

Provider Business Failure Procedure
Suffolk County Council
Adult and Community Services

June 2016

Adult Services Provider Business Failure Procedure

1. Introduction and the ACS Policy Framework

- 1.1. Suffolk County Council Adult and Community Services (ACS) has developed an **Adult Social Care Policy Framework**, to support the delivery of the requirements of the Care Act 2014, and to provide transparency for staff, service users, carers, the general public and partner organisations.
- 1.2. The policy framework covers the statutory duties of Suffolk County Council as set out in the Care Act 2014: some of a general nature which apply to the population as a whole; others which are specific and relate to people with care and support needs and / or their carers. The policy framework also indicates where the Council has legal powers under the Act, how it intends to exercise those powers, either for the benefit of the population of Suffolk, or in relation to people with care and support needs.
- 1.3. The Policy Framework can be found on the Council Website: [Policy Document](#)
- 1.4. The Policy Framework contains a section on market shaping and provider failure.
- 1.5. This document should be read in conjunction with the Policy Framework and provides details about the procedure which will be followed by ACS practitioners working with providers, customers and family carers, and other key stakeholders, in the event of provider failure.

2. Scope

- 2.1. Not all instances of provider failure require intervention by the Council. If service provision remains uninterrupted, and the needs of people using that service continue to be met, there may be no need for intervention. However, should provider failure lead to a temporary or permanent service interruption, the Council has a temporary duty to intervene.
- 2.2. This duty, and therefore this document, applies regardless of whether:
 - I. there is a contract in place between the provider and the Council;
 - II. the people using the service pay for their own care;
 - III. other councils have made the arrangement to provide the service.
- 2.3. This document applies to services delivered within Suffolk. The Council also purchases services for people in other local authority areas. In the event of provider failure for any 'out of county' services, the host council's provider failure procedure will apply and Suffolk County Council Adult and Community Services will work closely with the host authority to ensure that arrangements are made to meet the needs of Suffolk County Council funded people using the service.

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3. Business failure and service interruptions

- 3.1. There are numerous situations that can give rise to business failure and 'disruption to care and support services' that require action by ACS. Not all of these are classed as 'business failure'.
- 3.2. Examples include;
- 1.2.1 Financial – insolvency, going in to administration, going into the CQC financial oversight regime owing to:
- I. the appointment of an administrator;
 - II. a receiver is appointed;
 - III. a winding up order is made;
 - IV. an application for bankruptcy is submitted;
 - V. the charity trustees of the provider become unable to pay their debts.
- 1.2.2. Quality – safeguarding or quality of service concerns, up to and including, CQC special measures and or de-registration.
- 1.2.3 Force majeure – environmental disaster e.g. fire, flood, immigration enforcement on whole workforces, outbreak of illness such as norovirus or meningitis at a care home or other emergency situation.
- 1.2.4 Strategic Exit – provider leaving the market due to retirement, disinvestment or change of registration of service type.

4. Definitions: Types of Service interruptions

- 4.1. **Financial “Business failure”** is defined in The Care and Support (Business Failure) Regulations 2014. These Regulations define what is meant by “business failure” and explain the circumstances in 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). ‘Service interruption’ because of “business failure” relates to the whole of the businesses regulated activity and not to parts of it.
- 4.2. **Business failure involving a provider in the ‘CQC oversight regime’ April 2015.** The financial “health” of certain care and support providers is subject to monitoring by the Care Quality Commission (CQC). This applies to providers which, because of their size, geographic concentration or other factors, it would be difficult for one or more local authorities to replace, and therefore where national

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oversight is required.

- 4.3. CQC is in regular contact with ACS and they are required to notify ACS if this type of business failure is expected in a Suffolk provider. ACS would therefore be alerted to the fact that it may be required to carry out the 'temporary duty', so that ACS can prepare for the local consequences of the business failure.
- 4.4. Where CQC considers it necessary, it may request the provider to share with it relevant information to support ACS in the discharge of the temporary duty. CQC must give the information, and any further relevant information it holds, to ACS and to any other local authorities affected.
- 4.5. **Financial Business failure involving providers not in the CQC market oversight regime.** Where concerns are raised in relation to the financial viability of a provider that falls outside the CQC Market Oversight Criteria, ACS will request CQC run a credit check on the company. The action required in relation to each service interruption should be considered on its facts and via a process of risk assessment. It is for ACS to decide if it will act to meet a person's needs for care and support which appear urgent.
- 4.6. In exercising this judgement ACS will act lawfully, including taking decisions that are reasonable.
- 4.7. **Business Failure in relation to Quality.** ACS work closely with CQC as the regulator when there are quality issues. ACS has different routes to address quality failure, including:
 - I. The Provider Support Team working intensively with the provider to support them to identify the root causes of the quality failure and develop an overarching improvement plan. Delivering workshops can be arranged with the provider along with help to identify sources of support;
 - II. Suspending the contract with the provider;
 - III. Issuing a Notice to Remedy for specific breaches in the contract.
- 4.8. CQC has different routes to address quality failure, including:
 - I. Placing providers in Special Measures (See APPENDIX B)
 - II. Issuing a Notice of Proposal or an Urgent Notice of Decision – These can be in relation to restricting admissions, requiring the provider to submit quality audits to CQC, through to terminating a provider's registration or an individual location.
- 4.9. **Business Failure in relation to Force Majeure.** Providers who contract with ACS are required to have Business Continuity Plans in place to ensure service continuity, which must be available to the Council for review. Providers should:

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- Sign up to EA flood warnings if necessary.
- Have arrangements for responding to forecasts of winter weather.

4.10. **Business Failure in relation to a Strategic Exit.** Where the exit from the market is planned ACS requires providers to give the maximum possible notification to ACS, in line with contractual requirements.

5. Assessing the risk of provider business failure

Early warning

- 5.1. ACS will compile and assess information about the robustness of services and the quality of care they provide in order to provide early intervention and avoid crisis situations wherever possible.
- 5.2. This will be undertaken through the following:
- I. Communication: with key stakeholders including CQC; NHS Clinical Commissioning Groups; providers and provider representatives; people using services and their families;
 - II. Monitoring: complaints and compliments about services; monitoring Safeguarding referrals and outcomes; pro-active monitoring visits to care homes to assess the quality of the services provided.

The Provider Performance Panel

- 5.3. Information will be held by the ACS Contracts Team and will be assessed by the 'Provider Performance Panel (information sharing and planning)' which will meet fortnightly, focusing on each of the four localities in turn, meaning the panel will meet in each locality bi-monthly.
- 5.4. The panel will include representatives from ACS Contracts, ACS Provider Support Team, ACS Adult Protection Team, ACS Cluster Teams, ACS Customer Rights, CCG and CQC.
- 5.5. The panel will review key information about services which will include information about complaints and compliments, safeguarding referrals, information from customer reviews, CQC assessments and inspections, information from other key stakeholders, information from CQC including financial information.
- 5.6. The panel will risk-assess provided services and identify where a plan of support and intervention is required, where there are identified risks to the service which are likely to impact on the safety and wellbeing of people using the service.

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5.7. The following principles will apply:

- I. Action will be rooted in an assessment and judgement about the risks to people in terms of their safe care and wellbeing;
- II. Decision making will be transparent so that providers know the reasons for concern, escalation and consequent action;
- III. Providers will be treated equally and fairly;
- IV. Decisions will be communicated in writing, with the process set out clearly;
- V. Decisions will be made on the assessable facts and a judgement on the risks to people;
- VI. Decisions will be reviewed regularly and providers afforded a reasonable opportunity to demonstrate service improvement, consistent with the need of ACS to be satisfied that the risk to people is mitigated and service improvements are embedded and sustained.
- VII. Where necessary, the panel will request a dedicated strategy meeting is convened to focus on a particular service. This meeting will be arranged and chaired by the Contracts Manager unless otherwise agreed.

5.8. The panel will escalate concerns about providers to the Provider Performance Board, which is a multi-agency forum for sharing information. The Board will include representatives from ACS Contracts, ACS Provider Support Team, ACS Adult Safeguarding Team, ACS Cluster Teams, ACS Customer Rights, CCG, CQC, Environmental Health, Fire and Rescue Service, Public Health England and Healthwatch.

5.9. The Board will meet bi-monthly to exchange information about provider performance that is giving or is likely to give imminent rise for concern. This board will escalate concerns about providers to the Regional Quality Surveillance Group where required.

6. Procedure for responding to planned and emergency provider failure – information for all staff and other stakeholders who may be involved in the response process.

Principles

6.1. Actions undertaken by ACS where there are concerns about the possibility of provider failure, or actual consequences of provider failure are always governed by the following principles:

- I. The aim of any actions by ACS is to safeguard the wellbeing of people using the service and secure the best possible outcomes.
- II. Processes will be reviewed in the light of learning and experience, to improve them. Learning will be drawn from other sources and the experience of other councils wherever possible;
- III. Each situation is different and will require a response that is specifically

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- tailored to the situation as it develops;
- IV. The involvement of people using the service, their families and representatives, and all key parties will be undertaken.

6.2. Where there are concerns that a provider or service is at risk of failure or has failed, the following will apply:

Roles and responsibilities

- I. **Contract Manager:** responsible for arranging and chairing planning and monitoring meetings (Provider Failure Response Meetings) through the process. This will be with the support of an ACS senior manager. Co-ordination; primary contact with the provider/provider organisation; seeking legal advice; communicating with the provider through letter/e-mail; notifying key stakeholders internal and external as appropriate (including Finance, social work services, placements team); liaison with CQC, managing accreditation issues; co-ordinating 'lessons learned'.
- II. **Area Manager (social work services):** responsible for co-ordinating social work response; communications with customers and families; assessments and reviews - understanding needs and preferences of people using the service; co-ordinating transfer arrangements where appropriate and direct liaison with new providers offering alternative services; informing out of hours service; contributing to 'lessons learned'.
- III. **Social workers:** work to direction of the Area Manager (social work services); undertake reviews; liaise with family carers; arrange visits to alternative providers where necessary; manager transfer arrangements; mental capacity assessments/reviews; review following transfers; contribute to 'lessons learned'.
- IV. **Provider Support Team:** provide supportive intervention to providers and services through the process.
- V. **Placement Team:** contact alternative providers to make enquiries about alternative places where required; maintain records of local and other vacancies; liaise with social workers over specific placements.
- VI. **Safeguarding managers/officers:** may have a direct role in the above.

Actions: establishing a team

6.3. The following actions will typically apply. The response and sequence of actions will be governed by the specific incident of provider or business failure.

- I. Establishment of a team: a team will be established and led by the Contracts Manager. The team will include at least: Assistant Director or Head of Service; Area Manager or representative (social work services); Provider Support Team Manager; Placement Team Manager; Business Support; other membership as required from Customer Care Team, Adult Protection Team, Communications Team, Legal Team, External

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- Colleagues, e.g. CCG. See APPENDIX A for agenda for the initial meeting, subsequent meetings will be reviewing and updating the action plan based on information shared during the meeting.
- II. An Action Plan will be agreed for the team: i.e. not a provider service improvement plan. This will be agreed to be shared with the provider. Consideration given to referrals for new customers to the service.
 - III. Legal support and other key advice and support: the Contracts Manager will seek appropriate support and guidance.
 - IV. Meetings and communication: the Contract Manager will establish regular contact meetings/conference call arrangements, so that everyone is informed. The Contract Manager will establish clear communication with the provider (written plus verbal/meeting), explaining the Council's position. The Contract Manager and social work services will agree communications with provider so that residents and service users, families, staff and other key stakeholders are fully aware of the situation. This could include written communication and meetings.
 Rules of confidentiality will be strictly adhered to in any communications, to safeguard personal and private information.
 Communication will be planned and timely, to avoid concerns and uncertainty wherever possible.
 - V. Core group of workers: Social work services will establish a core group of social work practitioners and a leader to keep involved at the point at which concerns lead to the need to review individuals' care being delivered by the care provider through moves to alternative providers and reviews, to maintain continuity. The Leader will have the authority to make appropriate key decisions to ensure that the process is followed without undue delays.
 - VI. Maintain communications with CQC and other key agencies. The Contract Manager maintains close communication with CQC as appropriate.
 - VII. Reviews: social work services will undertake reviews to establish the needs and requirements of people using the service and their families, and will undertake mental capacity assessments/reviews.

Measures

6.4. ACS to consider and implement measures, which may include:

- I. Where the Council has a contract with the provider - suspension of the contract. This means that no new customers would be referred to the service by ACS. This is to enable the provider to make the necessary improvements to their service, or to allow plans to be agreed and acted upon.
 Where there is clear evidence of improvements being made, the suspension may be partially or fully lifted. Partial lifting of the suspension means that conditions will be set which might include restrictions to the number of new customers referred, types of customer need, reporting and review requirements.

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- II. Plan: the service provider will be required to complete a Service Improvement Plan (SIP).
- III. Provider Support Team: the team will provide advice and support to providers, to enable them to make the necessary improvements to their services.
- IV. Contract meeting between the provider and the ACS Contracts Team.
- V. 'Step-in' arrangements to be considered which could include the following:
 - 1. Additional support from care services (e.g. where the service is experiencing difficulties regarding staffing) – this on a temporary basis. The provider may themselves bring in additional support;
 - 2. Additional management support – from other providers or arranged through providers' representative organisation. (The provider may themselves undertake to bring in additional management capacity or support).
- III. Notice to remedy, setting out the Council's expectations clearly.
- IV. Notice to terminate the contract in situations of extreme concern.
- V. Alternative services: where intervention and work by the provider does not result in service continuation and there is a need for alternative arrangements to be made, social work services will ensure the provider offering the alternative service has all the necessary information about individuals' needs and requirements. In the case of residential or nursing care, social work services will agree and arrange transfers to alternative placements where appropriate, ensuring that there are transport arrangements. Checks that outgoing provider has recorded personal possessions and that these are safely transferred. Ensures that arrangements to receive new residents are in place, which are welcoming and supportive, given the concerns that residents and families will have about moves.
- IV. In the case of failure of domiciliary care services or non-building based services, procurement advice will be sought at the earliest opportunity regarding alternative arrangements.

Services rated by CQC as 'Inadequate'/placed in Special Measures

- 6.5. The Council is committed to not place people in services that have already been rated as 'inadequate', until such time as there is sufficient evidence to demonstrate that their action plan is sustainable and already delivering quantifiable improvement. This Council is committed to ensuring that people using services identified as 'inadequate' are properly safeguarded.
- 6.6. APPENDIX B provides additional information on the process for providers and services assessed as Inadequate/placed in Special Measures.

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Supporting information

- 6.7. Supporting information includes the points below:
- 6.8. The Care Act is clear that ACS has powers and duties when services are at risk of interruption in general and, in particular, when the interruption is because a provider's business has failed. ACS has responsibility to make sure that care and support needs of people affected by such business failure, service disruptions, however caused, continue to be met. This is referred to as the "Temporary duty" or "duty".
- 6.9. "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; and from the moment the authority becomes aware of the business failure. The actions to be taken will depend on the circumstances, and may include the provision of information. The duty is to meet needs, but ACS has discretion as to how they meet those needs.
- 6.10. Business failure of a major provider is a rare and extreme event and does not automatically equate to closure of a service. It may have no impact on residents or the people who use the services. If the provider's business has failed but the service continues to be provided then the duty is not triggered. The duty applies where a failed provider was meeting needs in the Council's area. It does not matter whether or not the authority has contracts with that provider, nor does it matter if all the people affected are self-funders or arrange their own care and support. 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.
- 6.11. It is not necessary to meet those needs through exactly the same combination of services that were previously supplied. However, when deciding how needs will be met, ACS will take all reasonable steps to agree how needs should be met with the person concerned involving as appropriate:
- I. The person concerned;
 - II. Any carer that the person has, or;
 - III. Anyone whom the person asks the authority to involve;
 - IV. anyone who appears to the authority to be interested in the person's welfare in cases where the person concerned lacks capacity, if required an Independent Mental Capacity Advocate will support the person;
 - V. the carer and anyone the carer asks the authority to involve where a carer's service is involved.
- 6.12. Where business failure is the reason for disruption of service or support needs must be met regardless of whether the needs would meet eligibility criteria, how people are paying for the cost of meeting those needs, for example where the person arranges their own care via a direct payment or in the case of self-funders,

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ordinary residence (in cases of out of county or cross-border placements where a person or persons are placed within Suffolk from another authority area).

- 6.13. It is permissible for ACS to charge the person for the costs of meeting their needs where they would ordinarily have paid these themselves, and ACS may also charge the local authority which was previously meeting those needs in the case of out of county or cross border placements. The charge must cover only the actual cost incurred by us. No charge must be made for the provision of information and advice to the person.
- 6.14. In cases of provider failure where, for example, persons are in receipt of NHS Continuing Healthcare (NHS CHC) the duty to meet the needs and provide NHS CHC falls on the NHS and the authority may **not** meet these needs. In such cases reference should be made to the relevant NHS regulations.*:
- 6.15. ACS may meet urgent needs regardless of whether the adult is ordinary resident in its area and, therefore, can act quickly if circumstances warrant. In this context, “urgent” takes its everyday meaning, subject to interpretation by the courts, and may be related to, for example, time, severity etc. The power to meet urgent needs is not limited by reference to services delivered by particular providers and is available where urgent needs arise as a result of service failure of an unregistered provider (i.e. 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.

7. Contingency planning

7.1 ACS requires providers to maintain a Business Continuity Plan. There should be:

- An annual review of the Business Continuity Plan
- An identified officer responsible for maintaining the provider’s business continuity arrangements.
- Training and awareness in business continuity for managers and staff who have a key role in business continuity arrangements.

7.2 ACS will maintain contact with providers and expects providers to notify ACS about problems and concerns that might impact on business continuity, on an individual provider basis, or through provider/provider representative forum arrangements.

7.3 ACS will maintain up to date information about alternative places in localities and undertake regular people reviews.

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8. Data protection

- 8.1 ACS requires that all parties must ensure that information is managed appropriately throughout the process, taking into account the highly sensitive nature of personal information in relation to customers and sometimes the circumstances of providers. Information about provider failure is likely to be highly commercially sensitive and all concerned should ensure that any information shared is processed in accordance with the Council's and, where relevant, the provider's duties under Data Protection Legislation. . For help and advice in relation to data sharing under the Data Protection Act or the Freedom of Information Act, please contact the ACS Information Agent.

9. Reviewing this document

- 9.1 This document will be subject to reviews and amendments based on learning.