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|                                       | <h2>Adults and Safeguarding Committee</h2> <h3>19 March 2015</h3>   |
| <p><b>Title</b></p>                   | <h2>Implementing the Care Act 2014:<br/>Market Shaping; Provider Failure</h2>   |
| <p><b>Report of</b></p>               | <p>Dawn Wakeling (Adult and Health Commissioning Director)<br/>Mathew Kendall (Adults and Communities Director)</p>   |
| <p><b>Wards</b></p>                   | <p>All</p>  |
| <p><b>Status</b></p>                  | <p>Public</p>   |
| <p><b>Enclosures</b></p>              | <p>Appendix 1 - Provider Failure Policy</p>   |
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| <h2>Summary</h2>  |
| <p>This report presents Barnet Council’s approach to developing a sustainable social care market place and a new policy formalising the new duties of the Council where a care provider fails.</p> <p>Both have been developed to meet the requirements described in the Care Act 2014, associated Regulations and Care and Support Statutory Guidance. All statutory duties described in this report commence on 1 April 2015.</p> |

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| <h2>Recommendations</h2>   |
| <ol style="list-style-type: none"> <li>1. That the Adults and Safeguarding Committee note that a refreshed Market Position Statement is being developed to meet the new market shaping duties under the Care Act 2014.</li> <li>2. That the Adults and Safeguarding Committee approve the adoption of the Market Failure Policy (Appendix 1).</li> </ol> |

## **1. WHY THIS REPORT IS NEEDED**

### **Market Shaping**

- 1.1 Under the Care Act 2014 Section 5, from April 2015, all councils in England will be required to promote the efficient and effective operation of a market in services for meeting care and support needs.
- 1.2 The purpose of this report is to inform the committee how Barnet Council intend to fulfil this duty.

### **Provider Failure**

- 1.3 Under the Care Act 2014 Section 48, from April 2015, all councils in England will be required to enact a temporary duty in the event of a business failure of a care and support provider to ensure that there is no disruption to the care and support that people receive. Currently our provider failure process covers only those people whose provision of care and support is managed by the Council.
- 1.4 A provider failure policy is needed to ensure the Council has a clearly documented statement on how it will fulfil these duties. The purpose of this report is to seek approval for Barnet Council's Provider Failure Policy. The policy takes into account the requirements of the Care Act 2014, the Regulations and the Care and Support Statutory Guidance.

## **2. REASONS FOR RECOMMENDATIONS**

### **Market Shaping**

- 2.1 The Care and Support Statutory Guidance states that the process of developing, publishing and using a Market Position Statement (MPS) should be central to the process of working with providers to adjust the extent and types of service provision. Publishing the MPS is a key market-shaping activity as required under the Care Act 2014.
- 2.2 The Barnet MPS is a document that sets out the future direction of travel of adult social care in Barnet. It aims to provide information that providers will find useful when planning the future of services, including local demographics, commissioning intentions and trends across service-user groups. It is a tool by which the Council can stimulate a diverse, high-quality market that has the ability respond to local needs, both now and in the future.
- 2.3 The MPS is for:
  - Providers who provide or have provided a service in Barnet.
  - The independent sector, voluntary and community organisations in Barnet.

- Potential providers in Barnet.
  - People with an interest in Barnet's vision for its adult social care market.
- 2.4 Barnet was one of the first local authorities to publish an MPS, in June 2013. Its development was informed by consultation with providers, service users and other stakeholders, and has been published on the Council's web site.
- 2.5 The MPS is a tool that contributes to wider market shaping activity. The local authority collaborates with relevant 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. The market includes services arranged and paid for by the authority itself, those services paid for by the state through direct payments, those services arranged and paid for by individuals from private sources (sometimes called 'self-funders'), and services paid for by a combination of these sources. Market shaping activity is facilitated through different functions within the local authority including commissioning, procurement, contract management, provider and service user and carer engagement.

### **Provider Failure**

- 2.6 Under the Care Act 2014, councils have a temporary duty to ensure that the needs of people continue to be met if a provider fails regardless of how their care is paid for.
- 2.7 Business failure is defined in the Care and Support (Business Failure) Regulation 2014. A business failure is generally described in the regulations as when an administrator or receiver is appointed, the business is compelled to be wound up or it becomes insolvent.
- 2.8 The Care and Support (Market Oversight Criteria) Regulations 2014 gives specific powers to the Care Quality Commission (CQC) to put in place a Market Oversight scheme. This will monitor the financial wellbeing of certain hard-to-replace providers of social care and support who:
- provide at least 30,000 hours of care in a week anywhere in England; or
  - provide at least 2,000 people with care in a week anywhere in England; or
  - provide at least 800 people with care in a week anywhere in England and the number of hours of care provided in the same week divided by that number of people exceeds 30.
- 2.9 The initial indications are that nationally there are 30 to 40 large providers of home and residential care who meet the CQC criteria described above. The failure of one of these organisations could result in many people being left

without the services they need and the impact would probably be felt by several local authorities.

- 2.10 The majority of home and residential care service providers will sit outside the CQC Market Oversight scheme as they will be small to medium sized organisations.
- 2.11 Whether the business failure occurs under the CQC Market Oversight scheme or not, the temporary duty to meet the needs of people affected lies with the local authority.
- 2.12 The duty applies only if a regulated activity is disrupted due to business failure. Regulated activities are listed in Schedule 1 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 20. Generally these can be thought of as personal care and residential or nursing care. However, the duty does not apply in cases of business failure when the regulated services continue to be provided, for example, in cases of insolvency when an Administrator has been appointed and is running the business until a new owner can be found.
- 2.13 To meet the requirements of the Care Act 2014, a policy has been developed which sets out the activity that the Council will undertake to manage an instance of the failure of a provider's business. The policy will ensure that people are not left without care or support should a service be disrupted due to business failure.
- 2.14 The policy will outline the Council's responsibilities to all those who could be affected. The Act broadens the Council's responsibilities to cover people who purchase their own care directly as well as those placed in a service funded by another local authority on a temporary basis. The duty also covers providers in Barnet with whom the Council does not have a formal contractual relationship. The Council will have the responsibility of meeting the needs of people as they were being met by the provider immediately before they became unable to carry on the regulated activity.
- 2.15 The policy will be delivered through a procedure which is in essence a contingency plan. This will be invoked on the notification of a business failure.
- 2.16 The procedure will define the roles and responsibilities of officers across the Council (such as adult social care, procurement, communications and legal). Project management arrangements will be built in to support the planning and co-ordination of the exercise. The procedure could cover activities such as communications, re-procurement, needs assessment and reviews. This approach is compatible with that of other local authorities.

- 2.17 Having a clearly defined policy and a procedure to be followed will ensure that the Council can act quickly to meet the immediate needs of people affected and minimise the anxiety that such disruption causes.
- 2.18 Feedback from the Care Act 2014 public consultation was used to shape the recommended approach. Only 6% (2) of respondents disagreed with the proposed plans to manage provider failure in Barnet. Comments from respondents were generally supportive with some practical suggestions on how the duty could be carried out. The detail of the consultation responses is attached as a background paper (Responses to the Barnet Public Consultation on the Care Act 2014).

### **3. ALTERNATIVE OPTIONS CONSIDERED AND NOT RECOMMENDED**

#### **Market Shaping**

- 3.1 Barnet published its Market Position Statement on the Barnet Social Care microsite in June 2013. This approach has therefore already been implemented.
- 3.2 Nevertheless, officers considered not refreshing the current (2013) Barnet MPS and not conducting other market engagement. This option has not been recommended because:
- The current (2013) MPS will soon be out of date and requires updating;
  - The current (2013) MPS does not include information on or reflect the changes being brought about by the Care Act 2014.
- 3.3 In the final analysis, there are more advantages and fewer disadvantages with market shaping primarily through the MPS.

#### **Provider Failure**

- 3.4 All councils in England have to prepare to meet the statutory provider failure duties. The policy sets out the governance framework for those duties: what they are, how they are triggered, what needs are covered and how they will be met. This framework enables the Council to act immediately and with confidence should the statutory duty need to be invoked.
- 3.5 The Council's preparations to deal with potential provider failure need to comply with the Care and Support Statutory Guidance. The Guidance is clear that robust contingency planning is required. Whilst small scale service interruptions might be easily managed, service interruptions on a large scale pose far greater problems.

- 3.6 Disruption to people's care and support services is an on-going risk to the Council and the Adults and Communities Delivery Unit has recently managed large scale provider failure. The Council's contingency planning approach has been refined as a result of the lessons learned through its experiences.

#### **4. POST DECISION IMPLEMENTATION**

##### **Market Shaping**

- 4.1 The work already in progress to refresh the MPS and market engagement will continue.
- 4.2 The refreshed MPS will be published on the Barnet Social Care microsite.
- 4.3 The MPS will be refreshed on an annual basis, with input from providers and service-users.

##### **Provider Failure**

- 4.4 The development of a robust continuity plan for provider failure will be completed in line with the approved provider failure policy. A training workshop is scheduled for late March 2015. This will be attended by the managers of those functions that would need to take action should the duty be triggered, and will ensure that these areas own the plan and that the plan is robust.
- 4.5 A communication plan will be developed to share with internal and external stakeholders
- 4.6 The provider failure business continuity plan will be reviewed at least every six months in line with the Business Continuity Plan (BCP) standard.
- 4.7 Officers will undertake simulation testing using a scenario of a residential care home failing.
- 4.8 Should the provider failure duty be invoked, the policy and procedure will be reviewed in the light of the experience and revised to incorporate any lessons learned.

## 5. IMPLICATIONS OF DECISION

### 5.1 Corporate Priorities and Performance

5.1.1 The MPS and provider failure policy relates to the following Corporate Priorities:

| <b>Corporate Priority</b>   | <b>Provider Failure</b>  | <b>MPS</b>  |
|---|--|---|
| To maintain the right environment for a strong and diverse local economy  | The Local Authorities approach to managing provider failure is important in relation to building and sustaining a diverse economy through our contract arrangements and strategic relationships across the social care sector. | The MPS seeks to promote a strong and diverse local economy in the adult social care market, voluntary sector and any other local economies that relate to adult social care. |
| To sustain a strong partnership with the local NHS, so that families and individuals can maintain and improve their physical and mental health. | Intelligence will be shared with key partners and there will be cross-borough working in the event of provider failure.  | The MPS aims to reflect health Commissioning intentions, as part of the integrated approach to adult social care.   |
| To promote a healthy, active, independent and informed over 55 population in the borough to encourage and support our residents to age well.    | Ensuring continuity of care for those affected by provider failure will ensure good health, activity and independence is maintained.   | The MPS can help to shape the kind of services and quality of services that the over-55 population in Barnet receives, to achieve the stated outcomes.                        |
| To promote family and community well-being and encourage engaged, cohesive and safe communities.  | In the event of provider failure the focus will be ensuring continuity of care for people in borough, to maintain connections to their local community.  | The MPS encourages well-being in the community and preventative services.   |

## **Market Shaping**

5.1.2 The MPS will advance the aims of the Health & Well-being Strategy, which are 'staying well' and 'staying independent', by promoting these ambitions to the adult social care market.

5.1.3 The effectiveness of the MPS will be measured in the following way:

- The number of visits to the MPS webpage.
- Annual engagement with providers and commissioners, to understand whether and how the MPS has informed their business planning.
- Providers indicating through the Procurement website that they have read the MPS.
- Improved quality of bids.
- A more diverse and high-quality adult social care market

## **Provider Failure**

5.1.4 Successful implementation of the Care Act 2014 will help to support and deliver the following 2013/16 Corporate Plan priority outcomes:

- "To sustain a strong partnership with the local NHS, so that families and individuals can maintain and improve their physical and mental health".
- "To promote a healthy, active, independent and informed over 55 population in the borough so that Barnet is a place that encourages and supports residents to age well".
- "To promote family and community well-being and encourage engaged, cohesive and safe communities".

5.2 **Resources (Finance & Value for Money, Procurement, Staffing, IT, Property, Sustainability)**

## **Market Shaping**

5.2.1 The Market Position Statement is being developed and maintained within existing budget resources.

## **Provider Failure**

5.2.2 The Council is required by law to meet the duty should a business failure occur within the borough. Currently our provider failure process covers those people for whom their provision of care and support is managed by the Council and in which a contract is held. It is not possible to quantify in advance the financial implications of dealing with a business failure. Internal and external resources would be required to manage the provider failure



whilst maintaining normal business as usual activities. For a small provider the cost could be less than £1,000 whereas for a large provider it could exceed £100,000. The costs will have to be managed within existing budget resources.

### **5.3 Legal and Constitutional References**

5.3.1 Under the Care Act 2014 Section 5 from April 2015 all councils in England will be required to promote the efficient and effective operation of a market in services for meeting care and support needs.

5.3.2 Under the Care Act 2014 Section 48 all councils in England will be required to enact a temporary duty in the event of a business failure of a care and support provider to ensure that there is no disruption to the care and support that people receive.

5.3.3 The responsibilities of the Adults and Safeguarding Committee are contained within the Council's Constitution - Section 15 Responsibility for Functions (Annex A). Specific responsibilities for those powers, duties and functions of the Council in relation to Adults and Communities including the following specific functions:

- Promoting the best possible Adult Social Care services.

5.3.4 As outlined in this section of the Constitution, the Adults and Safeguarding Committee is responsible for – and has delegated authority for – the following:

- Working with partners on the Health and Well-being Board to ensure that social care interventions are effectively and seamlessly joined up with public health and healthcare, and promote the Health and Well-being Strategy and its associated sub strategies.
- Ensuring that the local authority's safeguarding responsibilities is taken into account.
- To approve any non-statutory plan or strategy which falls within its remit, as outlined at 5.3.3.

### **5.4 Risk Management**

#### **Market Shaping**

5.4.1 The development of the Market Position Statement and the Provider Failure policies will help to minimise the risk of provider failure and foster more sustainable relations with the market.

#### **Provider Failure**

5.4.2 The duty is applied once the local authority is notified of a business failure and that it will cause a disruption to service. Therefore the implementation of the

policy and procedure is not to remedy the failure but to ensure the care and support needs of the individuals affected will continue to be met. Managing the risk will be dependent on the pace and nature of the failure.

5.4.3 Whilst the overall provider failure duty is positive for people receiving care and their carers, there are risks which centre on the resources and financial implications of the temporary duty being triggered. Risk management information is reported quarterly to the Care Act 2014 Programme Board which in turn feeds into the reports to the Board and Committee. Risk will be managed through business-as-usual processes, including on-going contract monitoring, on-going engagement with existing providers, intelligence from other boroughs, the CQC market oversight regime and engagement with the market.

## 5.5 Equalities and Diversity

5.5.1 On 1 October 2012, new provision in the Equality Act came into force banning age discrimination in health and social care. This is in line with the duties incumbent on all public bodies through the Equalities Act 2010. Adult Social Care works within LBB policy framework for equalities, offer's services to users within this framework, and undertakes relevant positive action to ensure social care is accessible to groups with different equalities characteristics; for example producing easy read information for people with learning disabilities and offering interpreters for service users.

5.5.2 Age discrimination should be considered broadly: younger people may perceive that older people receive more favourable treatment from services as well as older people perceiving that they are less favourably treated. The prohibition does not mean that all age group should therefore be offered identical support or services. However, it does require the local authority to have a transparent and fair rationale for different approaches or support offered to different age groups, just as it already does for current positive action in place, such as providing interpreters.

5.5.3 However, there is a general risk from this prohibition applicable to all local authorities, which may face an increased level of potential legal challenge from individual users or groups, using this prohibition as its basis. Nationally there have been legal challenges based on equalities legislation: for example the 2011 challenge to Birmingham City Council on its proposed change to its adult social care eligibility criteria.

5.5.4 An Equalities Impact Assessment has been undertaken on the implementation of local policies to support implementation of the Care Act 2014 and is attached as a background paper.

## 5.6 Consultation and Engagement

### Market Shaping

- 5.6.1 Extensive consultation work was undertaken with providers and service-users to inform the 2013 MPS. The findings of this consultation are being used in the exercise to refresh the MPS.
- 5.6.2 In order to build on this, a presentation was delivered on the MPS to Care Home providers in December 2014. A survey was disseminated to providers and approximately 50 replies have been received to-date. A focus group will be held with providers from different sectors and Commissioners will consult with providers around content relating to specific sectors and service-user groups.

### Provider Failure

- 5.6.3 The main proposals for provider failure contained within this report were subject to public consultation. The detail of the consultation responses is attached as a background paper.

## 6. BACKGROUND PAPERS

- 6.1 Special Safeguarding Overview and Scrutiny Committee on 24 September 2012 received a report on the 3 key adult social care policy documents published in July 2012: Caring for Our Future (White Paper); the draft Care and Support Bill; and the Government's interim statement on funding reform for Adult Social Care. The Committee endorsed Officers undertaking further work to assess the potential impact of these policy changes on Barnet. [Adult Social Care and Health \(1.1\)](#)
- 6.2 Cabinet on 18 April 2013 received a report describing the main impact of the White Paper, Caring for our Future, and the draft Care & Support Bill, both published in July 2012; and of the policy statement on Care and Support Funding Reform, presented to Parliament on 11 February 2013. The report set out the implications for Barnet based on empirical data and modelling where appropriate. [Social Care Funding Reform and the Draft Care and Support Bill: Implications for the London Borough of Barnet \(3.1\)](#)
- 6.3 Health and Well-being Board on the 27 June 2013 received a report which summarised the implications of the Care Bill and a further report on 21 November 2013 to update the Board on progress made locally to prepare for the implementation of the new legislation. [Social Care Funding](#)
- 6.4 [Care and Support Bill Update \(1.1\)](#)

- 6.5 The Safeguarding Overview and Scrutiny Committee on the 10 April 2014 received a report setting out the main points from the forthcoming changes to social care legislation as set out in the Care Bill, the implications for Barnet and the approach being taken to prepare for the new requirements. [The Care Bill Update Report \(2.1\)](#)
- 6.6 The Adults and Safeguarding Committee received a report on the implementation of the Care Act on the 2 July 2014. [The Implementation of the Care Act](#)
- 6.7 The Adults and Safeguarding Committee received a report on the Consultation on the Statutory Guidance on the 31 July 2014. [Response to Consultation on the Care Act Guidance](#)
- 6.7 The Adults and Safeguarding Committee received a report on Implementing the Care Act on the 2 October 2014. [Implementation of the Care Act 2014](#).
- 6.8 The Adults and Safeguarding Committee received a report on the Universal Deferred Payments scheme on 26 January 2015.
- 6.9 The Council's Market Position Statement was published in June 2013 and can be found on the Council's web site: [Barnet's Market Position Statement](#)
- 6.10 Responses to the Barnet Public Consultation on the Care Act 2014. [Responses to the Public Consultation](#)
- 6.11 Equalities Analysis (EqA) on local policies to support implementation of the Care Act 2014. [EqA on Local Care Act policies](#)
- 6.12 The Care Act received Royal Assent on 14 May. [The Care Act 2014](#)