

# CARE ACT 2014

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### Part 1 – Care and Support

##### Market oversight

##### *Section 53 – Specifying criteria for application of market oversight regime*

334. This section deals with the procedures for identifying those providers who are most difficult to replace, and will therefore be subject to financial oversight by the Care Quality Commission (CQC).
335. *Subsection (1)* requires that regulations set out the criteria for entry into the CQC's market oversight regime.
336. *Subsection (2)* stipulates certain factors which may be regarded for the purposes of setting out the entry criteria. These are the provider's size, its concentration in a particular area or areas, and its level of specialism.
337. *Subsection (3)* makes provision for the entry criteria to be kept under review and for the Secretary of State to publish information on how the size, concentration or specialism of a provider and on any other factors considered in setting out the criteria are to be measured.
338. *Subsection (4)* sets out that, by regulations, certain providers - who would otherwise, according to the criteria, be subject to financial oversight by CQC - may be exempted from the market oversight regime, or parts of the regime. The circumstances in which such regulations may be made include those in which the Secretary of State is satisfied that certain registered care providers are already subject to a regulatory regime comparable to the market oversight regime (*subsection (6)*).
339. Conversely, *subsection (5)* establishes that regulations may specify that the market oversight regime, or parts of the regime, apply, or apply only to the extent specified, to certain providers who would otherwise not fall within the regime.

##### *Section 54 – Determining whether criteria apply to care provider*

340. This section sets out that it will be the responsibility of the CQC to identify which providers satisfy the criteria set out for entry into the regulatory regime (*subsection (1)*).
341. The market oversight regime will apply to those providers identified by the CQC as meeting the entry criteria (*subsection (1)*) and those providers who are required to comply with the regime, or parts of the regime, by virtue of regulations made under section 53(5). *Subsection (2)* clarifies that the market oversight regime (or parts of the regime) do not apply to such providers identified by regulations made under section 53(4).
342. *Subsection (3)* provides that the CQC must inform the providers that satisfy the entry criteria that they are now subject to the market oversight regime. The CQC must also

inform those providers who are subject to the market oversight regime by virtue of regulations made under section 53(5) of the same.

### ***Section 55 – Assessment of financial sustainability of care provider***

343. This section sets out the duty of the CQC to assess the financial sustainability of those providers which are subject to its regulatory regime with a view to identifying any threats that such providers may face to their financial sustainability. This section also provides for the CQC's response to situations where it is concerned that a provider's financial sustainability is threatened.
344. *Subsections (2)(a) and (3)* set out that, where the CQC identifies a significant risk to financial sustainability, it can require the provider to develop a sustainability plan. This would set out the provider's plans for mitigating or eliminating the risk. The CQC may require the provider, in developing the plan, to cooperate with it. The final plan may also be subject to the CQC's approval.
345. *Subsections (2)(b) and (4)* allow the CQC, where it identifies a significant risk to financial sustainability, to organise, or require the provider to organise, an independent business review, and charge the costs of the review back to the provider. These costs do not include the administrative costs that the CQC may incur in organising such a review.
346. *Subsection (5)* sets out that regulations may make provision for enabling the CQC to obtain, from certain persons, information which may be helpful to the CQC in assessing the financial sustainability of the provider. The type of information the CQC may need is likely to be information which relates to the finances of the care provider or which relates to the financial position of the particular entity - if the care provider is financially dependent on such entity. The type of person that may be described in such regulations may include companies within the same group as the provider, and companies that hold a significant ownership stake in the provider.
347. *Subsection (6)* provides that regulations may be made about the making of the CQC's assessment of a provider's financial sustainability.
348. *Subsection (7)* sets out that the CQC may consult on how to assess financial sustainability, and publish guidance on the methods it expects to apply in making its assessments.

### ***Section 56 – Informing local authorities where failure of care provider likely***

349. This section sets out that the CQC must inform the relevant local authorities that a registered care provider (within the market oversight regime) is likely to become unable to continue carrying on the regulated activity in respect of which it is registered because of business failure.
350. The CQC will be required to inform all English local authorities which it thinks will be required to carry out the duty under section 48(2) if the provider becomes unable to continue carrying on the regulated activity in question (*subsection (2)*). The CQC is not required to inform local authorities outside of England.
351. *Subsection (3)* sets out that the CQC may require from the service provider, and any other person involved in the provider's business, any information that is necessary in order to assist local authorities in ensuring continuity of care. *Subsection (4)* requires the CQC to share with local authorities any information it has that would assist them in ensuring continuity of care.
352. *Subsection (5)* allows for regulations to make provision as to the circumstances in which the CQC can be satisfied that a registered care provider is likely to become unable to carry on a regulated activity.

353. *Subsection (6)* sets out that the CQC may consult on how it will assess a provider's likelihood of becoming unable to continue carrying on the regulated activity, and publish guidance on how it will make this assessment.

***Section 57 - Sections 54 to 56: supplementary***

354. *Subsection (1)* sets out that the CQC's functions of identifying which providers satisfy the entry criteria, and assessing the financial sustainability of care providers, are to be treated as "regulatory functions" of the CQC for the purposes of the 2008 Act. This establishes that the CQC will be able to rely on its existing powers under the 2008 Act, such as requiring information and explanations from a provider (sections 64 and 65 of the 2008 Act). The CQC will also be able to rely on its enforcement powers, for instance under sections 64(4) and 65(4) of the 2008 Act.
355. *Subsection (2)* sets out that anything which the CQC may do to assist local authorities to ensure continuity of care is to be treated as one of the CQC's "regulatory functions" for the purposes of the 2008 Act. This establishes that the CQC will be able to rely on its existing powers under the 2008 Act.
356. *Subsection (3)* establishes that the CQC may, when imposing requirements on providers as part of exercising the functions set out in sections 54 to 56, rely on sections 17 and 18 of the 2008 Act which provide for the cancellation or suspension of a care provider's registration.
357. *Subsection (4)* provides that the CQC must seek to minimise the burdens it may impose on others in exercising any of its functions under sections 54 to 56.