sup>2</sup> R v. Leonard Cheshire Ex Parte Heather and others (2002) EWCA Civ 366.  
R v. South Lanarkshire ex p MacGregor CCLR Vol 3 p188 (2001).

### *Tenancy versus licensee rights*

- 54 The CA points out that residents in care homes are defined as licensees rather than tenants, a 'status that offers them worse legal protection'. In practice the main difference is that tenants have greater protection from eviction.
- 55 It seems that there are sound policy reasons for this distinction. We take the view that an acceptable balance has been found between the competing interests of those who are being moved, other existing residents, and those who run homes. Any added restrictions could delay necessary moves, which could harm other residents and impede the flow of available beds to new residents.
- 56 Under the UTCCRs the OFT carefully scrutinises clauses relating to termination of residents' accommodation, and seeks to ensure that reasons are included in an attempt to balance such competing rights.

### *Access to medical services*

- 57 The CA raises concerns that some residents in care homes have difficulty in accessing the medical services they need from their primary care trusts. For example, we have been told that some older people in care homes are paying for GP services that would be free if they were in their own home. Care homes should not be making such charges – if evidence of such practices comes to light during the course of our examination of overall levels of fee transparency we will report it to the relevant health authority.

### THE ROLE OF REGULATORS IN HELPING CONSUMERS

- 58 The CA expresses concern that trading standards officers (TSOs) rarely become involved with ensuring that the consumer rights of care home residents are protected, or that they are seen by care home consumers as a service provider for them. The CA states that it would be helpful if more guidance were given to other regulators on the ways in which consumer protection legislation can assist residents of care homes.
- 59 Care home residents have the same rights under consumer protection legislation as other consumers. We have not been provided with evidence to suggest that TSOs do not become involved following receipt of a complaint or a request to do so. The OFT's recently published *Guidance on unfair terms in care home contracts: A guide for professional advisers* should help raise awareness in this area.



- 60 Elsewhere the CA makes the point that residents or their representatives may be reluctant to complain because of the resident's position within the home. The OFT believes that the statutory inspection and complaints procedures provide the most effective remedy and go some way to ensuring that consumers and their representatives are encouraged to make use of the independent procedures.
- 61 The CA suggests that we consider whether further legislation specific to older people and care homes is required. We do not, however, have sufficient reason to believe that the lack of such legislation is significantly harming the interests of consumers.

#### REGIONAL DIFFERENCES IN LEGISLATION

- 62 The CA suggest that there may be some merit in the OFT examining the differences in the regulation of care homes between the devolved administrations. We will be considering regional differences in legislation during our examination of transparency and contracts in relation to fees. We do not, however, believe that there are sufficient grounds for us to consider regional differences more generally, and we have not been shown evidence to suggest that any such differences may be significantly harming the interests of consumers.

## PROPOSED ACTION BY THE OFT

- 63 In response to the CA's super-complaint, we propose to use powers under section 5 of the EA02 to undertake a study throughout the UK into aspects of the care homes market, to be launched in the near future.
- 64 Subject to further detailed scoping work, we intend to examine further the following issues:
- *Consumer behaviour*: we are concerned that older people and their relatives may have to choose a care home in a hurry and that, once settled in, residents may be reluctant to change homes. If prevalent, such consumer behaviour may reduce competition among care home providers. Further research will help us to improve our understanding of the extent of such consumer behaviour and its impact on the market.
  - *Price transparency*: we believe that there may be a lack of transparency in relation to prices and related contractual issues and that this may distort prospective new residents' and their representatives' choice of care home. This may then reduce price competition, giving care home providers a degree of market power and scope to set higher prices than they would otherwise be able to. Further research in this area, together with additional research into consumer behaviour, will inform us about whether there is a lack of transparency that is affording care home providers a degree of market power and significantly harming the interests of consumers.
  - *Contracts in relation to current or future fees*: we are concerned that if contracts are not in place, or fail to have transparent clauses in relation to prices and how these can change, then older people may be vulnerable to unreasonable and unexpected price increases. These concerns will be of particular significance if older people are reluctant to move care homes. We will therefore conduct further research into the existence and content of contracts in relation to care home services for older people to determine whether the interests of consumers might be significantly harmed.
- 65 Any information that comes to light during the course of the study that may indicate breaches of the competition or consumer legislation for which the OFT is responsible will be investigated further to determine whether enforcement action is appropriate.
- 66 As part of our study we will be consulting stakeholders such as care home representatives, charities for older people, and central and local Government bodies.

- 67 At the end of the study we will produce a report presenting our findings, summarising the evidence on which this is based and, where relevant, making recommendations for how to make the market work better for consumers.