

Care Inspectorate response to the CMA's market study of care homes statement of scope

The Care Inspectorate is the official independent body responsible for inspecting standards of care in Scotland. That means we regulate and inspect care services to make sure they meet the right standards and help them improve if needed. We also carry out joint inspections with other scrutiny bodies to check how well different organisations in local areas are working to support adults and children. We help ensure social work, including criminal justice social work, meets high standards. Across all our work, we provide independent assurance and protection for people who use services, their families and carers and the wider public. In addition, we play a significant role in supporting improvements in the quality of care, and reducing health and social inequalities, in Scotland.

We therefore welcome the opportunity to respond to the CMA's statement of scope in respect of its market study of care homes and value our engagement to date with the CMA.

There are significant legislative, policy and implementational differences between the care systems across Scotland, Wales, Northern Ireland and England. It cannot be assumed that issues identified in one jurisdiction will also be prevalent in all or, indeed, in any one other. That notwithstanding, there are some commonalities of approach and some providers operate care homes in different parts of the United Kingdom, under different regulatory arrangements. We therefore welcome the commitment of the CMA to engage early with the Care Inspectorate and the regulators across the nations to ensure that the market study is able to properly address national issues within the care home sectors.

Theme 1: Consumer protection issues in the care home sector

1. What are the main consumer protection issues in the care home sector? How widespread are these issues and what harm do they cause to residents and their families?

The Care Inspectorate's primary responsibility is to further improvement in the quality of social care and social work. Our programme of scrutiny activities is therefore designed to assess the quality of social care and social work provision in Scotland. This encompasses the social work assessments of people's needs, the way local authorities and partners provide direct or commissioned care to meet those individual needs, and the delivery of the care itself within a care home and other care services. We also investigate complaints about the delivery of care by registered care services (but not about the assessment of needs by the social work department; separate independent complaints handling processes involving the Scottish Public Services Ombudsman exist for this). The Care Inspectorate does not inspect, or generally investigate complaints about, the fees charged by care homes.

Section 45(4) of the Public Services Reform (Scotland) Act 2010 requires that the Care Inspectorate must exercise its function in accordance with a variety of principles, including that "diversity in the provision of social services is to be promoted with a view to... persons being afforded choice". Conscious of this, the Care Inspectorate registers a wide variety of care homes offering different models of

care across the local authority, private, and voluntary providers. Of the 859 care homes for older people in Scotland as at November 2016, 625 were in the private sector, 133 were in the public sector¹, and 101 in the voluntary / not for profit sector. Voluntary / not-for-profit care homes and local authority / health board care homes are more often graded as providing higher quality of care, respectively, than private care homes, but excellent care is found in all sectors.

There are, of course, limitations in the degree of choice afforded to people. To self-funders, limitations include availability of places, affordability of places, and the geographic region in which someone may wish to live; the latter point is exacerbated in remote, rural, and island communities. For those funded by the local authority, existing commissioning practices may limit choice but there is a general policy direction in Scotland to afford people who use care more choice and control over their lives, including in their placements. The Social Care (Self-directed Support) (Scotland) Act 2013 is designed to give greater choice and control to how people receive care. This means care can be 'personalised' to people's individual needs and wishes. A financial assessment is likely to be used by the local authority to assess what, if any, charges are made in respect of a care home placement.

2. To what extent are care homes complying with consumer law, in particular in relation to the fairness of their contracts and their behaviour towards residents and their families?

In the course of our scrutiny activities, we do not routinely examine consumer protection issues and our scrutiny evidence, centred around an analysis of the quality of care, is not designed to quantify the extent to which they occur. We have received some anecdotal evidence, through our complaints activity, of sudden fee increases in respect of self-funders in care services. Potential issues about the quality of care may arise if people are no longer able to use a service which they have previously used and is right for them.

The behaviour towards residents and their families regarding any issue is a central feature of high-quality care. We expect care services to treat residents and their families with dignity and respect, both in terms of the decisions made and the way in which they are communicated. These expectations are set out in the current National Care Standards, which the Care Inspectorate must take into account when carrying out an inspection. These issues are even more central in the revised standards, which are currently out for consultation and which are expected to be in place from April 2017 onwards. These set out a person-led approach based on human rights and wellbeing to describe what quality care should look like across the process of planning, commissioning, assessing and delivering care.

Our scrutiny of care homes includes an examination of the quality of management and leadership, with the ability to provide improvement support or take remedial action where this is necessary. Our [complaints activities](#) also examine cases where there are problems related to the interaction around care. In 2015/16, poor communication was the third most common category of upheld complaint across all care services in Scotland. Amongst care homes (not just care homes for older

¹ The majority of public sector care homes are provided by the local authority; in the Highlands, 15 are provided by NHS Highland as part of integrated health and social care arrangements.

people), 8.2% of upheld complaints related to poor communication between staff and people using the care service or their relatives and carers, and 1.2% to poor information about the service being provided. We would be happy to provide further evidence to the CMA on these points.

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

The system of regulation of care in Scotland is robust and designed to provide independent public assurance about the quality of care, and support improvement where necessary. It is an offence to operate a care service that is not registered with the Care Inspectorate; this process is designed to ensure that providers are fit to run a care home and their intended arrangements for doing so are likely to lead to positive outcomes for residents.

The Care Inspectorate undertakes unannounced inspections of all care homes once per year, with much more frequent scrutiny where we have concerns. We use intelligence from a wide range of sources to plan our scrutiny and ensure resources are targeted where improvement is needed. Within care homes, we assess the quality of care and support, the quality of staffing, the quality of the environment, and the quality of management and leadership. We grade each element on a six-point scale from unsatisfactory to excellent, and can make recommendations and requirements for improvement. The majority of care services perform well (and most care homes in all sectors are providing care which is good very, good or excellent), but there are variations by geography, sector, and within care homes over time.

Where care is not of a sufficiently good level, our initial approach is to support improvement. This can take a variety of forms, including professional discussion between the manager and the inspector, development sessions for staff in services run by the Care Inspectorate, the provision of specialist improvement support advice in specific areas, liaison with the local health and social care partnership, signposting to effective practice, and the provision of support materials and resource guides. If such improvement is not forthcoming, we have extensive powers under sections 62, 64, 65, and 67 of Public Services Reform (Scotland) Act 2010 to require improvement or seek closure of the service, subject to appeal to the sheriff court.

In addition to scrutiny of regulated care services, the Care Inspectorate undertakes joint inspections of the strategic provision of care with other scrutiny and improvement partners. From April 2017, the focus of these joint scrutiny activities will be about the strategic commissioning of care in new integrated arrangements arising from the Public Bodies (Joint Working) (Scotland) Act 2014. This places a responsibility on integration partners (that is, the local authority and the health board) to assess the needs of their community populations and strategically plan how integrated services will be commissioned from a range of public, private and independent sector providers.

In addition, the Care Inspectorate (unlike some equivalent sector regulators) investigates complaints about care, whether or not those matters have already been investigated by the care home itself, and can take appropriate regulatory responses to require improvement.

We are currently in the process of refining and improving our methodology to reflect a more outcomes-based approach, embed modern and intelligence-led approaches to scrutiny, and to incorporate a new set of national care standards.

4. Are there barriers to residents and their families raising complaints when something goes wrong, and how effective are the current complaint and redress systems for care home residents?

Complaints are generally best resolved as close to source as possible. We require all care homes to have a clear and accessible complaints policy in place which allows concerns from residents, families and their carers to be heard and resolved.

There is no doubt that some people are reticent about making a complaint: this can be seen as a “big step” by people who wish to see something change but do not wish to cause problems for other people. Since 2011, we have seen a rise in the number of complaints about care services, with a particular spike following a public awareness campaign. This does not necessarily mean that care is getting worse: indeed, during the same period, we have evidenced that the quality of care is generally improving.

The Care Inspectorate seeks to make the process of making a complaint as simple as possible. Complaints can be made in writing, through our website, or by telephone through our contact centre. Complainants can opt to remain anonymous if they wish. Many simple complaints can be resolved quickly and simply without the need for a formal investigation. We have approximately 40 dedicated complaint investigation inspectors and managers to are experienced care professionals dedicated to working directly with people who use care, and their relatives.

The complaints process

Section 79 of the Public Services Reform (Scotland) Act 2010 requires that the Care Inspectorate “must establish a procedure by which a person, or someone acting on a person's behalf, may make complaints...in relation to the provision to the person of a care service or about the provision of a care service generally”. The section also requires that “the procedure must provide for it to be available whether or not procedures established by the provider of the service for making complaints...about that service have been or are being pursued”. This means that the [procedures in place for investigating complaints](#) are widely drawn.

In investigating complaints, the Care Inspectorate can exercise its powers of inspection, visit care services unannounced, interview staff in care services, and require information and documents to be provided.

Complaints about care homes

The largest number of complaints we investigated between 2011-2015 involved care homes. Although making up only around 10% of the 14,000 or so registered services, care homes account for 47.9% of the total number of complaints investigated – a total of 4254 completed investigations. The number of complaints about care homes increased by 20% from 717 in 2011/12 to 864 in 2015/16, peaking at 934 complaints completed in 2014/15.

Almost half of all of the complaints we investigated in 2015/16 were about care homes, and of these, the vast majority (93%) were about care homes for older people. During 2015/16 we had received a complaint about 61% of registered care homes, and upheld a complaint about 32% of these.

Of the 32% of care homes for older people with an upheld complaint, most (59%) had only one upheld complaint, 25% had two, and the remainder had between three and seven upheld complaints during the year. In 2015/16 we received at least one complaint about 70% of private sector care homes for older people, and upheld a complaint about 39% of them. This is higher than the proportions of services with complaints received and upheld in the other sectors.

Specific healthcare issues were the largest group of complaints (25.6%). This includes problems with nutrition, medication, tissue viability, and inadequate care and treatment.

Almost half of all complaints received in 2015/16 about care homes for older people were from relatives and friends of people living in the service – 7 percentage points higher than in other types of service. The proportion of complaints received from employees of the service was also higher for care homes for older people than for other service types by 8 percentage points. Although much smaller in number, complaints from health professionals and other professional visitors to a service made up a higher proportion of complaints about care homes for older people than they did for other types of service. Complaints from members of staff and ex members of staff accounted for over a quarter of complaints. People using the care home service themselves accounted for fewer than 1% of all complaints about care homes for older people – compared with 14% for all other types of service. We recognise that this is a very low figure and further work is merited to understand how barriers can be removed to increase this figure. For example, in 2016/17 the Care Inspectorate has begun a pilot programme of using inspection volunteers (lay experts by experience) to help investigate complaints. These people, who have personal experience of using care, support the inspector to investigate complaints, and can help raise awareness of, and accessibility to, the complaints process.

The efficacy of the process

The Care Inspectorate has appropriate management and governance mechanisms in place to ensure that complaints are investigated timeously and effectively. Where we do not uphold complaints, review processes allow people who are dissatisfied to have their case reviewed by another inspector. People who are unhappy about our work can complain about it to us and can have their complaint reviewed by the Scottish Public Services Ombudsman if they wish.

In 2013, the Care Inspectorate commissioned research from the University of Stirling and Queen Margaret University to examine the outcome and impact of complaint investigations on individual complainants in care services and on the services complained about. Overall, the study found that the Care Inspectorate's role in supporting an effective complaints process is valued and the attitude and the approach of its complaint investigators received plaudits from many complainants. The Care Inspectorate plays a fundamentally important role, the research found, for

people who feel 'at the point of no return', having complained to the service provider several times without a satisfactory response. It is generally seen as an independent and authoritative third party in establishing what should be done. The power to make unannounced visits to investigate complaints was highly valued by complainants but many wished to see greater clarity on what has changed as a result of a complaint being upheld². The report provided helpful advice on improving further the quality of our complaints service.

Maintaining awareness of standards

It is important that older people in care homes remain aware of the standards they are entitled to expect. We anticipate that there will be a significant public awareness need when the new national care standards, which are much more person-led and outcome-based, become operational.

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

5. What information and advice is available for older people and their representatives when deciding about entering or moving between care homes? Is it easy to access and understand this information? How can existing information/advice be improved? What further information would be useful?

The Care Inspectorate recognises that there is a wide range of information and advice about care provision available, and that many older people and their relatives will utilise a wide range of sources to make decisions about care. Often, the social work department will play an important role in guiding and advising on provision.

The Care Inspectorate provides public information about the provision and quality of advice. That is, our website shows all care homes registered in Scotland, with details about the type of service provided, the history of quality grades, its location, the provider, the manager, all inspection reports, and details of any complaints which have been upheld.

In addition, the Care Inspectorate provides factual information to other parties, such as care review sites and the NHS 24 Care Information Scotland website. We strongly encourage people who are considering moving into a care home to visit the home, if at all possible, to determine whether the ethos, values and facilities are right for them.

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

Quality of care, availability of funding, and the provision of services are core factors in facilitating older people to choose a care home and move between care homes if they wish. It is also relevant that, in Scotland, there is a well-established commitment, clarified in national policy, to shifting and sustaining the balance of care in favour of older people remaining at home. The establishment of this policy

² Since then, the Care Inspectorate has introduced follow-up inspections which allow problems identified through scrutiny to be followed up in between main inspections.

has been largely due to the need to address older people's preference to stay in their own home and a growing ageing population. This presents both a challenge and an obligation to providers and commissioners of social care, to deliver services that support people to live in their own homes for as long as possible, rather than in care homes or hospitals. A consequence of this policy is the emerging trend of people entering care homes at a later stage in their life, and remaining in those homes for a shorter period. Associated increases in the frailty of care home residents mean that the many (but not all) people are living in care homes with more complex conditions and greater needs, with a greater reliance on support for them.

We are also aware of emerging approaches where residents in care homes access self-directed support funds to obtain their own care, whilst using the residential element of a care home. We will continue to support an increase in choice and personalisation, and support the evaluation of such innovative approaches.

Theme 3: Regulation of care homes

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

The regulations by which care homes must operate are derived from the Public Services Reform (Scotland) Act 2010, associated statutory regulations, and the expectations and requirements of regulatory bodies. In terms of the quality of care and the overall regulation of the service, the Care Inspectorate is the primary regulatory body but other organisations including the Health and Safety Executive, the Scottish Fire and Rescue Service, and others, play a key role.

It is not clear what evidence, if any, exists about the impact of this regulatory framework on the pricing arrangements for care homes. It is important to note the relevance of the national care home contract in Scotland, which provides a uniform commissioning and purchasing arrangement for care home provision by the local partnership.

The Care Inspectorate believes that the impact of the scrutiny and improvement framework on the quality of care is significant. Over the first three years of the Care Inspectorate's operation, we evidenced an overall rise in quality of care services in Scotland. The Care Inspectorate's [triennial review](#) noted that between 2011/12 – 2014/15, the proportion of care homes for older people attracting very good or excellent evaluations across all quality themes inspected increased. Smaller care homes tend to perform better than larger ones, particularly when they are compared with those containing more than 90 places. Although private care homes have a higher proportion of services with lower grades than other sectors, there is some evidence of improvement: in 2012, 10% of privately provided care homes were considered to be weak or unsatisfactory for care and support but by the end of 2014/15, this figure had decreased to 8.5%.

Regulatory approaches in the care sector have played a major role in improving the quality of lives for individuals. In addition to the general improvement in quality, regulatory approaches have been historically instrumental in supporting major changes around, for example, the expectations of single rooms in care homes, residents' increased choice and control that inspectors expect care homes to

evidence, more exacting expectations around healthcare delivery, and rising expectations about how residents should engage in meaningful activity.

The primary responsibility, and indeed praise, for securing improvement lies with those care services which have improved the quality of their provision. Scrutiny and improvement arrangements help identify where improvement is need, help evidence the success (or otherwise) of that improvement, and provide public assurance about the quality of care. The ability for enforcement action, including the rare but important ability to seek judicially-approved closure of a service, provides an ultimate sanction in respect of a failing care service where there is no realistic prospect of improvement, but is always the last resort. An approach which is more likely to lead to better outcomes, if it can be made to work, is to support failing care homes to improve. The Care Inspectorate's interventionist approach to supporting improvement through signposting, collaborative working and the direct provision of staff development and improvement support, is not universal amongst health and social care regulators but is an approach which we believe can and does help improve the quality of care and the experiences of care home residents.

Increasingly, the Care Inspectorate is changing its approach from one of compliance to one of collaboration. Developing and deploying new, modern and proportionate forms of scrutiny is a core part of our strategic objectives and operational plan. We are mindful that regulators in Scotland must abide by the Scottish Regulators' Strategic Code of Practice, established by the Regulatory Reform (Scotland) Act 2014. This has certainly influenced our thinking and approach to scrutiny and improvement activities.

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

There are emerging new arrangements for local strategic commissioning approaches in Scotland, following the creation of integration joint boards from April 2016. This places new responsibilities on integration authorities to prepare a strategic plan and to undertake the strategic commissioning of health and social care services from a range of partners³. The boards' authority in this regard is delegated from the local authority and the health board.

It is too early to tell the extent to which these new arrangements are affecting competition in the sector. The Care Inspectorate and Healthcare Improvement Scotland have a joint responsibility to inspect the quality of strategic commissioning from April 2017, and to recommend improvements thereto, and will be outcome-focused.

The new approach will examine the leadership and culture of the new partnerships, the quality of the strategic planning, and the extent to which, as a consequence of this, people are getting the right help at the right time. This scrutiny programme will examine vision, values and culture across the partnership and the effectiveness of leadership through collaboration in developing and delivering the strategic plan. We will evaluate how effectively partnerships are fulfilling their statutory duty to develop

³ Separate lead agency arrangements apply in Highland local authority area, but the approach to strategic commissioning is Scotland-wide.

plans that reflect identified priorities, local needs and service re-design, including the identification and prioritisation of resources to deliver the strategic plan and how progress will be implemented, monitored and reviewed. The effectiveness of commissioning strategies in meeting identified needs, including how these are implemented, monitored and reviewed, will be assessed. We will seek evidence of improvements in performance of health and social care services to determine the effectiveness and early impact of strategic planning and commissioning strategies in meeting identified needs.

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

Local authorities in Scotland do not have a "market shaping" role as that conferred by the Care Act 2014 on local authorities in England. It would therefore be helpful to understand how, and the extent to which, the CMA intends to inquire into this issue in relation to devolved nations. The nearest equivalent policy approach is around strategic commissioning, discussed above.

Theme 4: Competition between care homes

10. How well does competition work between care homes?

It is not clear what evidence can be used to assess this issue, or for what purpose. Our expectation is about the quality of provision, not competition itself. Seeking to prioritise competition between care homes based on price risks being in tension with significant swathes of national policy designed to improve the quality of care. We do not believe that competition or other market forces alone provide sufficient public protection, public assurance, or mechanisms for accountability in the delivery of care to often elderly and sometimes vulnerable people.

The starting point for assessing the quality of a system should be the extent to which it meets people's needs and supports positive experiences and outcomes. This person-led approach to quality is embedded throughout good social care practice. We would therefore welcome the CMA interpreting this aspect of the proposed market study widely, and start its focus by examining the extent to which the care home sector offers a choice of high-quality provision for people using or seeking to use its services. We would be happy to provide more information about this point.

11. What are the key pressures for care home providers that are affecting their long-term sustainability?

There is no doubt that this is a challenging time for the care sector. Care homes operate in an environment with rapidly changing demographics, rising public expectations, rising wages, increasing needs of residents, long-term economic uncertainty, and challenging public sector funding.

We maintain regular dialogue with care providers, their representative bodies, and banks with an interest in the sector. The purpose of this is to understand the issues that may be prevalent and be able to respond where possible and appropriate. In cases where care homes close, or providers withdraw from the market, the Care

Inspectorate has an important role in supporting the continuity of care for people, in conjunction with local authorities and others. We participate in national contingency planning arrangements with the Scottish Government and COSLA where there is a risk of unplanned care home closure.

We recognise that staffing remains a significant challenge for care homes. At December 2014, 58% of care homes for older people reported to the Care Inspectorate that they had staffing vacancies, a rise on the previous year. Just under half of care of care homes for older people (49%) reported that they had had problems filling vacancies. There are significant regional variations to this pattern, which is likely to reflect, to an extent, local labour market conditions. (Data for 2015/16 will be reported in spring 2017.)

12. What, if any, barriers exist to care home providers entering the market and/or expanding their activities? Is there a lack of capacity in some geographical areas?

The capital infrastructure needed to provide a care home is clearly a barrier to market entry, and in some cases the physical nature of care homes has prevented expansion of capacity. However there is a more fundamental, quality-led gateway to entering the market which is the registration process: the Care Inspectorate is itself a gateway to the market. The Care Inspectorate is required to pay heed to a variety of factors when assessing whether or not to grant registration to a care home. This allows us to assess the fitness of a provider to register a care home, allows us to assess the extent to which the plans for the operation of the service are likely to lead to positive outcomes for people, and ensures that appropriate safeguards are in place to deliver high quality care. We believe this is a necessary and proportionate requirement for providers wishing to enter the market or expand.

The Care Inspectorate would welcome changes in the registration categories of care services, currently tightly drawn in legislation, to support more innovation but will continue to seek to balance this with the need to provide public protection and act as a quality gateway to the market.

Geography

The provision of care homes in rural, remote and island areas is challenging and a major feature of provision in many parts of Scotland. Geography can plan a limiting factor in providing a pool of potential residents and can limit the availability of appropriately-qualified staff. The Care Inspectorate is working with a number of integration boards who operate in rural areas to support new approaches to care, including innovative use of care at home and the use of self directed support to ensure people receive the right care for them.

Our recent joint inspections of health and social care provision in the Western Isles, Dumfries and Galloway, and Argyll and Bute have all identified various impacts of and responses to the provision of support for older people un rural areas. Key to this is recognising that support for older people does not always come from a care home: care at home service play a critical role in supporting older people to remain in their own homes.

For example, Dumfries and Galloway's population of older people includes a significant proportion living in rural areas. We heard from staff and older people about many challenges that the distances between communities and services could present to older people, which contributed to many older people becoming isolated. In Dumfries and Galloway, staff told us that community hospitals were, at times, being used to provide step-down care. However, some older people were delayed in community hospitals for lengthy periods while they waited for care at home packages. This was a significant risk in the more rural areas. It reduced the capacity in these hospitals to provide this step-down care as well as step-up care. The problem was compounded by a lack of care providers in the area, limiting the ability to provide care in the most appropriate place for the older person.

Elsewhere, both NHS Western Isles and the local council had experienced long-term issues of recruiting and retaining staff, but had clear approaches to address this. The local council faced a significant challenge in meeting the assessed need and demand for care at home services. We met older people and their families who were either waiting for, or who had waited significant lengths of time for, a care at home package. This had placed them under considerable pressure. This could be a problem across the islands, but was most acute in some of the most remote and rural areas and could be exacerbated by care at home staff having to travel very large distances to visit older people. We are now working with a range of partners to support improvement across the western isles.