

# **Oversight of the Social Care Market**

## **Discussion Paper**

10<sup>th</sup> October 2011



**DISCUSSION PAPER: NOT A STATEMENT OF GOVERNMENT POLICY**

**DH INFORMATION READER BOX**

<b>Policy</b>	Estates
HR / Workforce Management	Commissioning
Planning / Clinical	IM & T
	Finance
	Social Care / Partnership Working

**Document Purpose** Gathering INFORMATION

**Gateway Reference** 16742

**Title** Oversight of the Social Care Market: Discussion Paper

**Author** Department of Health/ Social Care Policy

**Publication Date** 10 Oct 2011

**Target Audience** All interested parties

**Circulation List**

**Description** This is a broad discussion paper on the issue of market oversight in social care. It provides an opportunity for those with views and technical expertise in this area to help shape the policy in this area going forwards. It forms part of the Government's wider engagement exercise on the future of care and support.

**Cross Ref**

**Superseded Docs**

**Action Required**

**Timing** By 02 Dec 2011

**Contact Details** caringforourfuture@dh.gsi.gov.uk  
Caring for our Future/ Market Oversight  
The Department of Health  
Area 116, Wellington House  
133-155 Waterloo Road, London  
SE1 8UG

**For Recipient's Use**

**Purpose of this discussion paper**

Over the past 20 years, the development of a market within social care has meant that individuals with a care and support need, and their families and carers, have experienced greater choice over the services that they receive.

The Government is keen to see this continue. In its *Vision for Adult Social Care*<sup>1</sup>, it said that it wanted to support the development of a more diverse and vibrant market. Having a plurality of different organisations offering services should lead to increased choice and better outcomes for individuals, drive innovation and result in improved quality. For this to happen, we want new providers to continue to enter the market, and those offering services that people no longer want, or who offer poor quality services, to exit. This has been happening consistently for many years, and has largely been managed effectively at the local level.

Since the Vision was published, the case of Southern Cross has led to concerns about the potential impact of a large-scale provider falling into financial difficulty. This has raised the question, also identified by a recent NAO report<sup>2</sup>, of whether there is a need for additional measures to oversee the social care market and ensure that those needing vital services are properly protected.

The Government also wants to see wider reform of public services<sup>3</sup>, with increased choice for individuals and public services open to a greater range of providers. It understands that to achieve this, the public must continue to have confidence that if a provider faces financial distress there will be no negative impact on service continuity. As such, the Government has committed to ensuring that robust plans are in place to protect those who rely on public services.

Given this, the question which now needs addressing is whether existing mechanisms can effectively ensure service continuity within social care, or whether new measures are necessary. In taking this work forward, we are considering the whole market, but the focus is on large residential care providers, given the heightened risks associated with financial failure amongst this group.

---

<sup>1</sup> *A Vision for Adult Social Care: Capable Communities and Active Citizens*, Department of Health 2010

<sup>2</sup> *Oversight of user choice and provider competition in care market*, National Audit Office, September 2011

<sup>3</sup> *Open Public Services White Paper*, HM Government, July 2011

## DISCUSSION PAPER: NOT A STATEMENT OF GOVERNMENT POLICY

The paper provides an opportunity for those with views and technical expertise in this area to help shape the policy going forwards. It also forms part of our wider engagement exercise on the future of care and support, and the findings will inform the forthcoming care and support white paper<sup>4</sup>.

### **Background**

Social care has been operating as a market for many years, with a large growth in private care homes starting in the 1980s. The Community Care reforms of the early 1990s acted as a further stimulus for the development of the market. The estimated size of the current care sector in the UK is £23bn.

On the demand side, social care is funded by both private individuals and by the state – through local authorities (increasingly through personal budgets and direct payments) and the NHS. As a result, there are four main groups of customers commissioning care services – private individuals using their own funds, people using direct payments, Local Authorities and the NHS. On the supply side, there is diversity of provision in residential, domiciliary and community-based care, with over 40,000 separate organisations delivering care (ranging from large national providers to micro providers).

---

<sup>4</sup> On 15th September 2011 the Government launched *Caring for our future: shared ambitions for care and support* – an engagement with people who use care and support services, carers, local councils, care providers, and the voluntary sector about the priorities for improving care and support. As well as how to shape local care services, the engagement covers a number of other key themes including quality and workforce, personalisation, the role of financial services, prevention and integration. The engagement will last until early December, and the Government is requesting written comments by 2 December to help inform discussions. More information can be found at the following website: <http://caringforourfuture.dh.gov.uk/>

## DISCUSSION PAPER: NOT A STATEMENT OF GOVERNMENT POLICY

<b>Residential care markets: Key facts and figures (2009/2010)</b>	
Number of care homes	17,500 care homes with 450,000 places
Average occupancy	89% (a fall of 2% since 2008)
Market share of four largest care home providers (March 2010 <sup>5</sup> )	23.7%
Share of providers with 3 or more homes	55%
Share of care home places provided by independent sector	83%
Number of care home closures for older people	175 homes with 4,360 beds (similar to the previous year)
Number of new registrations	142 homes with 8,093 beds
Sources: Laing & Buisson (2010) Domiciliary Care UK Market Report 2010 (researched and edited by P Mickelborough). Laing & Buisson (2010) Care of Elderly People UK Market Survey 2010. Note: The data here largely refers to the UK, rather than England.	

---

<sup>5</sup> To note this figure was calculated before the restructuring of Southern Cross

## **Market oversight**

### **Definitions**

**Market oversight:** a range of measures to promote and protect the interests of those using adult social care services. This includes the regulatory framework, but also how services are commissioned and how local markets are developed.

**Service continuity:** a possible range of measures to ensure service provision, including measures to reduce the risk of disorderly financial failure of providers (pre-failure), and arrangements to ensure continued care for services users following financial failure (post-failure).

In any well-functioning, competitive market, it is desirable for new providers to enter the market and poorly performing providers to exit. We want new providers to enter as they could offer a different, innovative service, or provide a service that better meets particular needs. Competition from new entrants should also incentivise existing providers to drive up the quality of their service. In a well-functioning market a provider who is offering a service which is of poor quality should lose business (and potentially exit the market) as people choose better providers. This is all part of the normal operation of a market and should be overall beneficial for those using services.

In social care, providers are exiting the market regularly<sup>6</sup>. To date, this has been resolved effectively within existing arrangements, and the welfare of individuals has been secured. This is partly due to low levels of concentration within the market for residential services<sup>7</sup>; and partly due to the effective management of closures at the local level<sup>8</sup>. It is also often the case that keeping a viable operation running makes

---

<sup>6</sup> *Care of Elderly People UK Market Survey 2010* (Laing & Buisson) shows changes in new registrations and deregistrations since 1989 (Table 4.2). This evidence shows that there were 175 deregistrations in 2010, 162 in 2009 and 219 in 2007. Looking back to 2004, there were 638 closures and in 2005 there was 711. In terms of new registrations, there were 142 new registrations (8,093 beds) in 2010, 160 (8,770 beds) in 2009, and 114 (5,552) in 2008. This evidence demonstrates that there is some consolidation within the sector, with a trend for new residential care homes to be larger.

<sup>7</sup> Analysis demonstrates that, across England, provision is highly decentralised, with the largest providers all currently having less than 10% market share. However, there is a great degree of variation by local area.

<sup>8</sup> The NAO in its report *Oversight of user choice and provider competition in care markets*, concluded that the exit or take over of care homes and domiciliary care providers is a feature of local care markets, and that normally other providers come in to run services with little or no impact on users.

## DISCUSSION PAPER: NOT A STATEMENT OF GOVERNMENT POLICY

commercial sense even if the provider faces financial distress, as the business is likely to lose significant value if it is not sold on as a going concern.

There are also important mechanisms and levers within the current social care system to safeguard the interests of all those using care services. The market is not free to operate without any regulation, and there are a range of bodies with specific responsibilities to ensure the safety and wellbeing of people who may find themselves in vulnerable circumstances should care not be available or be of poor quality. In summary:

- The **Care Quality Commission** regulates adult social care in England, registering all providers of care homes. When the Department first considered the case for a joint regulator, it consulted on what the regulator's key functions should be<sup>9</sup>; and presented a broad framework for regulation<sup>10</sup>. As a result of this exercise, the CQC was set up. In addition to gathering information on quality of care, CQC currently gathers some financial information on providers to monitor whether they have adequate resources to provide the quality of care required of them, and has the power to impose conditions upon the registration of, and ultimately close down, operators who are at risk of providing poor care because of their financial situation. However, it does not have specific functions relating to ensuring service continuity should there be a social care provider failure.
- **Local authorities have specific legal duties to provide care.** A local authority must provide residential accommodation for people who are in need of care and attention, which is not otherwise available<sup>11</sup>. If an individual in a care home is receiving local authority funded care, and that care home closes, the local authority is under a continuing duty to arrange suitable care for that person. This responsibility applies to those whose care was funded by local authorities and those who fund their own care but for reasons (e.g. of illness or frailty) are not able to arrange their own care and have nobody to do so on their behalf.<sup>12</sup>

---

<sup>9</sup> *The future regulation of health and adult social care in England*, Department of Health, 2006 and, *The future regulation of health and social care in England: response to consultation*, Department of Health, 2007.

<sup>10</sup> The regulatory framework looked at seven key areas: safety and quality assurance, promoting choice and competition, commissioner assurance, information/ performance assessment, price setting and allocations, stewardship of public assets, and financial distress and failure.

<sup>11</sup> This is a duty under Section 21(a) of the National Assistance Act 1948

<sup>12</sup> Under Section 47(5) of the NHS and Community Care Act 1990

## DISCUSSION PAPER: NOT A STATEMENT OF GOVERNMENT POLICY

- **Through their commissioning practices, local authorities (and the NHS) should be monitoring the standard and quality of the providers** with which they contract, and seek the best possible value for money/ quality of care.
- **Local authorities should also be overseeing their local market and shaping its development**, although there is an acceptance that a more strategic approach could be taken to the commissioning and procurement of services in many areas.<sup>13</sup>
- **The Office of Fair Trading (OFT) has a wider remit to protect consumers more broadly.** The OFT's role is to promote and protect consumer interests throughout the UK, whilst also ensuring that businesses are fair and competitive.

### **A practical example**

SCIE and ADASS have developed a practical tool and guidance to support local authorities who may have to manage closures at short notice<sup>14</sup>. This tool provides support across a number of areas including continuity of care, assessment and choice, communications, information sharing, legal issues, capacity and resources.

### The impact of Southern Cross

A number of recent events and policy developments have led the Government to consider whether the current mechanisms and processes for market oversight are adequate, and specifically whether there needs to be new measures to deal with cases of provider failure.

The case of Southern Cross has highlighted that there are risks if a provider operating at a significant scale falls into financial difficulty. In particular, people are concerned about the risk to service continuity if there are no alternative providers who can easily, and at similar cost, provide the same quality of care for the residents of a failing provider. This risk is greater in areas where incumbent providers face little

---

<sup>13</sup> The recent report by the NAO, *Oversight of user choice and provider competition in care market* (September 2011), stated that only one of the six local authorities which they visited as part of the study had carried out its own market analysis to see what type of care services users would like to see provided in the future, the amount they would be willing to pay, and the likely level of demand.

<sup>14</sup> See: <http://www.scie.org.uk/publications/homeclosures/>

## DISCUSSION PAPER: NOT A STATEMENT OF GOVERNMENT POLICY

competition. Others have commented that Southern Cross illustrates how the financial structure of a company can affect the delivery of vital care services.

In responding to the situation, Department of Health Ministers have said that they would consider whether additional measures needed to be put in place within the social care system<sup>15</sup>. In doing so, it was made clear that all options, including financial regulation, would be considered.

### **Southern Cross**

Southern Cross Healthcare, a large independent care home operator (with over 750 care and nursing homes and some 31,000 residents, predominantly older people), has been engaged in restructuring since spring 2011. The company had expanded rapidly since its establishment in 1997, via the purchase of existing care businesses. It funded its expansion by selling the freeholds of the care homes it acquired to property management companies and leasing or renting the properties back. The company's business model worked during times of increasing property values and buoyant occupancy levels in care homes. However, the contracts it entered into with its landlords proved to be unsustainable.

The Government has been working closely with all parties involved with the company, the Association of Director of Adult Social Services (ADASS), and the sector. It has sought to support a resolution to the situation, which protects the interests of those using care services, as quickly as possible. Care has continued to be provided to residents throughout the restructuring process.

It has been announced that a third of the Southern Cross care homes have now been transferred to new operators. Southern Cross has also said that there would be further transfers in October.

In its recent report, the NAO<sup>16</sup> recommended that '*the Government needs further arrangements at a national and local level to protect users from provider failure*'. The key issue raised by the NAO was that the Department of Health currently has no

---

<sup>15</sup> This commitment was made in a Written Ministerial Statement to Parliament by the Minister for Care Services on 5th September 2011.

<sup>16</sup> *Oversight of user choice and provider competition in care markets*, National Audit Office, September 2011

## DISCUSSION PAPER: NOT A STATEMENT OF GOVERNMENT POLICY

formal mechanism for dealing with a provider failure of the size of Southern Cross, where the cumulative impact could affect the delivery of essential services and the crossed local authority boundaries. The NAO also argued that, in the future, with more people directly commissioning their services – either as a self-funder or through a personal budgets/ direct payments – it would be important to ensure that their interests are properly protected.

The Government has previously recognised the need to examine this area, and in the Vision for Adult Social Care suggested looking further at whether Monitor should take on some responsibilities for social care in the future<sup>17</sup>. The current Health and Social Care Bill has provision to extend Monitor's role to social care, should the Government decide that this is its preferred approach.

***Discussion question: reflecting on past experience and the Southern Cross case, does more need to be done to oversee the social care market or is the existing framework adequate?***

---

<sup>17</sup> The 2011 Health and Social Care Bill (clause 60) has provision for the Secretary of State (via regulations) to give Monitor a role in relation to adult social care, with respect to regulation of the market and measures to manage provider failure.

**Objectives of reform**

**We think the principal reason for any reform in this area would be to provide greater protection to people who may find themselves without the care that they need due to the sudden failure of a provider. People need to be confident that they will have the necessary support whilst services are undergoing any transition.**

Social care is different to other sectors due to the type of service, and the length of time over which the service is required. This is particularly the case for people in residential care, when the provider is not only providing care services but also a home for the user – generally for the rest of their life. People who find themselves in a vulnerable situation - regardless of whether individuals fund their own care, or are funded by the state - need to be assured that they will continue to receive the care that they need until a new provider takes over the care home or alternative provision is found.

The Government believes that it is not optimal to guarantee that a particular care home will always remain open, although we do want to ensure service continuity. In the event of the financial failure of a provider there may be a high proportion of good, viable homes that should remain open – and in these cases, other providers in the market are likely to step in to take over the home. However, there are also good reasons for some homes to close, for example if they are offering poor quality care or because it is no longer a viable business. Given this, the Government believes that it is not always going to be possible, nor desirable, to prevent closures, but that there must be complete assurance that there will be effective and sensitive transition for users.

As well as being at risk of not receiving the necessary care, some people could also face financial consequences because a care home operator fails. Evidence suggests that current practices for residential care payment vary – some people may be paying in arrears, others in advance. If an individual is paying in advance for care services, there is potentially a risk that they may lose their money should their provider fail (under an administration arrangement, compensating customers is one of the final calls on any remaining assets, alongside unsecured creditors). The Government is keen to understand whether this is a problem, and if so, what steps might be taken to address it.

## DISCUSSION PAPER: NOT A STATEMENT OF GOVERNMENT POLICY

***Discussion question: what do you think of this overarching objective for reform? Is our approach the right one? Are we focusing on the right issues?***

In meeting this overarching primary objective, there are a number of other factors, which must be carefully balanced:

- Any intervention should **support the Government's wider vision for adult social care**. In particular, it will be important that any new measures encourage, rather than hinder, the development of the social care market. The Government is keen to see continued investment in the sector, and would not want to see undue burdens placed on businesses and not-for profit providers.
- Any measures will **not protect the financial interests of the businesses themselves (or any other stakeholders) in a way which is inconsistent with normal commercial risk taking in business**. It is important that interventions **do not create moral hazard**, whereby parties are insulated from the affects of their own failures. We would also want to make sure that providers do not take unnecessary risks and are motivated to deliver value for money services.
- Any changes in this area will need to be **cost effective and proportionate**, with any additional costs or burdens on providers, individuals or the state being clearly justified by the benefits accrued. In particular, the Government is aware that any additional measures could impose increased costs on different parts of the system – which could have wider impacts on the funding and quality of social care. It will also be important to ensure that incentives and impacts align. Any new policy in this area must meet the Government's **better regulation principles** of accountability, focus, predictability, coherence, adaptability and efficiency<sup>18</sup>; and be aligned with the principles for continuity regimes outlined in the Open Public Services White Paper. Any changes must also respect the principle that the Government does not insure with commercial firms.<sup>19</sup>
- A decision will need to be made as to whether any new measures place responsibility on all providers (e.g. all residential care home operators), or

<sup>18</sup> *Principles of Economic Regulation*, Department for Business, Innovation and Skills, April 2011

<sup>19</sup> The cost of capital for commercial insurers is always higher than the government's, and they also have to remunerate their shareholders. It should be noted that the Government would not readily meet the cost of providers taking out commercial insurance

## DISCUSSION PAPER: NOT A STATEMENT OF GOVERNMENT POLICY

whether a more **targeted** approach is required. There are benefits in ensuring a level playing field for all operators, but this will need to be balanced with ensuring that the costs and benefits are proportioned appropriately, incentives are aligned within the system, and impacts are fairly distributed. If a risk-based approach is required, then there will need to be a clear understanding and justification to which services require specific protection.

- Local authorities are accountable for social care services in their local area (through their democratic mandate), with central government setting the overall policy framework. In a limited number of cases, local authorities also continue to be the direct provider of care<sup>20</sup>. Any new measures of market oversight will need to be cognisant and complementary to this delivery structure. It will be important to take into account any **additional burdens on local government**.
- Social care is also a **devolved issue**, so careful consideration will need to be given to how any new measures interrelate with the social care systems in Scotland, Wales and Northern Ireland, and the affect on providers who operate across boundaries.

***Discussion question: Is the list of key considerations set out above complete? If not, what other factors must be taken into account?***

***Discussion question: should any measures apply to all providers, or be targeted on a risk basis?***

---

<sup>20</sup> Around 83% of care home places are now provided by the independent sector in the UK and 81% of home care purchased by councils in England is provided by the independent sector (Laing & Buisson 2010)

**Exploring the options**

**The options outlined below do not constitute a statement of government policy. We would welcome views on these, and other, options.**

The table below illustrates three broad levels at which measures to protect users could work, and some possible options under each. We want to take this opportunity to start to explore the issues and stimulate debate over the policy options. The list is based on our experience of other sectors and the proposals and suggestions that have been made to the Government over recent months. It is not an exhaustive list, nor does it seek to evaluate options.

In considering these options, it is worth noting that interventions may not be required at each level - although there are likely to be close inter-relationships between the different areas (e.g. a failure regime is likely to require good market intelligence). Thought will need to be given to the overall process for any regime to ensure service continuity, and the different phases that may be required.

Furthermore, there are different forms that the measures can take from light touch/ informal interventions to formal, statutory, economic regulation. It may be that no major new interventions are necessary and instead, the best way to meet our overarching objective may be to refine and improve existing practice and processes and ensure there is a coherent strategy in place.

The Government is aware that each of these options is potentially very complex. Before taking any policy position, the Government would complete a full cost/ benefit analysis and examine all the different impacts – positive and negative. In particular, the cost, and whom these costs fall to, would need to be carefully assessed and considered.

**DISCUSSION PAPER: NOT A STATEMENT OF GOVERNMENT POLICY**

<b>Possible options:</b>	
<b><i>Type of intervention</i></b>	<b><i>Possible measures</i></b>
<p><b>Market intelligence and monitoring</b></p> <p><i>Aim: to have rigorous analysis of the social care market and joined-up intelligence. Better intelligence would be the foundation for any other measures to prevent and manage failure.</i></p>	<p><b>Better market intelligence and improved information sharing</b></p> <ul style="list-style-type: none"> <li>- Develop better market intelligence at different levels within the system – local, regional and central</li> <li>- Improve information sharing - across central government, local Government, the care sector, and the financial services sector (acknowledging that some information on individual organisations will be subject to confidentiality restrictions).</li> <li>- Interventions in this area would seek to act as an early warning system, highlighting where potential problems may arise.</li> </ul> <p><b>Greater analysis of provider performance and improved transparency</b></p> <ul style="list-style-type: none"> <li>- Providers could voluntarily decide to go beyond publishing audited accounts and publish enhanced information (such as key ratios). This could be done in a way that is accessible to those purchasing services, and could help commissioners make more informed choices.</li> <li>- A national body could have responsibility for undertaking a formal analysis of the market. This could involve analysis of providers, across a range of financial metrics and specific stress testing of providers against key risks. This information could be used as a basis for trying to prevent failure (see below). This could involve specific work with key large suppliers (both nationally and regionally) to understand their concerns. This information, in turn, could be communicated back to those commissioning services</li> </ul>
<p><b>Measures to try and avoid provider failure</b></p>	<p><b>Procurement and commissioning</b></p> <ul style="list-style-type: none"> <li>- Measures to reduce the risk of failure targeted through improvements to commissioning policy and practice.</li> <li>- Local authorities (and the NHS) could more rigorously</li> </ul>

**DISCUSSION PAPER: NOT A STATEMENT OF GOVERNMENT POLICY**

<p><i>Aim: to try and identify providers who may be at risk of financial distress and intervene early, to manage the situation and potentially avoid failure.</i></p>	<p>assess the financial and operational strength (including insolvency risks) of a care provider at the point of commissioning a service.</p> <ul style="list-style-type: none"> <li>- Improved quality control and monitoring systems could be put in place which would allow local authorities to choose to intervene (e.g. manage the transition process, renegotiate the contract, or second staff to support the home) if a care home was at threat of being closed and there could be a significant adverse effect on residents.</li> <li>- Improvements in this area could be facilitated by sharing best commissioning practices across local authorities and the NHS.</li> </ul> <p><b>Changes to registration</b></p> <ul style="list-style-type: none"> <li>- As a requirement of registration a provider could be obliged to undergo a more rigorous financial check. It may be that certain providers are then subject to additional regulation and more regular monitoring (e.g. because of market size or because they are providing an essential service).</li> <li>- With such an approach, operators would have to have their financial position re-assessed. This could be a regular review (the timing of which could depend on the risk level of the operator) or be triggered (e.g. with pre-authorisation required before any significant change in their financial position, such as a securitisation or highly leveraged transaction).</li> <li>- In the event of persistent financial weakness, the responsible body could have a set of enforcement steps, ranging from supporting the management to improve the situation to ultimately removing the license to operate (with the understanding that a clear plan is in place to ensure service continuity).</li> </ul>
<p><b>Resolution/ post-failure regimes</b></p> <p><i>Aim: to better</i></p>	<p><b>Clear, transparent contingency plans</b></p> <ul style="list-style-type: none"> <li>- Each local authority could have a responsibility to publish how it will respond to provider failure within its local area, including any plans to pre-empt failure and measures to</li> </ul>

## DISCUSSION PAPER: NOT A STATEMENT OF GOVERNMENT POLICY

<p><i>manage provider failure immediately prior and after it has occurred, to ensure service continuity and protect the interest of those receiving care.</i></p>	<p>maintain continuity of services. This would need to build on earlier market intelligence.</p> <ul style="list-style-type: none"><li>- There could be a formalisation of roles and responsibilities at local, regional and national level. Part of this would include ensuring that there is a common view of the risks across geographical boundaries. (This was the approach suggested by the NAO in its recent report on the social care market.)</li></ul> <p><b>Voluntary sector-led agreements</b></p> <ul style="list-style-type: none"><li>- Providers of care home services could agree to measures to manage the care home/s of a failed provider in the short term. For example, providers might identify a number of designated troubleshooters, experienced in management, who could go in and run a failing home.</li><li>- Providers (or those parts of the sector with complex financial operations) could be encouraged to develop recovery and resolution plans – known as ‘living wills’ (see section below).</li></ul> <p><b>Changes to insolvency and closure arrangements</b></p> <ul style="list-style-type: none"><li>- A special insolvency arrangement could be put in place to ensure service continuity and guard against the risk of competing administrators being appointed as part of a disorderly process.</li><li>- Changes to existing registration conditions to make sure that a care home cannot close suddenly, for example, by posting capital upfront in a segregated account or through a risk pooling scheme.</li></ul> <p><b>Government</b></p> <ul style="list-style-type: none"><li>- Strengthening of powers and duties of Local Authorities in terms of their responsibilities for ensuring continuity of services in their locality.</li></ul>
---	---

***Discussion question: If you believe that further measures are required, what should these be?***

***Discussion question: what would be the broad impact of any measure – both positive and negative? Would it be practical and workable?***

### **Sharing of best practice**

Given the complexities involved in this issue, the Department of Health is keen to learn from other sectors. This was a point raised by the recent NAO report, which suggested that any new interventions needed to reflect an assessment of risk and draw on best practice from other regulated areas.

It may be that we can learn from the changes which are being introduced in health, given that for both of these services continuity is very clearly in the public interest, and there may be severe consequences to people's health and well-being if they fail. There are also parallels to utilities where essential services are provided by the for-profit sector. We may also be able to learn from the recent work done on how to regulate the banking sector.

Examples of different approaches, which reflect the underlying nature of different sectors, include:

- The Air Travel Organisers' Licensing (ATOL) scheme is an example of a risk pooling scheme which protects individual travellers from losing their money or being stranded abroad. It does this by carrying out checks on the tour operators and travel organisers it licenses, and requiring them to take part in a financial guarantee scheme managed by the Air Travel Trust (ATT) which provides the funds to protect customers should a firm fail. In some cases, a licence holder will also provide a bond, which is lodged with the ATT and provides additional funds.
- In some sectors, contingency arrangements are in place to ensure that service provision is not disrupted. Special administration regimes operate across a range of sectors, including rail, postal services and utilities. In a special administration regime a unique objective is set in legislation, which allows the regulating body to step in, in the case of a provider going into insolvency, to ensure service continuity.

## DISCUSSION PAPER: NOT A STATEMENT OF GOVERNMENT POLICY

- A number of sectors, such as health and the rail sector, have financial monitoring frameworks. For example for Foundation Trust hospitals, Monitor currently undertakes financial risk assessments by using set criteria (e.g. underlying EBITDA<sup>21</sup> performance, liquidity ratio, return on assets etc). Each Foundation Trust is rated, and if the score shows that they are at risk of failing, Monitor will start to intervene and monitor the hospital more closely.
- The banks are now developing robust recovery and resolutions plans – ‘living wills’ - with the aim of ensuring individual banks are resilient to shocks and not ‘too big’ or ‘too interconnected’ to fail. These plans identify options to achieve recovery when a crisis occurs and show how the firm will wind-down if it fails<sup>22</sup>.

***Discussion question: Is there anything that we can learn from the approaches taken in other sectors?***

### **Roles and responsibilities**

A number of different bodies could take on specific roles and responsibilities within any new continuity framework.

Once a decision is taken on whether intervention is required and what form that should take, a decision can be made on which body will take responsibility. It will be important that roles and responsibilities are very clearly defined, to ensure accountability.

Possible bodies include:

- Central Government/ Department of Health
- A representative body of Local Government
- Individual Local Authorities
- Regulators – including the CQC and Monitor
- Sector-led bodies – including new or existing organisations

***Discussion question: If you think we should introduce a new measure, who would be best placed to oversee your recommended approach?***

---

<sup>21</sup> EBITDA is an acronym for earnings before interest, taxes, depreciation, and amortization.

<sup>22</sup> For more information see [http://www.fsa.gov.uk/pubs/cp/cp11\\_16.pdf](http://www.fsa.gov.uk/pubs/cp/cp11_16.pdf)

**Summary of discussion questions:**

1. Reflecting on past experience and the Southern Cross case, does more need to be done to oversee the social care market or is the existing framework adequate?
2. If there is a case, what do you think of the overarching objective for reform we outline? Is our approach the right one? Are we focusing on the right issues?
3. Is the list of key considerations set out in this paper complete? If not, what other factors must be taken into account? Should any measures apply to all providers, or be targeted on a risk basis?
4. If you believe that further measures are required, what should these be?
5. What would the impact of any measure – both positive and negative? Would it be practical and workable?
6. Is there anything that we can learn from the approaches taken in other sectors?
7. If you think we should introduce a new measure, who would be best placed to oversee your recommended approach?
8. Do you have any further comments or ideas?

**Responses**

Responses to this paper can be sent to the Department of Health on the following e-mail address: **caringforourfuture@dh.gsi.gov.uk**. Please mark the subject line of your e-mail: **Market Oversight**

Or by post:

***Caring for our Future/ Market Oversight***

***The Department of Health***

***Area 116, Wellington House***

***133-155 Waterloo Road***

***London***

***SE1 8UG***

If you have any questions on this paper, please e-mail the address above.

**We would be grateful for written responses by 2<sup>nd</sup> December 2011.**