

Service Interruptions & Provider Failure



Dorset
Council

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Draft



Service Interruptions & Provider Failure Policy

Policy Details

Purpose	<p>The Care Act 2014 put in place a new framework for adult safeguarding, and it includes measures to guard against provider failure and ensure that any instances that occur are managed without disruption to services. This policy is based on statutory guidance and it has been written to help Dorset Council achieve compliance with those measures.</p> <p>The Council will consider what actions might be needed if there is a provider failure. For example, undertaking early planning to identify potential replacement service.</p> <p>Where a provider faces imminent financial failure in Dorset the Council will take appropriate steps to ensure continuity of care and support for people who have their care and support provided by that provider.</p>
Scope	<p>This policy applies wherever the 'temporary duty' set out in the Care Act 2014 applies:</p> <p>Sections 48 to 52 of the Care Act 2014 impose duties ('temporary duties') on Councils in England and Wales, to meet the care and support needs of adults, or the support needs of carers, in circumstances where registered providers of care are unable to carry on because of 'business failure'.</p> <p>The Care and Support (Business Failure) Regulations 2015 is secondary legislation under the Care Act 2014 that defines 'business failure' and the circumstances in which a provider is to be treated as unable to do something because of it. Regulation 2 sets out the events which constitute business failure for the purposes of the temporary duties on Councils.</p> <p>This policy does not apply to provider failure in settings outside the Dorset Council boundary. In respect of provider failure, Dorset people placed outside the Dorset Council boundary are the responsibility of the Council within whose boundary they are placed.</p> <p>Similarly, in respect of provider failure, people from outside Dorset in settings within the Dorset Council boundary are the responsibility of Dorset Council.</p>
Underpinning Guidance and Legislation	<p>Care and support statutory guidance - GOV.UK (www.gov.uk)</p>



Equality Impact Assessment	<p>The Department of Health (DH) itself prepared an Impact Assessment to understand the costs, benefits and impacts of the Care Act 2014. This Dorset policy can rely on the DH Impact Assessment because it is designed to ensure compliance with the Care Act 2014 in Dorset.</p> <p>The Department of Health's Impact Assessment did not identify any unlawful discrimination relevant to this policy. However, it did note that [at the time it was written] the proportion of the minority ethnic population living in care homes is smaller than the white population living in care homes, and that older people from ethnic minorities are more likely to be living in larger households and a household with one or more carer.</p>
Date policy approved	To be confirmed.
Policy approved by	Dorset Council DLG Meeting – To be confirmed.
Date for review	It is suggested that this policy be reviewed two years after it is approved, or earlier if the underpinning legislation should change.
Date reviewed by legal (to be removed once approved)	Sue Turner 11/09/2023
Status	<p>Draft. UNRESTRICTED. Public-facing when approved.</p> <p>The approved policy will be mandatory for all colleagues to whom it applies.</p>
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1. Introduction

- 1.1 This policy sets out Dorset Council's legal powers and duties when services are at risk of interruption in general and when the interruption is because a provider's business has failed. It will outline how Dorset Council will exercise those powers and the discharge of those duties.
- 1.2 Interruptions can arise from a number of different causes. An example is when a provider of services faces commercial difficulties that put the continuation of their business under threat. The Council will use its powers to act in relevant cases, as set out below.

2. Service interruptions because of business failure

- 2.1 The business failure of a major provider has been a rare event in the past and it has not automatically resulted in the closure of a service. It may have no impact on residents or the people who use the services. However, if a provider of any size is unable to continue because of business failure, the duties on the Council are as follows.
- 2.2 The Council is under a temporary legal duty to meet people's needs when a provider is unable to continue to carry on a relevant activity because of business failure. The duty applies when a service can no longer be provided and the reason for that is that the provider's business has failed. If the provider's business has failed but the service continues to be provided, then the duty is not 'triggered'. This often may happen in insolvency situations where an administrator is appointed and continues to run the service.
- 2.3 The duty applies where a failed provider was meeting needs in the Dorset Council area. It does not matter whether or not Dorset Council has any contracts with that provider, nor does it matter if all the people affected are self-funders. The duty is in respect of people receiving care by that provider in Dorset Council's area – it does not matter which Council (if any) made the arrangements to provide services.
- 2.4 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. Dorset Council will ensure the needs are met, and there is flexibility in determining how to do so, as set out in [section 8](#) of the Care Act 2014: 'how to meet needs'.
- 2.5 It is not necessary to meet those needs through the same combination of services that were previously supplied. However, when deciding how needs will be met, we must involve the person, any carer that the person has, or anyone whom the person asks us to involve (see chapter 10 of the Care and Support statutory guidance on [care and support planning](#)). Where the person lacks the mental capacity to ask the Council to do that, we must involve anyone who appears to us to be interested in the person's welfare following the principles of the [Mental](#)



[Capacity Act 2005](#). Where a carer's service is involved, we must involve the carer and anyone the carer asks us to involve. We must take all reasonable steps to agree how needs should be met with the person concerned. We should seek to minimise disruption for people receiving care, in line with the wellbeing principle and, although we have discretion about how to meet needs, our aim should be to provide a service as similar as possible to the previous one.

- 2.6 The Council has the power, where it considers this necessary to discharge the temporary duty, to request that the provider, or anyone involved in the provider's business as it thinks appropriate, to supply it with information that it needs. This may involve, for example, up-to-date records of the people who are receiving services from that provider, to help us to identify those people who may require our support.
- 2.7 The Council should act promptly to meet people's needs. The lack of a needs or carer's assessment or a financial assessment for a person must not be a barrier to action. Neither is it necessary to complete those assessments before or whilst taking action. Similarly, we must meet needs irrespective of whether those needs would meet the eligibility criteria. In particular, how someone pays for the costs of meeting their needs – for example, in full by the person themselves – must have no influence on whether we fulfil the duty. However, we may charge the person for the costs of meeting their needs, and we may also charge another Council which was previously meeting those needs, if we temporarily meet the needs of a person who is not ordinarily resident in the Dorset Council area. The charge must cover only the actual cost we incur in meeting the needs. No charge must be made for the provision of information and advice to the person.
- 2.8 The Care Act 2014 imposes certain restrictions on the provision of health services by Councils and these also apply to meeting needs in provider failure cases. A Council may not meet needs in provider failure cases by, for example, providing health care which is deemed beyond incidental and ancillary to the meeting of social care needs. Where needs are deemed such, other methods of support such as NHS Continuing Healthcare (NHS CHC) must be considered. Where the failed provider's clientele consists of people in receipt of NHS CHC, it is reasonable for us to conclude that it was not necessary to do anything to meet those needs. This is because the duty to meet both the health and social care needs of people eligible for CHC is the responsibility of the NHS. However, other statutory provisions remain the responsibility of a local authority, even when an individual is eligible for CHC, such as carers assessments or minor/major adaptations. Please refer to the [Standing Rules \(the National Health Service Commissioning Board and Clinical Commissioning Groups \(Responsibilities and Standing Rules\) Regulations 2012, as amended\)](#); and to the [national framework for NHS Continuing Healthcare and NHS-funded nursing care and the NHS-Funded Nursing Care Best Practice Guidance for further guidance](#).
- 2.9 In fulfilling this function, the Council must follow the general duties to cooperate ([see chapter 15](#) of the Care Act 2014 statutory guidance). Where a person is not ordinarily resident in the Dorset Council area, we must cooperate with the Council which was arranging for the needs to be met previously (for example, before the provider became unable to carry on because of business failure). The duty of



cooperation applies equally where the needs being met previously were paid for (in full or in part) by another Council through a direct payment to the person concerned.

- 2.10 If we disagree with another Council on whether and/or how the law (for example, [section 48](#) of the Care Act 2014) applies in these circumstances then we may apply to the Secretary of State for a determination of a dispute under the procedure that applies to disputes over ordinary residence or continuity of care (see chapters [19 and 20](#) of the Care Act 2014 statutory guidance).
- 2.11 All of the duties on the Council described above apply equally, if the needs at the time the provider became unable to carry on because of business failure, being met under arrangements made by Councils in Wales, Scotland or Northern Ireland under the legislation that applies in those countries. English Councils may recover from their counterparts in Wales, Scotland and Northern Ireland the costs incurred in meeting the person's needs. If applicable, English Councils can also recover costs from the person themselves (other than the costs of needs being met or funded by the Councils mentioned above).
- 2.12 Disputes between Councils in England, Wales, Scotland or Northern Ireland about whether or how the temporary duty applies in cross-border situations must be resolved under the legislation governing disputes about cross-border placements in [Schedule 1](#) of the Care Act 2014 and the relevant Regulations (see [chapter 21](#) of the Care Act 2014 statutory guidance).

3. Business failure involving a provider in the CQC oversight regime

- 3.1 [The Care and Support \(Market Oversight Criteria\) Regulations 2015](#) sets out the criteria for a provider to fall within the oversight regime. The intention is that the oversight regime applies to providers which would be difficult for one or more Councils to replace because of their size, geographic concentration or other factors. The CQC determines which providers satisfy the criteria using data available to it. CQC will notify the providers which meet the entry criteria. The CQC must then assess the financial sustainability of the provider's business. If it assesses there is a significant risk to the financial sustainability of the provider's business, there are certain actions CQC may take with that provider (none of which involve Councils).
- 3.2 Where the CQC is satisfied 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 Council(s) which it thinks will be required to fulfil the temporary duty, so that they can prepare for the local consequences of the business failure. The CQC's trigger to contact Councils 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. It is not required to make contact with Councils if, say, a single home owned by the provider in the



regime is likely to fail because it is unprofitable and the CQC is not satisfied that this will lead to the whole of the provider's relevant regulated activity becoming unable to continue. In those 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.

- 3.3 Where the CQC considers it necessary to help a Council to carry out the temporary duty, it may request a provider to provide it with information. The CQC must then give the information, and any further relevant information it holds, to the Councils affected. If the CQC is of the view that a provider is likely to become unable to continue with its activity because of business failure, the CQC should work closely together with the affected Councils to help them fulfil their temporary duty. In exercising its market oversight functions, the CQC must have regard to the need to minimise the burdens it imposes on others.

4. Business failure involving a provider not in the CQC oversight regime

- 4.1 [Regulations](#) set out the entry criteria into the CQC regime. It is for CQC to apply the regulations and decide which providers are included. There are many thousands of providers in England and only a relatively small number of providers fall in the regime. The providers outside the regime will in the main be those with small and medium size businesses.
- 4.2 The temporary duty on the Council to meet needs in the case of business failure applies regardless of whether the provider is in the market oversight regime. Despite the CQC having a market oversight responsibility, the Council has responsibility to ensure continuity of care in respect of business failure of all registered providers.

5. Administration and other insolvency procedures

- 5.1 Business failure (as defined in this policy) will usually involve an official being appointed for example, an Administrator to oversee the insolvency proceedings. An Administrator represents the interests of the creditors of the provider that has failed and will typically try to rescue the company as 'a going concern'. In these circumstances, the service will usually continue to be provided, and the exercise of the Council's temporary duties may not be called for. It is not for the Council to become involved in the commercial aspects of the insolvency, but we should cooperate with the Administrator if requested. The Council should, insofar as it does not adversely affect people's safety and wellbeing, support efforts to maintain service provision by, for example, not prematurely withdrawing people from the service that is affected or ceasing to commission that service.



6. Service interruptions other than business failure

- 6.1 [Sections 18 and 20](#) of the Care Act 2014 set out when the Council must meet a person's eligible needs. They place duties on the Council. If the circumstances described in the sections apply and the needs are eligible, the Council must meet the needs in question. These duties apply whether or not business failure is at issue.
- 6.2 [Section 19](#) of the Care Act 2014 covers the circumstances where care and support needs 'may' be met for example, circumstances where no duties arise under section 18 but the Council may nevertheless meet an adult's needs. In particular, section 19(3) permits the Council to meet needs which appear to us to be urgent. In this context, 'urgent' takes its everyday meaning, subject to interpretation by the courts, and may be related to, for example, time, severity. This is likely to be the case in many situations where services are interrupted but business failure is not the cause.
- 6.3 The power in [section 19\(3\)](#) can be exercised in order to meet urgent needs without having first conducted a needs assessment, financial assessment or eligibility criteria determination. The Council may meet urgent needs regardless of whether the adult is ordinary resident in its area. This means the Council can act quickly if circumstances warrant. 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 (for example, 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.
- 6.4 This section gives the Council a power to act to meet needs, but it does not require that the Council must act. Whether or not to act is a decision for the Council itself but we will consider the examples which follow.
- 6.5 In relation to service interruption, circumstances that might lead to the exercise of the power include where the continued provision of care and support to those receiving services is in imminent jeopardy and there is no likelihood of returning to a 'business as usual' situation in the immediate future, leading to urgent needs. Not all situations where a service has been interrupted or closed will require involvement because not all cases will result in adults having urgent needs. For example, if a care home closes and residents have agreed to the provider's plans to move the residents to a nearby care home that the provider also owns, we will not necessarily have to become actively involved as urgent needs might not arise. Alternatively, we might be satisfied that the alternative home can adequately meet the urgent needs. Whether to act under this power is a decision for the Council.



- 6.6 If a provider has not failed, it is primarily the provider's responsibility to meet the needs of individuals receiving care in accordance with its contractual liabilities. The Council may wish to be involved to help with this. The power provides an ultimate backstop for use where the provider cannot or will not meet its responsibilities, and where we consider that the needs of individuals are urgent (and where we are not already under a duty to meet the adult's needs, for example under [section 18](#) of the Care Act 2014).
- 6.7 A service closure may be temporary (for example, unforeseen absence of qualified staff) or permanent (for example, the home is to be sold). Similarly, an emergency closure or planned closure may be involved. What matters in deciding whether to meet needs is whether the needs of the people affected appear to be urgent. For example, the sale of a provider's business may be a positive development for residents, service users and commissioners alike and may not lead to urgent needs. These powers are not intended to inhibit the effective operation of a market in improving choice, quality and investment.
- 6.8 Where we do get involved in ensuring needs continue to be met, that involvement might be short-term (for example, the giving of advice) or enduring over some months (for example, overseeing the movement of residents following the closure of several homes owned by the same provider). 'Acts of God' (for example, flooding) or complications with suppliers (for example, a nursing agency refuses to continue to provide qualified staff) should not in themselves automatically be considered to trigger the use of the power. In all cases, the test is whether the Council considers there is an urgent need to be met.
- 6.9 When considering action in relation to service interruption or closure, there is a balance to be struck. On the one hand, if we know there is a serious risk to the continued provision of a service, we may consider not using that service temporarily or reassigning people using that service to an alternative service. Alternatively, it may be possible and justifiable for us to act in a way that maximises the provider's chances of continuing to provide the service and avoiding a business failure. We will weigh the consequences of the providers actions before deciding how to respond, in particular, how their actions might impact on the likelihood of the service continuing.
- 6.10 In summary, each service interruption should be considered on its facts and assessed by the Council through a process of risk assessment.

7. The link with the Council's duties in respect of market shaping

- 7.1 [Section 5](#) of the Care Act 2014 and the associated guidance sets out the Council's duties to promote the efficient and effective operation of the local market in care and support services (as set out in [chapter 4](#) of the Care Act 2014 statutory guidance). Central to this function is the need to ensure that the Council 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 information is equally relevant to our responses to business failure and other service interruptions. Where alternative services are to be put in place, an effective response requires a thorough knowledge of the market, which providers provide which services, the quality of each provider's services and where there is capacity in service provision. In anticipating potential service interruptions, there is also a need to know the vulnerabilities in the operation of the market. For example, where there is only one local provider of a particular service and no alternatives exist locally, or where one provider caters for a substantial part of the local market and alternative capacity could not be found easily. The Council should have knowledge of market vulnerabilities, market capacity and capabilities in order to respond effectively to service interruptions.

- 7.2 We aim to understand how providers in our area are coping with the current trading conditions through discussions with the providers. The business failure of providers outside the CQC regime will be on a smaller scale, usually with lesser impact, and we should take a proportionate approach to anticipating or getting early warning of business failure. Given that CQC is responsible for monitoring the financial sustainability of providers falling within the market oversight scheme, it is not necessary for us also to ask for detailed financial information from these providers.

8. The need for contingency planning

- 8.1 Dorset Council will consider how we would respond to different service interruptions and, where the involvement of neighbouring Councils would be essential in order to maintain services, ensure effective liaison and information sharing arrangements are set up in advance. Close cooperation between Councils may be particularly required where we have a substantial number of people placed within its area by other Councils.
- 8.2 As part of contingency planning, we will discuss with local providers which services they would be willing and able to provide if the need arose because another local provider had failed. This should help to facilitate a prompt response that would help to maintain continuity of care for the people affected. Through its market shaping activities, we will encourage trust between the parties so that effective relationships exist where urgent needs are to be met.
- 8.3 We will undertake contingency planning at a local level, to ensure preparedness for possible service interruptions. Service interruptions are often unforeseen and require rapid response. We will review which service interruptions pose the greatest risk in their locality and we will develop contingency plans in advance, in conjunction with local partners. This may include regional activity with other Councils in the same area, where risks are better shared between a number of neighbouring Councils.



9. Managing 'Provider Failure' process in Dorset

9.1 In the event of potential 'Provider Failure' the Quality Assurance, Contract and Purchasing Service will take the lead in managing and overseeing the de-commissioning of the service working in collaboration with all key stakeholders, including but not limited to:

- Quality Assurance and Contract Monitoring Manager
- Contract and Commissioning Manager
- Locality Managers
- Brokerage Team Leaders
- Commissioning Manager or Strategic Commissioning Lead
- Care Quality Commission Inspector / Manager
- NHS ICB Partners
- Service Users and their Carers as appropriate
- Commissioned Service Providers

9.2 Will enact the provider closure procedures and will work with the provider and in accordance with the contract and agreeing an appropriate period (where possible) in which to find alternative service provision for the individuals affected. Once a notice period is agreed, the Quality Assurance and Contract Monitoring Manager will take the lead in managing the closure process to ensure that individuals continue to have their assessed health and social care needs met.

9.3 An appropriate Adult Social Care worker(s) will be allocated to support individuals. The allocated professional will undertake a review of the individual's needs and provide support to family member / representative through the brokerage service to find a suitable alternative commissioned provider.

9.4 It may be necessary during the closure phase for additional service provision to be commissioned in order to reduce risk and maintain the safety and quality of the current service provision. This service may be sourced by the provider from an appropriately registered nursing and or social care provider.

10. Data Protection

11.1 The Council are dedicated to protecting your privacy when using our services. For advice about how we use your personal information and protect your privacy please see the Council's website: [Data Protection Guide - Dorset Council](#).



11. Complaints

11.1 Anyone who is dissatisfied with the Council's services, or a Council decision, or believes that they have been treated unfairly, has the right to make a complaint. If the person remains dissatisfied, they may refer to the Local Government and Social Care Ombudsman.

12. References and Related Information

- [The Care Act 2014](#)
- [Care and Support Statutory Guidance issued under the Care Act 2014 by the Department of Health as revised](#)
- [The Care and Support \(Assessment\) Regulations 2014](#)
- [The Care and Support \(Business Failure\) Regulations 2015](#)
- [Mental Capacity Act 2005](#)
- [Standing Rules \(the National Health Service Commissioning Board and Clinical Commissioning Groups \(Responsibilities and Standing Rules\) Regulations 2012, as amended\)](#)
- [national framework for NHS Continuing Healthcare and NHS-funded nursing care and the NHS-Funded Nursing Care Best Practice Guidance for further guidance.](#)
- [Care Quality Commission](#)

13. Glossary of terms

Term	Definition
'The Council', 'we' and 'us.'	In this policy, the term 'The Council' refers to Dorset Council. The terms 'Councils' refers to local authorities generally, or as made clear in the text. The terms 'we' or 'us' etc. also refer to Dorset Council.
Ordinary residence	It is critical to the effective operation of the care and support system that Councils understand which people they are responsible for; and that people themselves know which Council is responsible for their care. Whether the person is 'ordinarily resident' in the Council area is a key test in determining where responsibilities lie for the funding and provision of care.
Business failure	'Business failure' is defined in The Care and Support (Business Failure) Regulations 2015 These Regulations define what is meant by 'business failure' and explain the circumstances in



Term	Definition
	<p>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).</p> <p>Service interruption because of 'business failure' relates to the whole of the regulated activity and not to parts of it.</p>
Temporary duty	<p>'Temporary duty' or 'duty' means the duty on Councils to meet needs in the case of business failure. 'Temporary' means the duty continues for as long as the Council considers it necessary. The temporary duty applies regardless of whether a person is ordinarily resident in the Council's area. The duty applies from the moment the Council becomes aware of the business failure. The actions to be taken by Councils will depend on the circumstances and may include the provision of information. The duty is to meet needs, but Councils have discretion as to how they meet those needs.</p>
CQC	<p>'CQC' stands for Care Quality Commission. The CQC's role is to make sure health and social care services provide people with safe, effective, compassionate, high-quality care and encourage care services to improve.</p>

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