

APPENDIX 1

Provider Failure Policy

London Borough of Barnet

POLICY COVER SHEET

POLICY NAME	Provider Failure Policy		
Document Description	The Care Act 2014 places a new temporary duty on local authorities to meet an adult's care and support needs and a carer's support needs when a registered care provider becomes unable to carry on a regulated activity, establishment or agency because of business failure. This policy document explains what this duty means and Barnet Council's approach to ensure that adults and carers are not left without the care or support they need if their care provider becomes unable to carry on providing it because of business failure.		
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1. Introduction

The Care Act 2014 places a new temporary duty on local authorities, to meet the care and support needs of an adult and the support needs of a carer when a registered care provider becomes unable to carry on a regulated activity, establishment or agency because of business failure. This policy document sets out what this duty means, when it is triggered, what needs will be met and how those needs will be met by Barnet Council. The policy seeks to ensure that adults and carers are not left without the care or support they need in the event that their care provider becomes unable to carry on providing it because of business failure.

The policy also covers service interruptions and the discretionary power to meet urgent needs.

2. Key definitions applicable to this policy

2.1. Temporary duty

This means the duty on Barnet Council to meet care and support needs for an adult, or support needs for a carer where registered care providers are unable to carry on because of business failure. The duty is temporary and will continue for so long as Barnet Council considers it is necessary. The temporary duty will be triggered when Barnet Council becomes aware of the business failure and the provider can no longer carry on its activity..

2.2. Registered care provider

Any individuals, partnerships or organisations (companies, charities, NHS trusts and local authorities), that provide care, support or other services to people on a contractual basis must be registered with the Care Quality Commission (CQC)¹. The temporary duty applies to these 'registered care providers' in respect of carrying out 'regulated activities'.

2.3. Regulated activity

These are regulated activities involving or connected with the provision of health or social care. The services and activities that are regulated are prescribed in Schedule 1 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014. Providers of these regulated activities must be registered with the CQC. Examples of regulated activities include the provision of personal care and accommodation for persons who require nursing or personal care.

¹ The statutory basis for registered care providers and persons registered (in respect of an establishment or agency) is the Health and Social Care Act 2008, Part 1, Chapter 2 and the Care Standards Act 2000, Part 2

2.4. Business failure

The Care and Support (Business Failure) Regulations 2014 (the Regulations) define business failure. These Regulations explain the circumstances in which a provider is to be treated as being unable to carry on because of business failure. The list of events includes: the appointment of an administrator; the appointment of a receiver or an administrative receiver and the passing of a resolution for a winding up order; in the case of a charity, that the trustees are unable to pay their debts; or in the case of an individual, he or she is declared bankrupt. The full list is in the Regulations.

2.5. Relevant adult

This is the adult whose needs for care and support were being met or the carer whose support needs were being met immediately before the provider was unable to carry on providing it because of business failure.

2.6. Ordinary residence

Ordinary residence is given its ordinary and natural meaning and as defined in a leading case² refers to a person's abode in a particular place or country adopted voluntarily and for settled purposes, whether for a short or long duration. Ordinary residence can be acquired as soon as a person moves to an area, if their move is voluntary and for settled purpose, irrespective of whether they own, or have an interest in a property in another local authority area.

3. Legal Framework

The Care Act 2014 imposes a clear temporary duty on local authorities to meet adults' care and support needs and carers' support needs which were being met immediately before the registered care provider became unable to carry on the regulated activity. This temporary duty applies to all people receiving services in the area of Barnet as set out in paragraph 4.1 below.

This policy is written in accordance with the statutory framework and guidance. For ease of reference, the relevant provisions are set out in Appendix 1 of this document.

4. Scope of temporary duty

4.1. To whom does this policy apply?

This temporary duty applies to all people receiving services in the area of Barnet regardless of whether:

- the relevant adult or carer is ordinarily resident in the area of Barnet;

² Shah v London Borough of Barnet (1983)

- Barnet Council has carried out a needs assessment, a carer's assessment or a financial assessment;
- any of the needs meet the eligibility criteria;
- the costs of meeting their needs are made by a self-funder;
- Barnet Council has a contract with the failed provider;
- another local authority made the arrangements to provide the services, the cost of which was paid for by that authority or that authority was making direct payments in respect of those needs.

4.2. What needs will be met?

Barnet Council will meet those care and support needs of adults and support needs of carers, which were being provided immediately before the provider became unable to carry on that activity in Barnet because of business failure. This means Barnet Council will provide care and support based on the assessment that informed the care and support package. This will ensure there is no delay in arranging the alternative provision.

In the event that there is no assessment of needs, carer's assessment or a financial assessment and irrespective of whether those needs would meet the eligibility criteria, Barnet Council will act as promptly as possible to meet needs under the temporary duty.

Where Barnet Council requires further information to enable it to meet this temporary duty, it will request, that the provider or anyone involved in the provider's business as it thinks appropriate, supply it with the information it needs. For example, this may involve up to date records of the people who are receiving services from that provider, to help Barnet Council to identify those who may require its support.

4.3. How will those needs be met?

Barnet Council has a discretion as to how it will meet needs when this temporary duty becomes applicable. Examples in the Care Act 2014 include accommodation, care and support at home or in the community, counselling and other types of social work, goods and facilities, information, advice and advocacy. Barnet Council is not required to meet needs in exactly the same combination of services that were previously supplied, however, it will aim to provide a service as similar as possible to the previous where possible and on the basis that the person's needs will continue to be met.

Some people may only require information and advice on alternative services available locally to enable them to make a properly informed choice about a new provider.

Others may require Barnet Council to actively arrange care with a different provider for a period of time, to ensure there is continuity of care.

The steps taken will depend on both the circumstances of the provider failure and the nature of the support the adult or carer requires from Barnet Council.

4.4. Who will be involved in deciding how needs will be met?

In deciding how to meet an adult's needs for care and support, Barnet Council will involve:

- the relevant adult concerned,
- any carer that the adult has, and
- anyone whom the relevant adult asks the authority to involve
- where the relevant adult lacks capacity to ask Barnet Council to involve other persons, Barnet Council will involve anyone who appears to it to be interested in the adult's welfare.

In deciding how to meet a carer's needs for support, Barnet Council will involve:

- the carer, and
- any person the carer asks Barnet Council to involve.

Barnet Council will take all reasonable steps to agree how needs should be met with the relevant adult or carer.

In line with the wellbeing principle, Barnet Council will seek to minimise disruption for people receiving care.

4.5. When will the temporary duty apply?

The temporary duty will apply as soon as Barnet Council becomes aware of the business failure and the provider can no longer carry on its activity. It will not apply where a business ceases to operate because of its failure to meet the CQC's standards. If arising from quality failures, the needs become urgent the local authority has a discretionary power that could be exercised to meet needs.

If, for example, a business is declared insolvent and an Administrator is appointed, that is, there is a business failure but the service is still continuing to be provided, Barnet Council has no duty to intervene to provide care and support. If, however, the service does not continue to run following business failure, the temporary duty will apply and Barnet Council will step in to ensure an adult's care and support needs and a carer's support needs are met.

The temporary duty will apply for as long as Barnet Council considers it is necessary, i.e. that it is satisfied that the person's needs will be met by the new provider. At that point the person will once again become responsible for arranging their own care.

4.6. Will a charge be made when discharging this temporary duty?

Barnet Council may charge the relevant adult for the actual costs incurred of temporarily meeting his or her needs by providing alternative care or support.

Barnet Council will not charge for the provision of information and advice to a person.

Barnet Council may recover the actual costs of temporarily meeting the needs of a person who is not ordinarily resident in Barnet from the relevant local authority which made or funded the arrangements with the failed provider. The costs recovered will be those costs incurred by Barnet Council in meeting the needs under the temporary duty. Costs can also be recovered from the relevant local authority in Wales or Scotland or the relevant Health and Social Care trust in Northern Ireland that arranged or funded the care and support with the failed provider.

4.7. Cross border placements

There will be close communication and co-operation between Barnet Council and the relevant local authority in Wales or Scotland or the relevant Health and Social Care trust in Northern Ireland that arranged or funded the care and support with the failed provider. Generally, responsibility will continue to remain with the authority that arranged and or funded the care and support.

4.8. NHS Continuing Healthcare

Where a failed provider in England is providing an adult with NHS Continuing Healthcare which is commissioned by a clinical commissioning group, the relevant clinical commissioning group will be treated as a relevant partner that Barnet Council will co-operate with in reaching an agreement about how to meet needs.

Barnet Council will not be able to meet NHS Continuing Healthcare needs in provider failure cases. This is because the duty to provide NHS Continuing Healthcare falls on the NHS and Barnet Council is not permitted to provide it. The NHS duties are outside the scope of this policy.

5. Discretionary power to meet 'urgent needs'

Where Barnet Council considers the needs to be urgent, it may exercise its discretionary power³ to meet needs without first conducting a needs assessment,

³ Section 19 Care Act 2014

financial assessment or eligibility determination and regardless of whether the relevant adult is ordinarily resident in Barnet.

This may be necessary where services are interrupted, there are quality failings with a provider or there is a risk of an emergency closure but business failure is not the cause. Where the provider's business has not failed, it remains the provider's primary responsibility to meet the needs of individuals receiving care and support in accordance with their contractual liabilities. Where the continued provision of care and support is in imminent jeopardy and there is no likelihood of returning to business as usual, Barnet Council will exercise its discretionary power to meet urgent needs. This power is not limited to regulated providers and may be extended to unregistered providers, i.e. unregulated providers of a social care activity.

Before exercising this discretionary power a risk assessment will be completed to determine whether the needs are urgent. Every service interruption will be considered on its facts and the circumstances.

6. Contingency planning

As part of our contingency planning we will identify and assess potential risks in Barnet with our local partners. We will also communicate with local providers which services they would be willing and able to provide if the need arose because of the failure of a provider. This will enable Barnet Council to facilitate a prompt response and secure continuity of care for people affected in the event of a business failure or service interruption.

7. Equality impact assessment

This Provider Failure Policy is one of a number of policies flowing from the Care Act 2014. The Equality Impact Assessment in respect of these policies can be found here: [EqA on Local Care Act policies](#).

8. Related policies, procedures or strategies

The procedures in respect of Provider Failure can be found separately.

The following policies and strategies may also be useful:

- Information, Advice and Advocacy Policy and Strategy
- Assessment and Eligibility (Adults in Need) Policy
- Assessment and Eligibility (Carers) Policy
- Fairer Contributions Policy

9. Disputes between authorities

There will be close communication and co-operation between Barnet Council and the relevant local authority that arranged and or funded the care and support with the failed provider. This is to ensure that alternative care and support is secured with minimum delay and disruption. In the event of a dispute the mechanism for resolution will be an application to the relevant Secretary of State for a determination⁴ (ordinary residence dispute resolution procedure).

10. Policy status and transition arrangements

This Provider Failure Policy will apply when the relevant commencement order brings into force relevant statutory provisions. It is intended that this commencement order will be made in April 2015.

11. Review of policy

This Provider Failure Policy will be reviewed annually or earlier as required by policy or legislation changes. Any major amendments to this policy will be subject to consultation.

12. Contact information / further guidance

Further advice and guidance is available from the Care Quality Team via email on supplymanagement@barnet.gov.uk

⁴ Section 40 Care Act 2014, Schedule 1; The Care and Support (Cross-border Placements and Business Failure: Temporary Duty) (Dispute Resolution) Regulations 2014

Appendix 1

Subject Area	Statutory framework	Regulations	Guidance
Provider failure /business failure	Care Act 2014 Sections: 48-52	The Care and Support (Business Failure) Regulations 2014	Care and Support Statutory Guidance issued under the Care Act 2014 : Chapter 5: Managing provider failure and other service interruptions
Temporary duty on LAs	Care Act 2014 Section 48	As above	Care and Support Statutory Guidance issued under the Care Act 2014 : Chapter 5
Registered provider	Care Act 2014 Section 48 Health and Social Care Act 2008, Part 1, Chapter 2	Regulation 1 of the Care and Support (Business Failure) Regulations 2014	Care and Support Statutory Guidance issued under the Care Act 2014 : Chapter 5
Regulated activity	Care Act 2014 Section 48 Health and Social Care Act 2008, Part 1, Chapter 2	Health and Social Care Act 2008 (Regulated Activities) Regulations 2014	Care and Support Statutory Guidance issued under the Care Act 2014 : Chapter 5