



# Care Market Shaping and Oversight Protocol

## Social Care, Health and Wellbeing OP/PD, DCALD/MH and Strategic Commissioning (Adults)

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# 1 Introduction

1.1 The Care Act 2014 places new duties on local authorities to facilitate and shape their local market for adult care and support as a whole, so that it meets the needs of all people in their area who need care and support, whether arranged or funded by the state, by the individual themselves, or in other ways.

1.2 Interruptions, and the possibility of interruptions to care and support services causes uncertainty and anxiety for people receiving service, their carers, family and friends. It is vital, therefore that the care and support systems remain robust, and that provisions are made to minimise the impact on the individuals concerned.

1.3 Interruption to care and support services can arise from a number of different causes. The Care Act 2014 gives local authorities the power to intervene in specified situations in order to minimise the impact of an interruption to care and support services on the individuals receiving service, their Carers, family and friends.

1.4 Local authorities have a duty to safeguard the needs and welfare of people in receipt of a community service regardless of whether they are publically funded, self-funding or whether they have been placed by another authority. This protocol **does not replace** duties under the safeguarding policy and procedures and where there are safeguarding risks. For matters to do with safeguarding, Kent and Medway Multi Agency Safeguarding Vulnerable Adults Protocols and Guidance process should be followed and can be accessed via the link below:

<https://shareweb.kent.gov.uk/Documents/adult-Social-Services/adult-protection/adult-protection-policies-protocols-and-guidance.pdf>

1.5 The provisions of the Care Act also firmly establish the importance of involving the person as fully as possible in any decisions relating to them and that the wishes and feeling of the person must be considered. It is recognised that the transfer of people to an alternate service provider can be particularly stressful. Where a community service provider makes a decision to exit the market necessitating the transfer of services to an alternate service provider, possible adverse effects can be minimised if:

- *continuity of care is maintained*
- *there is good consultation*
- *there is good communication and planning*

1.6 This document seeks to provide an overview of the market shaping duties contained in the Care Act along with the procedures for responding to planned and emergency service provider failure, it should be read in conjunction with:

- *Section 5 of The Care Act 2014 (Market Shaping and Commissioning of Care and Support)*
- *Sections 19 and 48 and 57 of The Care Act 2014 (Managing provider failure and other service interruptions)*
- *The Care and Support (Business Failure) Regulations 2014*
- *Chapter 4 of the Care and Support Statutory Guidance (Market Shaping and Commissioning of Care and Support)*

- *Chapter 5 of the Care and Support Statutory Guidance (Managing provider failure and other service interruptions)*

## 2 The Care Act: Market Shaping

2.1 High-quality, personalised care and support can only be achieved where there is a vibrant, responsive market of service provision. The role of the local authority is critical to achieving this, both through the actions it takes to directly commission services to meet needs, and the broader understanding and interactions it facilitates with the wider market, for the benefit of all local people and communities.

2.2 Local authorities have a vital role in ensuring that universal services are available to the whole population and where necessary, tailored to meet the needs of those with additional support requirements (for example housing and leisure services).

## 3 What is Care Market Shaping?

3.1 Care market shaping means the local authority collaborating closely with partners, including people with care and support needs, carers and families, to facilitate the whole market in its area for care, support and related services. This includes services arranged and paid for by the state through the authority itself, those services paid by the state through direct payments, and those services arranged and paid for by individuals from whatever sources (sometimes called 'self-funders'), and services paid for by a combination of these sources. Market shaping activity should stimulate a diverse range of appropriate high quality services (both in terms of the types, volumes and quality of services and the types of provider organisation), and ensure the market as a whole remains vibrant and sustainable.

3.2 The core activities of market shaping are to engage with stakeholders to develop understanding of supply and demand and articulate likely trends that reflect people's evolving needs and aspirations, and based on evidence, to signal to the market the types of services needed now and in the future to meet them, encourage innovation, investment and continuous improvement. It can also include working to ensure that those who purchase their own services are empowered to be effective consumers, for example by helping people who want to take direct payments make informed decisions about employing personal assistants.

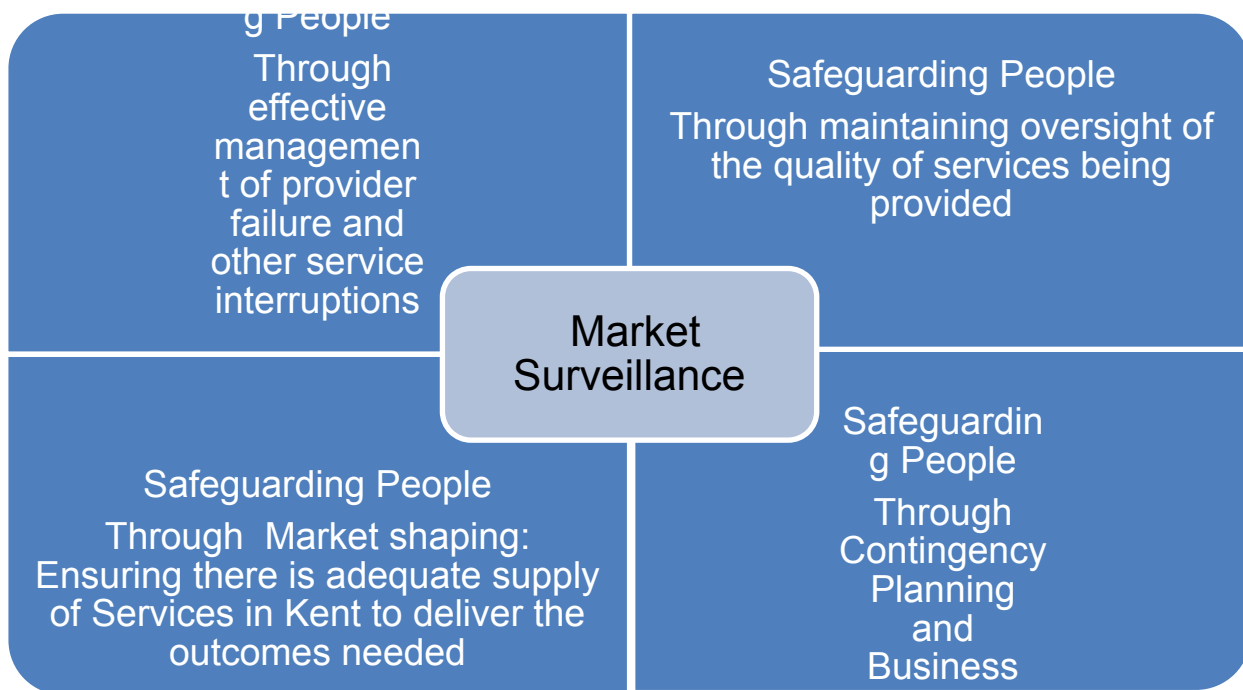
3.3 The Care Act sets out authorities' duties to promote the efficient and effective operation of the local market in care and support services. This is described in this protocol as **Market Surveillance**. Central to this function is the need to ensure that the authority has, and makes available, information about the service providers of care and support services in its area and the types of services they provide. This gathering of market intelligence is equally relevant to authorities' responses to business failure and other service interruptions.

3.4 Where alternative services are to be put in place, an effective response requires a thorough knowledge of the market:

- a. *which service providers deliver which services*

- b. *the quality of each service provider's services*
- c. *where is there spare capacity in service provision/market*

3.5 In anticipating potential service interruptions, there is also a need to know the vulnerabilities in the operation of the market. For example, if there is only one local service provider of a particular service and no alternatives exist locally, or one service provider caters for a substantial part of the local market and alternative capacity could not be found easily. Service interruptions involving such service providers are likely to be more difficult to address. We will work to develop good knowledge of the market vulnerabilities, market capacity and capabilities in our areas in order that we respond effectively to service interruptions.



#### 4 The Focus of Shaping the Care Market In Kent

4.1 Kent County Council (KCC) will reference the following high-level themes when carrying out duties to shape the local care market. The specific themes will apply to a greater or lesser extent depending on the specific activity.

4.2 **Focussing on outcomes:** KCC is committed to promoting the wellbeing of individuals who need care and support, as well as the wellbeing of their carers, emphasising the importance of enabling people to stay independent as long as is possible. KCC will ensure that the focus on achieving positive outcomes is imbedded in all care market shaping activities. The county council has set out its strategic statement outcomes document which informs the work of our directorate.

In encouraging outcomes-based services, we will give consideration to incorporating “payment-by-outcomes” mechanisms, where practical.

**4.3 Promoting quality:** KCC has a duty to facilitate markets that offer a diverse range of high-quality and appropriate services. When considering the quality of services, we will be mindful of the capacity, capability, timeliness, continuity, reliability and flexibility of services delivered to support well-being, where appropriate, using the definitions that underpin the Care Quality Commissions fundamental standards of care as a minimum.

**4.4 Supporting sustainability:** KCC will work to develop markets for care and support that, whilst recognising that individual providers may exit or enter the market from time to time, ensure the overall provision of services remains healthy in terms of the sufficiency of adequate provision of quality care and support needed to meet expected needs.

**4.5 Ensuring choice:** KCC is committed to encouraging a range of different types of service provider organisations to ensure that the people have genuine choice of service type. We will pay suitable regard to ensuring sufficiency of provision, both in terms of capacity and capability to meet the anticipated needs of the local population, regardless of how they are funded.

**4.6** KCC will facilitate the personalisation of care and support, and will encourage services designed to enable people to make meaningful choices, and to take control of their support arrangements. Our belief is that personalised care and support services should be flexible to ensure people have choices over what they are supported with, when and how their support is provided, and whenever possible, by whom.

**4.7** KCC will facilitate the provision of information and advice to support people's choices for care and support.

**4.8** In the case of service provider exit, people should be involved as fully as possible in choosing alternative service provision and should have the opportunity to have contact with potential new service providers and access services on a trial basis.

**4.9** Strategic commissioning using contractual, purchasing and mapping and research intelligence will design transfer options for senior management approval. The chosen alternate service provider option (which may include a direct payment arrangement where appropriate), will be shared with the person affected and their family/carer to make an informed decision.

**4.10** If the person facing the decision of alternate provision is assessed as lacking the mental capacity to make that decision and they have no family or friends willing and able to be consulted as part of making that decision, the local authority or NHS body commissioning the care, will instruct an IMCA to support the decision-making process. The IMCA does not become the decision maker; that remains with the identified decision maker (i.e. generally a case manager).

**4.11** Where the service provider exit is an enforced or undertaken as an emergency and there is not enough time to instruct an IMCA to represent the person, an IMCA referral will be made as soon as practicable after the transfer to audit the

decision making process and ensure decisions were made in the best interests of the person. An IMCA will be instructed for the first care review and may be involved in further care review decisions.

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4.12 Decision-making by health and social care professionals must always be made according to the five Statutory Principles of the Mental Capacity Act 2005:

[http://www.kent.gov.uk/\\_data/assets/pdf\\_file/0017/10862/mental-capacity-act-brief-guide.pdf](http://www.kent.gov.uk/_data/assets/pdf_file/0017/10862/mental-capacity-act-brief-guide.pdf)

4.13 In some instances of enforced or emergency exit, due to market capacity restrictions, it may not be possible to move people to the service provider of their choice. In such cases interim service options can be offered then choice must be given for who will provide the long term service if desired.

4.14 A local authority is not empowered to change a person's service provider against their will. If a person states that they do not want to transfer and is assessed as having capacity, an assessment including risk, will be completed. All options for future support should be discussed and put in writing to the person. These options may include supporting the set-up of a direct payment or personal assistance *arrangement (unless legal advice has supported an agreement to prevent direct payment arrangements if the risk of remaining with the exiting service provider is assessed as too high)*. In the event that the person continues to refuse to move then advice should be taken from the local authority legal team.

4.15 Normally if an adult refuses an assessment of their needs the local authority need not carry it out. However, the local authority must carry one out if the adult is experiencing or at risk of abuse or neglect. The local authority must also carry out a needs assessment where an adult lacks capacity to refuse and it would be in the adult's best interests to do so (Care Act s11).

4.16 **Co-production with stakeholders:** In line with our standing policies, KCC will work alongside people with care and support needs, service providers and other stakeholders to develop shared and agreed solutions.

4.17 **Understanding the market:** KCC will endeavour to maintain a robust understanding of current and future needs for care and support services, using Market Position Statements that include;

- What support and care services people need and how they need them to be provided
- The support and services available at the moment, and what is not available but needs to be

- What support and care services the council thinks people will need in the future
- What the future of care and support will be like locally, how it will be funded and purchased

**4.18 Facilitating market development:** Where practicable, the local authority will collaborate with stakeholders and providers to bring together information about needs and demands for care and support with that about future supply, to understand for their whole market the implications for service delivery.

4.19 KCC will endeavour to support and empower effective purchasing decisions by people who self-fund care or purchase services through direct payments, recognising that this can help deliver a more effective and responsive local market.

4.20 KCC is committed to ensuring that the market has sufficient signals about its intentions, intelligence and understanding to react effectively and meet demand, a process often referred to as market shaping.

4.21 Market position statements are intended to encourage a continuing dialogue between a local authority, stakeholders and providers where that dialogue results in an enhanced understanding by all parties, and is therefore an important market shaping tool.

**4.22 Ensuring value for money:** KCC will reference best practice in the commissioning, re-commissioning and decommissioning of services, and recognises that achieving value for money means optimum use of resources to achieve intended outcomes and therefore will regard service quality as well as cost when procuring services, including considering additional social value.

4.23 The market for care and support services is part of a wider system in which much of the need for care and support is met by people's own efforts, by their families, friends or other carers, and by community networks. Market shaping and commissioning should aim to promote a market for care and support that should be seen as broadening, supplementing and supporting all these vital sources of care and support.

- **Market shaping, commissioning, procurement and contracting** are inter-related activities but all have a critical bearing on the ability to minimise poor provider performance and manage provider failure.
- **Market shaping** is close collaboration with relevant partners, including people with care and support needs, carers and families, to facilitate the whole market for support and related services. This includes local authority funded services, those services arranged and paid for by the individuals with care and support needs and carers with support needs and services paid for by a combination of these sources.
- **Commissioning** is the local authority's cyclical activity to assess the needs of its local population for care and support services, determining what element of



this need to be arranged by the authority, then designing, delivering, monitoring and evaluating those services to ensure appropriate outcomes.

- **Procurement** is the specific functions carried out by the local authority to buy or acquire the services which the local authority has duties to arrange to meet people's needs, to agreed quality standards so as to provide effective value for money to the public purse and deliver its commissioning strategy. Contracting is the means by which that process is made legally binding.
- **Contract management** is the process that then ensures that the services continue to be delivered to the agreed quality standards. Commissioning encompasses procurement but includes the wider set of strategic activities.

4.24 The Care Act 2014 places a duty on local authorities' on to facilitate and shape their market for adult care and support as a whole. The ambition is for the whole market to consist of a sustainable and diverse range of care and support providers, continuously improving quality and choice, and delivering better, innovative and cost-effective outcomes that promote the wellbeing of people who need care and support.

4.25 Under the Care Act 2014, local authorities must:

- *ensure that the promotion of the wellbeing of individuals who need care and support, and the wellbeing of carers, and the outcomes they require, are central to all care and support functions in relation to individuals, emphasising the importance;*
- *facilitate markets that offer a diverse range of high-quality and appropriate services;*
- *have regard to ensuring the continuous improvement of those services and encouraging a workforce which effectively underpins the market. It is important to establish agreed understandable and clear criteria for quality and to ensure they are met;*
- *when arranging services themselves ensure their commissioning practices and the services delivered on their behalf comply with the requirements of the Equality Act 2010, and do not discriminate against people with protected characteristics, this should include monitoring delivery against the requirements of that Act;*
- *consider how to help foster, enhance and appropriately incentivise the care sector workforce to underpin effective, high quality services*
- *work to develop markets for care and support that – whilst recognising that individual providers may exit the market from time to time – ensure the overall provision of services remains healthy in terms of the sufficiency of adequate provision of high quality care and support needed to meet expected needs*
- *encourage a variety of different providers and different types of services*
- *encourage a range of different types of service provider organisations to ensure people have a genuine choice of different types of service. This will include independent private providers, third sector, voluntary and community based organisations, including user-led organisations, mutual and small businesses*

- *have regard to ensuring a sufficiency of provision – in terms of both capacity and capability – to meet anticipated needs for all people in their area needing care and support – regardless of how they are funded*
- *understand local markets and develop knowledge of current and future needs for care and support services, and, insofar as they are willing to share and discuss, understand providers' business models and plans*

4.26 Shaping the market and commissioning in this way should minimise poor performance providers and enable an effective response to provider failure if and then this occurs.

4.27 Equally central to this function is the need to ensure that the local authority has, and makes available, information about the providers of care and support services in its area and the types of services they provide. This gathering of market intelligence is equally relevant to authorities' responses to business failure and other service interruptions.

## **5 The Care Act: Managing Provider Failure**

5.1 The possibility of interruptions to care and support services causes uncertainty and anxiety for people receiving services, their carers, family and friends, this procedure explains how the Care Act 2014 makes provision to ensure that, in such circumstances, the care and support needs of those receiving the service continue to be met.

5.2 It describes local authorities' powers and duties when services are at risk of interruption in general and, in particular, when the interruption is because a provider's business has failed.

5.3 Under the Act local authorities have a legal duty to ensure people continue to have their care needs met if a provider stops being able to do so.

5.4 The Act makes it clear that local authorities have a temporary duty to ensure that the needs of people continue to be met if their care provider becomes unable to carry on providing care because of business failure, no matter what type of care they are receiving. Local authorities will have a responsibility towards all people receiving care. This is regardless of whether they pay for their care themselves, the local authority pays for it, or whether it is funded in any other way. In these circumstances, the local authority must take steps to ensure that the person does not experience a gap in the care they need as a result of the provider failing.

- ***Non Business failure*** (Care Act s.19) *means where a service provider cannot or will not meet its responsibilities and KCC judges that the needs of the person are urgent (and where there is not already a duty under s.18 of the Care Act to meet the adult's needs) KCC can decide to act to ensure the person's needs continue to be met.*
- *In urgent cases this can be done without first carrying out the required assessments. In such cases the assessments must still be carried out but can be done in due course so as to not delay care and support being put in place.*

- **Business failure** is defined in *The Care and Support (Business Failure) Regulations 2014*. These Regulations define what is meant by “business failure” and explain the circumstances in which a person is to be treated as being unable to do something because of business failure. Business failure is defined by a list of different events such as the appointment of an administrator, the appointment of a receiver or an administrative receiver (the full list appears in the Regulations). Service interruption because of “business failure” relates to the whole of the regulated activity and not to parts of it.
- **Temporary duty or duty** means the duty on local authorities to meet needs in the case of business failure. **Temporary** means the duty continues for as long as the local authority considers it necessary.

The temporary duty applies:

- *regardless of whether a person is ordinarily resident in the authority’s area; and*
- *from the moment the authority becomes aware of the business failure.*

5.5 KCC is under a **temporary duty** to meet people’s needs when a service provider can no longer provide the service because the service provider’s business has failed. This duty does not apply in insolvency situations where an Administrator is appointed and continues to run the service.

5.6 The actions to be taken will depend on the circumstances, and may include the provision of information. The duty is to meet needs but authorities have discretion as to how they meet those needs.

5.7 **Needs to be met must be met** are those being met by the service provider immediately before the service provider became unable to carry on the activity. KCC is entitled to charge for meeting those needs. How the needs are met is a decision for the local authority however we must involve the person concerned. Where the person lacks capacity anyone who appears to be interested in the person’s welfare must be asked to be involved.

5.8 The actions to be taken will depend on the circumstances, and may include the provision of information. The duty is to meet needs but authorities have discretion as to how they meet those needs.

5.9 There are numerous other situations that can cause disruption to care and support services not all of which will be related to business failure. These may be planned or unplanned disruptions and relate to, for example:

- *business failure or other commercial difficulties which put the continuation of the provider’s business under threat such as insolvency;*
- *cancellation of registration with Care Quality Commission (CQC) including when enforcement action is taken;*

- *management/ staffing changes impact such that services or support cannot be delivered;*
- *unforeseen emergencies such as flood or fire;*
- *outbreak of illness such as norovirus or meningitis at a care home*

5.10 Action should be taken in line with the duties and powers to act placed on local authorities, as set out below.

## **6 Service interruptions because of business failure**

6.1 Business failure of a major provider is a rare and extreme event and does not automatically equate to closure of a service. It may have no impact on residents or the people who use the services. However, if a provider is unable to continue because of business failure, the duties are as follows.

- **A temporary duty to meet people's needs** - this duty applies when a provider is unable to continue to carry on the relevant activity in question because of business failure. If the provider's business has failed but the service continues to be provided then the duty is not triggered, for example.
- The duty applies where a failed provider was meeting needs in the authority's area. It does not matter whether or not the authority has contracts with that provider, nor does it matter if all the people affected are self-funders or arrange their own care and support.

6.2 The needs that **must** be met are those that were being met by the provider immediately before the provider became unable to carry on the activity. Kent County Council **must** ensure the needs are met. However, how that is done is for us to decide, and there is significant flexibility in determining how to do so, as set out in section 8 of the Care Act.

6.3 It is not necessary to meet those needs through exactly the same combination of services that were previously supplied. However, when deciding how needs will be met, we must take all reasonable steps to agree how needs should be met with the person concerned involving as appropriate:

- *the person concerned, any carer that the person has, or anyone whom the person asks the authority to involve;*
- *anyone who appears to the authority to be interested in the person's welfare, in cases where the person concerned lacks capacity;*
- *the carer and anyone the carer asks the authority to involve where a carer's service is involved*

6.4 Disruption for the person or people receiving care should be minimised in line with the wellbeing principle and, although we are able to exercise discretion about how to meet needs, the aim should be to provide a service as similar as possible to the previous one.

6.5 Prompt actions should be taken to meet people's needs and it is not necessary for a needs or carer's assessment or a financial assessment to be in place before action is taken.

6.6 Where business failure is the reason for disruption of service or support needs must be met regardless of:

- *whether the needs would meet eligibility criteria*
- *how people are paying for the cost of meeting those needs, for example where the person arranges their own care via a direct payment or in the case of self-funders*
- *ordinary residence (in cases of out of county or cross-border placements where a person or persons are placed within Kent County Council from another authority area)*

6.7 However, it is permissible to charge the person for the costs of meeting their needs where they would ordinarily have paid themselves, and may also charge the local authority which was previously meeting those needs in the case of out of county or cross border placements. The charge must cover only the actual cost incurred by us in meeting the needs. No charge must be made for the provision of information and advice to the person.

6.8 In cases of provider failure where, for example, persons are in receipt of NHS Continuing Healthcare (NHS CHC) the duty to meet the needs and provide NHS CHC falls on the NHS and the local authority does not have a legal obligation to meet these needs. In such cases reference should be made to the:

- *National Health Service Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) Regulations 2013*
- *National Framework for NHS Continuing Healthcare; and*
- *NHS-funded Nursing Care and the NHS-Funded Nursing Care Best Practice Guidance*

6.9 Where the local authority temporary responsibilities are invoked due to providers failure and in order to ensure continuity of care and support to service users, this requires the local authority relevant function(s) and staff whose usual responsibility it is to take necessary actions.

## **7 Business failure involving a provider in the CQC oversight regime**

7.1 From April 2015, the financial "health" of certain care and support service providers will become subject to monitoring by the Care Quality Commission (CQC). The Care and Support (Market Oversight Criteria) Regulations 2014 set out the entry criteria for a service provider to fall within the regime. These are intended to be service providers which, because of their size, geographic concentration or other factors, would be difficult for one or more local authorities to replace, and therefore where national oversight is required. CQC will determine which service providers

satisfy the criteria using data available to it. It will notify the service providers which meet the entry criteria.

7.2 Where CQC determines that a provider in the regime is likely to become unable to continue with their activity because of business failure, it is required to tell the local authorities which it thinks will be required to carry out the temporary duty, so that they can prepare for the local consequences of the business failure. CQC should work closely together with the affected local authorities to help them fulfil their temporary duty. CQC's trigger to contact authorities is that it believes the whole of the regulated activity in respect of which the provider is registered is likely to fail, not parts of it, so if, say, a single home owned by the provider is likely to fail because it is unprofitable but the remainder of the provider's relevant regulated activity is able to continue. In these circumstances, it is the provider's responsibility to wind down and close the service in line with its contractual obligations and it is expected that providers would do so in a planned way that does not interrupt people's care.

7.3 Where CQC considers it necessary, it may request the provider to share with it relevant information to support local authorities in the discharge of their temporary duty. CQC must give the information, and any further relevant information it holds, to the local authorities affected.

## **8 Business failure involving a provider not in the CQC oversight regime**

8.1 Where the provider falls outside the CQC Market Oversight Criteria the temporary duty on local authorities to meet needs in the case of business failure and to ensure continuity of care in respect of business failure still applies.

## **9 Service interruptions other than business failure (service failure)**

9.1 In situations where services fail or are interrupted but business failure is not the cause powers detailed in Sections 18 and 19 of the Care Act 2014 can be exercised in order to meet urgent needs without having first conducted a needs assessment, financial assessment or eligibility criteria determination.

Examples might be:

- *the continued provision of care and support to those receiving services where these services are in imminent jeopardy and there is no likelihood of returning to a "business as usual" in the imminent future*
- *a temporary service closure related to unforeseen absence of qualified staff*
- *a temporary service closure related to interruption of essential utilities such as water, gas or electricity*
- *complications with the providers suppliers of say agency nursing staff*
- *an unforeseen emergency situation such as fire or flood*
- *permanent closure of a service, such as the sale of a care home which is being sold on for use as a hotel*

9.2 The authority may meet urgent needs regardless of whether the adult is ordinary resident in its area and, therefore, can act quickly if circumstances warrant. In this context, “urgent” takes its everyday meaning, subject to interpretation by the courts, and may be related to, for example, time, severity etc.

9.3 The power to meet urgent needs is not limited by reference to services delivered by particular providers and is thus available where urgent needs arise as a result of service failure of an unregistered provider (i.e. a provider of an unregulated social care activity). The power may also be used in the context of quality failings of providers if that is causing people to have urgent needs.

9.4 The action required in relation to each service interruption should be considered on its facts and via a process of risk assessment. It is for the authority to decide if it will act to meet a person’s needs for care and support which appear to it to be urgent. In exercising this judgement the local authority must act lawfully, including taking decisions that are reasonable.

## **10 Contingency planning**

10.1 This section complements KCC existing emergency, contingency and business continuity plans for service provider exit. As part of contingency planning, KCC will:

- *Consider how they would respond to different service interruptions including reviewing which service interruptions pose the greatest risk in their locality developing contingency plans in advance, in conjunction with local partners*
- *Discuss with local providers which services they would be willing and able to provide if the need arose because another local provider had failed*
- *Consider where the involvement of neighbouring authorities would be essential in order to maintain services, ensure effective liaison and information sharing arrangements are set up in advance*
- *Have the capacity to react quickly to any media reporting of service interruptions, whether large scale or small, to minimise uncertainty and anxiety amongst those in receipt of services and the wider public*

## **11 Service Provider Exit Protocols**

There are two sector specific protocols which build on the Care Act service provider exit principles and are designed to provide practical guidance and tools for the lead mobilisation managers and stakeholders on managing the process. These step by step guides ensure legal duties are met, best practice is followed and people’s well-being is maintained and promoted throughout such incidents. They are:

- Care Home Service Provider Exit Protocol
- Home Care Business Provider Exit Protocol