

**EXPLANATORY MEMORANDUM TO  
THE CARE AND SUPPORT (MARKET OVERSIGHT CRITERIA)  
REGULATIONS 2015**

**2015 No. 314**

1. This explanatory memorandum has been prepared by the Department of Health and is laid before Parliament by Command of Her Majesty.
2. **Purpose of the instrument**
  - 2.1 The Care Act 2014 (the Care Act) introduces a new oversight regime of the financial sustainability of certain providers of social care who are registered with the Care Quality Commission (CQC) (care providers). This instrument sets out the criteria for the CQC to determine to which care providers section 55 of the Care Act applies and so are within that regime (“the market oversight regime”).
3. **Matters of special interest to the Joint Committee on Statutory Instruments**
  - 3.1 None.
4. **Legislative Context**
  - 4.1 Section 54(1) of the Care Act imposes a duty on the CQC to determine whether a care provider satisfies the criteria for determining whether section 55 of the Care Act applies to that provider (which we refer to herein as the entry criteria for the market oversight regime). The criteria must be specified in regulations made under section 53(1) of the Care Act. This instrument specifies those criteria.
  - 4.2 Section 48(2) of the Care Act imposes a temporary duty on local authorities in England to ensure that care and support needs of adults and support needs of carers continue to be met in circumstances where care providers become unable to carry on a regulated activity because of business failure. The *Care and Support (Business Failure) Regulations 2014* make provision as to the interpretation of “business failure” and as to circumstances in which a care provider is to be treated as being unable to carry on because of business failure.
  - 4.3 Under section 55 of the Care Act, the CQC is under a duty to assess the financial sustainability of those care providers who meet the entry criteria to the market oversight regime and any care providers or care providers of a specified description specified in regulations made under section 53(5) of the Care Act. The *Care and Support (Market Oversight Information) Regulations 2014* make provision for enabling the CQC to obtain information from persons other than the care

provider to assist it in making this assessment. If the CQC, in the light of the assessment, considers that there is a significant risk to the financial sustainability of the provider's business, then it may require the provider to develop a plan to mitigate or eliminate the risk or an independent review of the business by a person with appropriate professional expertise may be arranged.

- 4.4 Where the CQC is satisfied that a registered care provider is likely to become unable to carry on providing the care for which it is registered with the CQC because of business failure, it must inform the local authority which it thinks will be required to carry out the duty under section 48(2).
- 4.5 This market oversight regime is new, confers new powers and duties on the CQC, and does not replace any existing central regime.

## **5. Territorial Extent and Application**

- 5.1 This instrument applies to England.

## **6. European Convention on Human Rights**

The Minister of State for Care and Support has made the following statement regarding Human Rights:

In my view the provisions of the Care and Support (Market Oversight Criteria) Regulations 2014 are compatible with the Convention rights.

## **7. Policy background**

- 7.1 There is a diverse market for care and support services in England. Public, private and voluntary sector organisations can all provide these services. As in any market, some providers leave whilst new providers join it. Providers may leave the market for a number of reasons. Examples include a provider selling on its property for residential use or a provider's business being taken over by a competitor. Most exits from the market are handled responsibly by providers who ensure that those receiving care services continue to do so in line with contractual liabilities. This process is normally managed in an orderly way that does not cause interruption of services for the people receiving care.
- 7.2 Occasionally however, care providers do exit the market in a way that adversely impacts on their ability to manage the closure of the service in a planned way, and ensure that people receiving care and support services continue to do so in line with contracts.
- 7.3 Prior to the Care Act, when a care provider became unable to meet needs because of business failure, local authorities had functions which would generally extend to meeting the needs of those individuals whose needs the provider was meeting before failing. Local Authorities

have done this effectively for the financial failure of smaller scale providers operating at a local level. The Care Act therefore clarifies the position by setting out legal duties (“temporary duties”) on local authorities in England in order to ensure that people are not left without the care they need if their care provider becomes unable to carry on providing care because of business failure.

- 7.4 Today, there are a number of medium and large providers of care, operating across large parts of England, on a significant scale. The impact of such a provider failing may affect many parts of the country and cause individual local authorities considerable difficulty in discharging functions under the Care Act without early warning that such a failure was likely to occur.
- 7.5 One such example was when, in 2011, Southern Cross, the largest provider of residential care services, got into financial difficulties. The local authorities affected had little or no consistent prior warning of the company’s financial position and the growing possibility that care services could be interrupted as a result. This caused significant distress among the residents of Southern Cross’s homes, worried in case their care service was interrupted. Although ultimately only a handful of people had to change their accommodation, the Government recognised that it was unacceptable for people’s care to be interrupted, or for the threat that this might happen to cause unnecessary anxiety to them, their families and their carers.
- 7.6 The Government published the White Paper ‘Caring for our future: *Reforming care and support*’ which in large part prefigured the Care Act, where it set out a clear set of underpinning principles for the future of market oversight in adult social care. Building on these principles, Government carried out a separate public consultation (‘Oversight in Adult Social Care’) into a more detailed set of proposals for market oversight and provider failure. Proposals included a light touch framework for assessing the financial sustainability of those providers local authorities would find ‘difficult to replace’ should they financially fail. The vast majority of consultation responses were generally supportive of the broad shape of the proposals and wider principles set out in the *Caring for our Future* White Paper.
- 7.7 The Care Act therefore provides for the establishment of a market oversight regime, whereby the CQC will assess the financial sustainability of any registered care provider who is subject to the regime (either by means of meeting the entry criteria set out in regulations or otherwise by being specified as subject to the regime in regulations).
- 7.8 The CQC will look at the finances of these providers, including issues like profitability and debt level, to assess their overall financial health. Where the CQC has identified that there is a significant risk to the

financial sustainability of a provider's business, it will take action with the aim of ensuring the provider is taking steps to return to financial health (by requiring the provider to develop a plan for how to mitigate or eliminate the risk or by arranging, or requiring the provider to arrange, for an independent review of the business by a person with relevant professional expertise). Where that is not possible and the CQC is satisfied that a provider is likely to become unable to carry on providing the care for which it is registered with the CQC because of business failure, it must inform local authorities who may have to carry out temporary duties to meet people's needs and the CQC may also request information from that provider which it believes will assist local authorities in ensuring continuity of care. The CQC must share with those local authorities carrying out the temporary duties any information that it believes will help the relevant local authorities to carry out those duties. The aim of this new regime is not to prop up failing providers, but to provide reassurance for people affected by the care business failing that their care services will not be interrupted.

- 7.9 The relevant sections in the Care Act were uncontentious with both stakeholders and Parliamentarians during the passage of the Care Bill through Parliament, echoing the broad agreement found in earlier consultation and engagement.
- 7.10 This instrument specifies the criteria that providers must meet in order to fall within the new market oversight scheme. It is intended that the CQC will consider the regulated care provided by a registered care provider at regular intervals in order to determine whether the provider meets the criteria. The criteria are different for providers of non-residential care and residential care and have been designed to be met by those providers that would be "difficult to replace" (looked at objectively on the basis of volume of care provided, concentration of market share and geographical distribution). The entry criteria have not been designed to be met by providers on any other alternative basis, such as the pre-existing financial health or quality of service provision of the provider (as such an alternative basis for the design of the entry criteria could risk creating a situation where entry into the market oversight scheme, in and of itself, could inadvertently affect the health of a care provider's business because of a perception that entry into the regime itself would represent a judgement about the likely failure of the provider, ultimately increasing the risk that services for those receiving care are interrupted).
- 7.11 The entry criteria for residential care providers are designed to be satisfied by organisations that deliver different types of residential care services. Examples include a care business that delivers nursing care services along with care accommodation or an organisation that provides reablement services. The criteria are designed to be satisfied by those large providers that operate nationally, alongside those providers who are medium-sized but provide care services across much

of the country and those who provide a significant level of the total care delivered in a small number of local authority areas. The justification for choosing these three factors in specifying the criteria – size, geographical coverage and market concentration – is that were such providers to fail financially, there would be significant challenges in managing that failure both locally and nationally.

- 7.12 The entry criteria for non-residential care providers are designed to be satisfied by organisations that deliver different types of non-residential care services. Examples include organisations providing personal care services to people in their own homes or a provider that runs supported living services. The criteria are designed to be satisfied by those providers that deliver significant levels of care, providers that deliver care to a large number of people or medium size providers who deliver high levels of care and support to a relatively small number of individuals. Were those providers to fail financially, local authorities would face significant logistical challenges to temporarily meet the needs of those affected.
- 7.13 Market concentration was not included in respect of the entry criteria for non-residential care providers as local non-residential care markets are usually relatively competitive and the failure of one smaller provider with a large market share in a single local authority area (i.e. not captured in the criteria due to its size) would very likely be manageable by the relevant local authority given that a number of care providers would be readily available and willing to take over the failed provider's business. Setting entry criteria by reference to intensity of care provided (measured in hours of care per week) is considered more appropriate, as these providers would be difficult to replace even if they represent a relatively small portion of the local market. Intensity of care typically equates to a high level of services provided in people's own homes, for example, people needing 24 hour care.
- 7.14 The instrument has been drafted in consultation with a group of external stakeholders made up of representatives from the care provider sector, provider umbrella groups, representatives of care users and local authorities to ensure that the entry criteria are designed to be met by those providers who, because of their size or concentration local authorities would find difficult to replace should they be unable to carry on because of business failure.
- 7.15 Section 53(2) of the Care Act also requires that the Secretary of State have regard to the extent to which care providers specialise in the provision of particular types of care (specialism) when setting the entry criteria for the CQC's market oversight regime. It has not proved possible to develop objective criteria relating to specialism to include in this instrument, largely because there is a lack of data on specialist providers broken down into categories that would be meaningful in the context of the criteria being designed to be met by 'difficult to replace' providers. The Department of Health, in consultation with relevant

stakeholders, is working on proposals to consider which, if any, providers who, because of the specialised nature of the services they deliver should be considered 'difficult to replace' and therefore subject to the market oversight regime. It is intended that if any providers are so identified, they will be made subject to the regime by means of regulations being made under section 53(5) of the Care Act to provide that section 55 applies to them irrespective of whether they meet the entry criteria.

- 7.16 It is worth noting that only care provided in England is relevant under these Regulations. This is because the market oversight regime can only apply to registered care providers who are registered in respect of the carrying on of regulated activities relating to the provision of social care for adults (and the regulation making powers to specify criteria for determining whether section 55 applies to a particular provider apply only in respect of such registered care providers carrying on regulated activities). "Registered care provider" means a person registered under Chapter 2 of Part 1 of the Health and Social Care Act 2008 ("the 2008 Act") in respect of carrying on a regulated activity and "regulated activity" has the meaning given in Part 1 of the 2008 Act. It is the definition of "regulated activity" in the 2008 Act (section 8) that leads to the England only application of these provisions as it provides that an activity may only be prescribed as such if the activity involves, or is connected with, the provision of health or social care in, or in relation to, England.
- 7.17 These Regulations come into force immediately after section 53(1) of the Care Act comes into force. Section 53(1) has been commenced for the purposes of making regulations on 1 October 2014 by a commencement order (S.I. 2014/2473). It is intended that section 53(1) will be brought into force for remaining purposes, by a further commencement order, in April 2015.

## **8. Consultation outcome**

- 8.1 The consultation on the package of regulations relating to Part 1 of the Care Act was published on 5 June 2014, and ran for ten weeks to 15 August. In order to reach a comprehensive and varied pool of experience and expertise, the consultation contained a mix of digital and face-to-face meetings and events with the full spectrum of stakeholders, including: people receiving care and support and their carers; social workers and other frontline practitioners; local authority finance managers, commissioners and elected members; voluntary and private social care providers; national representative groups and other charities and trusts; and NHS agencies, housing departments, DWP Job Centre Plus and other key partners involved in the reforms. In total, the consultation drew over 4,000 responses from many different sources. Responses were carefully analysed and, where appropriate, changes were made to regulations.

- 8.2 A number of respondents to the consultation commented on these Regulations in draft which the Department considered carefully. In particular, some respondents felt that the entry criteria for the CQC's market oversight scheme should be amended so that, in addition to residential care providers that are large and those that are medium in size but spread across the country or retain a large market share in a small number of local authority areas, those who were relatively small in size but retain a large market share in a single or small number of local authority areas should be overseen by the CQC.
- 8.3 The Department considered this issue carefully but decided not to include providers solely on the basis that they retain a large market share in a single or small number of local authority areas, as local residential care markets typically run with some spare capacity and the failure of one smaller provider with a significant market share would likely be manageable by the relevant authorities who should, as part of standard contingency planning, be aware of alternative providers in their local area that have spare capacity and have developed relationships with those providers. The Department will be making available advice to supplement existing work by local authorities in respect of contingency planning and in light of these responses, will consider what further work is needed to assist them in this area.
- 8.4 The Government response to the consultation was published on 23 October and can be found here:

<https://www.gov.uk/government/consultations/updating-our-care-and-support-system-draft-regulations-and-guidance>

## **9. Guidance**

- 9.1 Statutory guidance to support implementation of Part 1 of the Care Act was subject to public consultation as part of the consultation on regulations under that part. The guidance is published at <https://www.gov.uk/government/publications/care-act-2014-statutory-guidance-for-implementation> on 23 October. This guidance is not itself the subject of Parliamentary scrutiny.
- 9.2 The guidance will contain a chapter outlining local authorities' roles and responsibilities when managing business failure (in respect of both providers who will not be subject to the market oversight regime and those who will be) and other service interruptions.
- 9.3 The CQC must also publish guidance on two aspects of the operation of the market oversight regime. First, under section 55(7) of the Care Act, it must publish guidance on the method it expects to apply in making an assessment of the financial sustainability of the business of a care provider who is subject to the market oversight regime. Second, under section 56(6) of the Care Act, it must publish guidance on the method it expects to apply in making an assessment of whether it is

satisfied that a care provider which is subject to the market oversight regime is likely to become unable to carry on the regulated activity in respect of which it is registered because of business failure as mentioned in section 48 of that Act.

## **10. Impact**

- 10.1 A separate impact assessment has not been prepared for these Regulations. These Regulations are part of a package of legislative measures and the relevant impact assessment can be requested via [careactconsultation@dh.gsi.gov.uk](mailto:careactconsultation@dh.gsi.gov.uk) or Department of Health, Richmond House, 79 Whitehall, London SW1A 2NS and is available online at <http://www.legislation.gov.uk/ukpga/2014/23/resources>
- 10.2 Although we are unable to calculate the precise number of care providers who will be included in the market oversight regime until late 2015 (by which time the market oversight regime will have been operating for a number of months, and it is intended that any regulations specifying particular care providers to be made subject to the regime, irrespective of whether they would meet the entry criteria for the regime, will have come into force), the latest projections based on existing data suggest some 50 - 60 private providers and third sector organisations will be subject to the regime at a total annual net cost of approximately £0.365 million spread across those organisations. This figure includes all costs to organisations in the regime, including costs associated with providing information to the CQC.

## **11. Regulating small business**

- 11.1 The legislation does not apply to small businesses.

## **12. Monitoring & review**

- 12.1 The Government has committed to keeping the impact of the package of regulations under Part 1 of the Act under review. We will monitor the impacts of implementation of the policies contained within the Act and regulations under it on an ongoing basis. This will include continuing to work closely with care providers, local government and other stakeholders to understand the impact of implementation of the reforms.
- 12.2 In particular, we will consider whether the numbers and types of care providers who meet the entry criteria for the market oversight regime under these Regulations are appropriate (and so whether the entry criteria remain appropriate), and whether any regulations should be made under section 53(5) of the Care Act to specify particular care providers or types of care provider who, despite not meeting the entry criteria, should be subject to the regime.

### **13. Contact**

Stephen Airey at the Department of Health Tel: 0207 210 5717 or email: [Stephen.airey@dh.gsi.go.uk](mailto:Stephen.airey@dh.gsi.go.uk) can answer any queries regarding the instrument.