

Bracknell Forest Council
Provider Failure Policy and Procedures
December 2023

Introduction

This document sets out Bracknell Forest Council's policy in relation to Adult Social Care provider interruptions, failures and other closures. Included in appendix 1 and 2 to this document are the procedures setting out how this policy should be put into practice.

The purpose of the policy and its procedures is to:

- Recognise that whilst providers may fail or sometimes choose to close, service continuity never should. The Council's duty to safeguard and ensure continuity of care comes first.
- Give confidence and reassurance to service users, carers and family members and partners in the event of uncertainty about the continuity of care and support.
- Establish a clear set of responsibilities and accountabilities for mobilising staff and other resources in response to potential provider closure or failure.
- Ensure the safety and wellbeing of service users, regardless of funding arrangements, by enabling continuity of care in the event of or the likelihood of provider or business failure or service interruption.
- Develop a proactive approach which, so far as is practicable, ensures the Council works with the market to ensure continuity of care and support services, and;
- Ensure that the use of duties under the Care Act 2014 are used only in exceptional circumstances and remain only temporary.

Scope of Policy

With regards to business failure this policy applies to all registered adult social care providers located in Bracknell Forest regardless of there being a formal contract in place with the provider and regardless of whether Bracknell Forest residents are using the service.

The policy will be applied to non-CQC registered services but on the understanding that the Council's duties and powers for intervention under the Care Act 2014 will only apply in part. It will be important to establish whether a provider is registered or not prior to any intervention.

The policy applies to Out of Borough providers where the Council has placed service users and where the Council will work jointly with the appropriate Local Authority to ensure that Bracknell Forest funded service users are safe and in receipt of the care commissioned for them.

The Council has a separate policy for the oversight and intervention into safeguarding failures as part of The Berkshire Safeguarding Adults Policy and Procedure. However, it should be noted that business failure and safeguarding failure can sometimes be linked with one often being a symptom of the other.

Legal Context: Financial Failure

The Care Act 2014 places a duty on local authorities to temporarily intervene to ensure there is continuity of care in the event of service interruption as a result of business or

provider failure. It also gives power to local authorities to intervene in circumstances where there are service interruptions for any reason in relation to a provider's ability to deliver high quality care.

Legal Definitions

"Business failure" is defined in the Care Act 2014 and Care and Support (Business Failure) Regulations 2015. Where a provider is not an individual, business failure means that, in respect of that provider:

- an administrator is appointed
- a receiver or an administrative receiver is appointed
- a resolution for a voluntary winding up without a declaration of solvency is passed
- a liquidator is appointed
- a winding up order is made by a court
- a members' voluntary winding up becomes a creditors' voluntary winding up
- an order by virtue of Article 11 of the Insolvent Partnerships Order 1994 (joint bankruptcy petition by individual members of insolvent partnership) is made
- administration moves to winding up pursuant to an order of a court
- the charity trustees of the provider become unable to pay their debts as they fall due. CQC has concerns over the provision.
- death of the owner

Where the business failure relates to an individual person, business failure means that the individual has been declared bankrupt.

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. The duty applies from the moment the authority becomes aware of the business failure. The actions to be taken by authorities will depend on the circumstances and may include the provision of information.

Identification of Providers at Risk of Failure or Interruption of Provision

The continuity of care to service users throughout a provider failure will be of prime importance for all organisations involved - consequently, the Commissioning team will ensure that the following actions are applied for all organisations providing regulated activities in Bracknell Forest:

Regulated care providers registered in Bracknell Forest are responsible for informing the Council in the event of a planned or unplanned closure. In the event of a planned closure then the provider must work with the Council to agree an acceptable notice prior to the

planned closure date to allow a smooth service transition.

- All regulated care providers are required to maintain business continuity and disaster recovery plans.
- Care providers are required to maintain (and supply the Council as required) with a 'register' of service users either placed or receiving support from the provider in the event of a planned or unplanned closure - the register will detail all named individuals placed with or using the service; details of next of kin or representative, details of placement or service category; name and contact details of the funding authority; or confirmation if the service user is a self-funder;
- Regulated care providers will also supply the Council with an up-to-date employee or establishment list, in the event of an unplanned or imminent business failure.
- The Council's actions to commission services and place service users will seek to avoid contributing to market uncertainty and contributing to the pre-conditions of provider financial failure,
- Due Diligence, including financial health checks are undertaken by the Adults Commissioning team on regulated care providers where the council has commissioned a service.

The Council should be able to identify providers that could be seen as High Risk if the service was to be withdrawn. For examples:

- Providers in Bracknell Forest which support a very large number of service users.
- Providers outside of Bracknell Forest which support a large number of Bracknell Forest Council funded service users
- Providers who only have business from Bracknell Forest Council
- Providers who are the only provision of specific services in the sub-region.

Supporting Struggling Providers

Whilst the Council has no legal responsibility to support providers at risk of failure, it is recognised that in a well-functioning market there may be good providers in difficulty and that the Council may choose to work with these providers to delay or avoid failure where possible. Support may be provided to providers who are struggling where the support offered is:

- Essential to maintain service user health and wellbeing
- Consistent with provider business continuity plans
- Necessary to sustain an adequate supply of high quality local services
- Fair in that the offer is tailored to the circumstances of each provider

Service interruptions because of financial business failure

Business failure of a major provider does not automatically equate to closure of a service. It may have no impact on service users or residents. However, if a provider is unable to continue because of business failure, the Council's duties are as follows:

- The Council is under a temporary duty to meet service users' needs 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. This may happen in insolvency situations where an Administrator is appointed and continues to run the service.
- The duty applies where a failed provider was meeting needs in Bracknell Forest. It does not matter whether or not the Council has contracts with that provider, nor does it matter if all the service users affected are self-funders. The duty is in respect of people receiving care by that provider in the borough- it does not matter which local authority (if any) made the arrangements to provide services.
- 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. It is not necessary to meet those needs through the same combination of services that were previously supplied. When deciding how needs will be met, the Council must involve the service user concerned, any carer that the service user has, or anyone whom the service user asks to be involved.
- The Council has the power, where it considers it is 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 to identify those service users who may require support.
- The lack of a needs assessment, 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. The Council must meet needs irrespective of how an individual is funded or whether those needs would meet the eligibility criteria. The Council may charge the person for the costs of meeting their needs, and it may also charge another local authority which was previously meeting needs, if it temporarily meets the needs of a person who is not ordinarily resident in the borough. The charge must cover only the actual cost incurred by the Council in meeting the needs.
- Where the failed provider's service users include service users in receipt of NHS Continuing Healthcare (CHC) funding, the responsibility to act falls on Frimley ICB commissioners. The Council will work closely with the ICB and follow NHS Policies and Procedures surrounding these individuals to ensure all individuals have appropriate care that meets their needs.

Business failure involving a provider in the CQC oversight regime

Where a provider, because of their size, geographic concentration or other factors, is considered too complex for one or more local authorities to replace, and therefore where national oversight is required the CQC takes on the duty to intervene with the provider.

Where 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 advise the Council so that it can prepare for the local impact of the business failure. CQC's trigger to contact the Council 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

the Council if a single home owned by the provider is in failure.

Business failure involving a provider not in the CQC oversight regime

The providers outside the CQC oversight regime will in the main be those with small and medium size businesses. The temporary duty on the Council to meet needs in the case of business failure applies regardless of whether or not 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.

Administration and other insolvency procedures

Financial Business failure 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 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. The Council will not become involved in the commercial aspects of the insolvency but will cooperate with the Administrator if requested. The Council will support efforts to maintain service provision where this is in the best interests of service users.

Service interruptions other than business failure

The Care Act 2014 permits the Council to meet needs which appear to be urgent. In this context, "urgent" takes its everyday meaning, and may be related to, for example, time, severity etc. This is likely to be the case in many situations where services are interrupted but business failure is not the cause.

This power can be exercised in order to meet urgent needs without having first conducted a needs assessment, financial assessment or eligibility criteria determination. The Council can meet urgent needs regardless of whether or not the adult is an ordinary resident in Bracknell Forest so that they can act quickly.

The power may also be used in the context of safeguarding failings of providers if that is causing people to have urgent needs.

The Council has the power to act to meet urgent needs, but this does not mean that it has to do so. The Executive Director - People will determine whether or not to act depending on the individual circumstances.

Examples of service closure or interruption that will require a decision to act 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;
- where a provision closes, and service users have agreed to the provider's plans to move to a nearby alternative provision that the provider also owns

- where the provider cannot or will not meet responsibility
- where the authority judges that the needs of individuals are urgent;
- where the service closure is temporary, for example unforeseen absence of qualified staff;
- where the service closure is permanent, for example a residential home being sold on for alternative use;
- where a provision is transferred and or sold to another provider where there may be concerns over the new provider
- where the service closure is an emergency, for example due to a flooding or fire;
- where the service closure is planned, for example where a service is de-registered;
- where a temporary planned closure may be required, for example the building needs to be renovated
- Where the proprietor of a service and or organisation is under criminal investigation

Where the Council becomes involved in ensuring needs continue to be met, that involvement will be short-lived, 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 an 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 there is an urgent need to be met.

The need for contingency planning

The Council will work with all relevant stakeholders and neighbouring local authorities to oversee providers that are used. This includes working together to conduct financial appraisals of small providers and working together to accommodate service users in the event of a large-scale provider failure. This should be included in Business Continuity plans.

Interdependencies

This policy will take into account and run alongside the following policies and procedures:

- Corporate Emergency Response Plan
- Departmental Business Continuity Plans
- The Berkshire Safeguarding Adults Policy and Procedure
- Council policies and procedures for individual S.42 investigations, Police investigations and CQC investigations for safeguarding
- Care Governance Policy and procedures

Intervention

As an option for ensuring the continuation of appropriate care and support, The Care Act 2014 allows Local Authorities to intervene on a temporary basis. This will be a last resort for the Council, where all other options for maintaining care have been exhausted. This will be a temporary arrangement to be in place only until alternative, stable care arrangements have been secured. It is intended that the Council is not financially disadvantaged through the temporary intervention.

Where the proposed option for continuing to meet needs, involves the intervention of the Council either by;

- taking direct responsibility for the provision of services, or
- the employment of staff, or
- bringing in another provider to deliver the service

Then the decision to intervene must be taken by the Executive Director – People, with reference to the Executive Member - People

Exit Plan

Any direct intervention by the Council must be supported by a clear exit plan that, is fully informed by appropriate Legal, Procurement, Financial and Human Resources advice.

Continuous Improvement

Following on from business failure, lessons learned should be recorded and reported from each experience and process used. This will help alter / change existing processes and procedures to help predict any further potential business failure and to identify any alternative action that the Council could have taken.

Market Oversight

The Council has established a number of mechanisms to ensure robust oversight of the Adult Social Care Provider market to afford every opportunity to identify any potential provider failure as early as possible, as well as undertaking a robust approach to Market management and development. These mechanisms encompass oversight of all in borough provision and, all provision outside of borough where the council commissions services.

These mechanisms are,

- The Care Governance Board (CGB)
- Adult Market Oversight Board (AMOB)
- Provider Contract Monitoring Framework (CMFW)

- Due Diligence Process (DDP)

The Care Governance Board (CGB)

While the Council always seeks to commission high quality services and works collaboratively with all providers to prevent quality and safeguarding concerns, when quality of safeguarding concerns do arise, those providers will be subject to the Care Governance policy. The Bracknell Forest Care Governance Board (CGB) oversees Providers' accountability for the quality and safety of services provided is monitored and assured. CGB will consider if restrictions (Red or Amber flag) need to be placed on any new placements with a provider whilst any identified quality or safety concerns are addressed. Where there are specific safeguarding concerns that require investigation, the care governance policy will be used in conjunction with the Berkshire Safeguarding Adults Policy and Procedure.

A Cautions List is provided monthly to internal departments, for example the Duty Team and Access to Resources, so everyone can easily see which providers are currently flagged. This list is also shared with neighbouring Local Authorities when appropriate.

A **red flag** indicates a **possible high risk** to those using the service and **no new services** will be commissioned until concerns are resolved.

An **amber flag** indicates a **medium risk** and new packages are only commissioned after a risk management discussion has occurred and agreed by relevant management.

The providers progress, in addressing quality and safety concerns are reviewed monthly at CGB. Where a consensus of professionals who attends the board agree that sufficient progress has been made to address concerns, and the service is now safe and of improved quality the red or amber flag status will be lifted, and placements can resume. The provider will be subject to the routine contract monitoring process.

Adults Market Oversight Board (AMOB)

In recognition of the Council's duties and powers with regards to service continuity and with reference to be proactive in the management of local social care markets, a further board - the AMOB has been established.

The purpose of the AMOB is to ensure there is robust strategic oversight of the marketplace for Adults providers. Oversight includes a review of intelligence in relation to:

- Market trends e.g. utilisation, capacity, pressures and gaps and Future demand for services
- Market Failure -providers at risk - non-Safeguarding/quality related

- Contract management and due diligence data and information
- Referral, assessment and placement data
- Spend and placement costs
- 'Change' projects and likely impacts on the market

Provider Contract Monitoring Framework (CMFW)

The local authority has in place a robust contract monitoring framework. This framework covers both contracted provider services and spot purchased provision. Where there is a formal contract in place the contract monitoring requirements are clearly stipulated in this specification and set out performance expectations and key performance indicators under which the provider will be monitored on a regular basis.

Contract monitoring is also undertaken where we spot purchase services for example, in residential and nursing care homes.

To ensure contract monitoring is effective in ensuring the quality and safety of services and ensuring providers are delivering as required, several different strands make up the contract monitoring activity undertaken. For example the commissioning team conduct regular site visits, meetings with providers, engagement with providers staff and service users, and complete formal contract monitoring documentation to evaluate performance.

Where it is clear that service delivery is not meeting performance expectations a corrective action plan will be implemented with providers and monitored in terms of progress. Obviously, if there are any serious quality or safeguarding concerns identified the local authority would then implement our care governance policy, the Berkshire safeguarding adult policy and procedure or both, where appropriate.

Due Diligence Process

Where a formal contract is not in place with a provider and services need to be 'spot purchased' The Local Authority undertakes a robust due diligence process before the decision is approved to spot purchase with any new provider.

Due diligence checks undertaken on any potential new provider involves:

- Reviewing the providers CQC/Ofsted rating and last inspection report (if applicable)
- Assessing financial viability - via a full Credit check
- Host Authority feedback (if out of borough)
- Two references from separate organisations
- Obtaining all relevant policies – these include insurance, fire risk assessment, safeguarding etc.

Once all of these due diligence checks have been undertaken, the strategic commissioning manager reviews the intelligence collected and makes a decision regarding if checks have been completed satisfactorily and the new service can go ahead.

If any areas of concerns are identified following receipt of all aspects of the due diligence a

detailed response is provided to the officer requesting due diligence, who must consider the information and any risks before deciding to go ahead with the service provision.

Ongoing due diligence is carried out, whereby due diligence checks are repeated on an annual basis. The purpose of this is to ensure that providers remain financially viable, there are no significant quality or safeguarding concerns that have been identified through inspection, necessary insurance is still in place and all current policies and procedures are up to date.