

Our response to the call for feedback on our draft provider guidance on Market Oversight

1. Introduction

We have developed the Market Oversight scheme ('the scheme') through ongoing collaboration and consultation with key stakeholders in the adult social care sector as well as those from other relevant sectors such as finance and regulators responsible for financial oversight regimes and the public. We have achieved this through hosting monthly working group sessions as well as larger co-production events, public events and an online survey.

The stakeholders we have worked with include:

- Public and people using services
- Experts by Experience
- Providers
- local authorities
- Provider representative organisations
- Insolvency Practitioners
- Other regulators (Monitor, the Homes and Communities Agency, care regulators from devolved territories)
- Lenders

These groups have collaborated with us in shaping the key policy decisions through discussions which centred on topics including:

- The operating model
- Factors likely to represent a risk to a provider's sustainability
- Roles and responsibilities in the event of business failure
- Financial and quality indicators
- Regulatory responses to risk
- Balancing transparency with commercial confidentiality
- Determining the trigger point to notify local authorities

These sessions have been extremely valuable. Experts from a variety of backgrounds have generously given their time and provided us with rigorous

challenge. This has helped to ensure that the scheme delivers the best outcomes for the people it is supposed to protect, for providers (in terms of minimising any burdens on them) and for local authorities.

The feedback we have received from these stakeholders and the public has been positive with many of them reporting how much they have appreciated the opportunity to shape this important work and how well both CQC and the Department of Health ('DH') have done in terms of encouraging and accommodating co-production. Stakeholders tell us they that feel they have had a tangible influence on the Market Oversight scheme.

2. Feedback on the draft provider guidance

In addition to the monthly working group sessions and larger consultation events, we invited comment over a four-week period across January and February 2015 on the design of the scheme generally and on the tone and content of our draft guidance for providers.

We had 46 individual responses from a combination of:

- 27 x providers and provider representative organisations
- 6 x social care professionals
- 5 x healthcare professionals
- 3 x local authorities
- 3 x members of the public and people who use services
- 1 x carer
- 1 x trade union

We present the questions we posed below together with a summary of the responses we received and our reaction to those.

Responses from providers and professionals were largely positive with people saying that they feel the guidance is clear and that it enables them to understand what Market Oversight is trying to achieve and how it will do it.

Responses from the public were also positive. We hosted a meeting with Carers UK where we discussed our new role in Market Oversight and it was well received by the participants. We conducted a survey on our public online community where respondents were supportive of our new role and felt that our quick guide was clear and concise. Lastly we also discussed our new role with local Healthwatch representatives who agreed with the change and felt it would bring reassurance to the sector.

However, there were a few recurring negative themes:

1. Some respondents were concerned that the scheme is only aimed at the more significant providers of adult social care, and there is a concern that the failure of medium and small sized providers can also be challenging for local authorities to respond to.

➤ **Our response**

As Regulations set out the criteria for what constitutes a ‘difficult to replace’ provider and the Department of Health¹ have already published a response to the consultation they held on the draft regulations we will not revisit that here.

¹ Department of Health: *Response to the consultation on draft regulations and guidance for implementation of Part 1 of the Care Act 2014*

2. A number of the comments received with the responses expressed a fear that CQC’s registration fees will rise, in order to pay for the oversight of those providers in the scheme; which was perceived as unfair. That is, that the administration burden will be shared across all providers.

➤ **Our response**

Our Market Oversight function is funded through our grant in aid from the Department of Health, and there is no plan to change our current policy in relation to registration fees as a result of the introduction of the Market Oversight duty.

3. Another clearly voiced and recurrent concern was the extent to which local authority commissioning strategies are thought to have a direct impact on providers’ sustainability. People expressed the concern that the fees local authorities are paying are contributing to poor care and problems of financial sustainability as providers are not able to maintain the required standards of care or to recruit and retain appropriately trained staff.

➤ **Our response**

This debate goes beyond the specifics of the Market Oversight scheme but in carrying out our duties in respect of Market Oversight, we will have regard to this and the other pressures which can affect the financial health of providers. In the design of the scheme, we have sought to identify the key elements necessary to adequately assess financial stability and capture these in our structured information returns. We have also ensured our approach is sufficiently flexible to reflect the numerous issues that are likely to be relevant to providers’ sustainability.

The key to our approach (and some respondents recognised and welcomed this) is that it is firmly centred on active dialogue and engagement with the providers themselves; it is not a remote exercise whereby we analyse financial indicators in isolation.

Responses to the questions we asked

Question 1a: *Is the language clear and easy to understand?*

Yes	No	Did not respond
43	1	2

People responding to this question added that they felt the content was concise and easy to understand and that the aims and objectives were clearly defined.

One person was frustrated that the Regulations did not include smaller providers and that the scheme does not include a system of prevention of failure; the Government in legislating for the creation of the scheme was to provide an early warning system designed to protect people who could be placed in vulnerable circumstances.

➤ **Our response**

Our guidance sets out the boundaries of the scheme in terms of scope and what our duties are in legislation but does also suggest that, in ensuring all parties engage effectively with one another, there may be an element of helping prevent failure happening.

Question 1b: Are there any words or terms which you did not understand?

No	Yes	Yes, but	Did not respond
22	1	2	21

Some people said they found the glossary of terms very helpful in explaining any technical terms and none said they found this to be incomplete or unhelpful.

One suggested our use of the term “light touch” was inappropriate, given that the Scheme gives us the ability to delve into the financial matters of major businesses.

➤ **Our response**

We have developed the scheme in co-production with providers (including those which will be subject to it) and experts in finance and insolvency. Feedback from them is that we have struck the right balance and that the operating model rightly focusses more intensive work where the indications are that it is necessary.

Question 2a: Does the guidance flow in a clear and logical order?

Yes	No	Did not respond
41	4	1

Text accompanying these responses expressed a feeling that a system such as this should have been implemented years ago.

Another response welcomed the fact that we will be publishing the names of the providers that will be in the scheme. Several people pointed to the 6-stage Operating Model as being a really useful illustration of how the scheme works.

One respondent voiced an overall frustration that the scheme did not reflect the impact of local authority purchasing behaviours on care quality, particularly in relation to the majority of the care market which falls outside of Market Oversight.

➤ **Our response**

Assessing commissioning behaviours is out of scope of the Market Oversight scheme, but we are clear that we will look at both financial and quality information in our assessment of financial sustainability.

Question 2b: *Is it consistent?*

Yes	No	Don't know	Did not respond
40	2	2	2

The language was felt to be simple and easy to understand but could be repetitive.

➤ **Our response**

In our final draft we have taken this point into account.

Question 3: *Would the guidance benefit from more illustrations? (e.g. tables, diagrams)*

Yes	No	Don't know	Did not respond
12	21	11	2

People felt there was no great need for further illustrations generally and, while one claimed that a flowchart of the decision making process might be useful, another suggested this would complicate the picture as Market Oversight is not a 'one size fits all', linear decision making process.

➤ **Our response**

We have looked at this and have not been able to identify diagrams that would improve clarity. We have tried to illustrate how the decision making process might work by providing example scenarios in the appendix.

Question 4: *Are you clear about how the scheme will work and develop based upon what you have read in the guidance?*

Very / fairly clear	Neither clear nor unclear	Very / fairly unclear	Don't know	Did not respond
38	2	3	1	2

There was support for the fact that our financial assessments build on our existing knowledge and expertise in relation to inspection and the quality of services.

Another response was supportive of the clarity of the operating model depiction but, agreeing with the guidance that it is not ‘one size fits all’, cautions that we may be at risk of over-simplifying matters.

➤ **Our response**

In the guidance we could not possibly cover every scenario, but we believe that, from the inputs and comments we have received, we have achieved the right balance.

One comment suggested we need to make it clearer about what we will and will not publish and we have now addressed this in the guidance.

This question, again, prompted people to point to the impact on providers of local authority commissioning. There is a desire from some respondents for us to focus on what is seen as the “cause” rather than the symptom.

➤ **Our response**

While, undoubtedly, this will sometimes have an impact on individual providers, there are other factors that have such an influence and we must consider them all. We are bound by a statutory duty to assess the financial sustainability of providers in the scheme.

However, through our oversight of providers in the scheme, we will gather valuable information which will give us insight into the issues that the sector is facing. We will analyse this and publish our findings as we believe this will be an important contribution to the wider debate on the future of adult social care.

Question 5: Does the guidance address all the issues you have?

Yes	No	Don't know	N/A (I don't have any issues)
16	22	2	6

Responses to this question referred to the uncertainty over what might be deemed ‘specialist’ by the DH panel.

➤ **Our response**

At this stage, before the panel has been convened, we are not able to respond to this. However, the guidance does include the latest information about how DH will operate its responsibilities about identifying specialist providers and the role of the specialist panel.

Over the course of the summer when we were running our co-production events, we also heard from several providers who expressed concerns over our interpretation of what triggers us to make a notification to local authorities. Specifically, they were concerned that notification could happen when there was no risk to the continuity of care services (when care services are to be sold to another provider, for instance).

➤ **Our response**

We have listened carefully to these concerns and have considered how best to interpret the requirements of the Care Act and meet the aims of the scheme.

One of the conditions that must be met for our duty to notify local authorities to be triggered is we must consider that the registered provider is *“likely to become unable to carry on the regulated activity for which it is registered”*.

Previously, we had interpreted a change in the registered provider which delivers the regulated activity as meeting this condition, where this change happened because of business failure. For instance, where a provider is in financial difficulty, faces administration and sells all of its residential care or homecare business to another solvent registered provider.

We have now amended our interpretation to make it clear that it is only where it is likely that a regulated activity will *cease* or a service will *close* where this condition is met. This is because these events mean that a local authority may need to step in and carry out its duty under s.48(2) of the Care Act 2014.

This means notification to local authorities will only happen where we have a genuine concern about the continuity of care for people and not just because of a change in registered provider.

In our call for feedback on the guidance, one response considers that Stage 6 is too late for local authorities to be informed and that Stage 4 might be more appropriate. We have heard this from several people but not so frequently as we have heard that the risk of precipitating failure through earlier notification is a real danger to be avoided as it would undermine the purpose of the scheme.

➤ **Our response**

We have set out the conditions that must be met in order for us to notify local authorities and have found that the majority of stakeholders agree that these are sensible and that notification occurs at the right stage of the model. This also meets the requirements set out in legislation. However, at our consultation events, stakeholders have also suggested that any ‘responsible’ provider would automatically be speaking directly with local authorities should they be experiencing financial difficulty and that it should not take the regulator to intervene for this to happen. This suggests that where this good practice takes place, the local authority will already be minded to make contingency plans and

notification from CQC of likely business failure and the ceasing of a regulated activity will not come as a surprise.

There are some doubts expressed as to how far consultation has taken place with regards to Market Oversight.

➤ **Our response**

We hope that this document and the foreword from the Chief Inspector in the guidance now make this more clear and transparent.

In support of our approach are comments referring to the benefits of on-going, real-time monitoring (as opposed to referring only to Statutory Accounts), the emphasis on the relationship between quality and finance, the balanced way in which indicators will be considered and the fact that we will be present in debt restructuring negotiations. In high-risk situations there will be frequent contact between CQC, the provider and its stakeholders, and the guidance makes this clear.

Question 6: How could we improve the guidance? (i.e. is there anything we can change, or which you would add?)

Positive	Negative	Neutral
2	3	14

Responses to this question were really more about the scheme itself rather than how we describe it in the guidance. The need to look at local authority behaviours is raised again.

There was also some concern that the section relating to safeguarding commercially sensitive material suggested a bias towards non-disclosure in response to Freedom of Information requests and Parliamentary questions.

➤ **Our response**

We have balanced this more in the final draft and have clarified our legal position, which is what ultimately governs all our decisions, in this regard.

Another response queried what we would do if a provider refused to allow us access to their stakeholders.

➤ **Our response**

We have now set out our approach to dealing with providers which do not cooperate with us. This includes the options of:

- Requiring registered providers to legally enforce their information undertaking (legal contracts which require corporate providers' compliance with our information requests).

- Escalation of providers along the operating model, potentially to the point of notification where we believe the conditions for that have been met.
- Formal enforcement proceedings against registered providers.

A number of responses expressed concern that there was little in relation to what happens in the event of actual failure.

➤ **Our response**

This is explained in more detail in the final guidance, though we are clear that the actual response will depend on the individual circumstances involved, such as the scale of the failure (local, regional or national).

Question 7: Is "Market Oversight" the most appropriate name for the scheme?

(Please keep in mind that the scheme needs to be understood by the full range of stakeholders that the scheme potentially affects i.e. general public, service users, carers, providers, lenders/shareholders and policy makers.)

Yes	No	Don't know	Did not respond
19	13	12	2

This is a question that was raised on a couple of occasions at our external consultation events; because it is not the whole adult social care market, is the name correct?

A number of respondents agreed with this view but unfortunately we have not been able to use any of the suggested alternatives offered. A number said they did not like the name but could not provide an alternative.

➤ **Our response**

We have clarified what the scheme does in the title of guidance:
Market Oversight of 'difficult-to-replace' providers of adult social care
 However, the name of the scheme remains the same.

Further comments on the Financial Submissions Template and financial indicators

In addition to responses to the questions above, we also had comments relating to the Financial Submission Template and the financial indicators and these are summarised here.

1. We received concerns that the language used in the guidance and the Financial Oversight Submission Template excessively reflects a commercial 'for-profit'

model and that insufficient regard is shown for the ethos and terminology more commonly associated with not-for-profit care providers. Examples given related to:

- Asset values being difficult to calculate for many not-for-profit providers.
- Not-for-profit providers are not subject to the same tax rules as for-profit companies.
- References to shareholders, dividends, goodwill, corporation tax and share capital, all give the impression of the template having been designed with corporate for-profit providers in mind.

➤ **Our response**

The Financial Submission Template now includes an alternative balance sheet for Charities. This includes charity specific terminology, such as restricted and unrestricted reserves, and means irrelevant categories such as dividends will not have to be filled in. We are also no longer basing our initial financial assessment on property valuations, which means difficulties in calculating asset values should no longer be an issue.

However, we have not changed the presentation of the Profit and Loss Account as this facilitates the calculation of the standard set of financial risk indicators, which are considered relevant for both 'for-profit' and 'not-for-profit' organisations. We recognise that the trading performance for 'not-for-profit' organisations will differ from their 'for-profit' counterparts, however we will allow for this in our analysis and interpretation of these indicators. We also understand that tax may not be relevant, and that a zero tax charge will have to be entered into the Financial Submission Template for most charities.

2. There were concerns that some of the requirements to supply financial information represented a significant burden for providers. Examples given were:

- Reporting by regulated activity is impractical.
- The level of supplementary balance sheet information required, particularly in respect of properties, will be onerous for providers operating across many locations.
- Information requirements relating to property leases need to be more clearly defined (i.e. finance lease or operational lease) and is potentially onerous for some providers that may have hundreds of leases that change on a fairly regular basis. A stated preference was to report on on-going lease commitments as done in statutory account reporting.
- The reconciliation that will be required between the Statutory Accounts and the information submitted on a quarterly basis would be onerous.

➤ **Our response**

Reporting by regulated activity

The description of the reporting by regulated activity was not as clear as it could have been in the guidance, which caused confusion with several providers. The guidance made reference to the profitability of the group being split between residential care, non-residential care and other regulated activities, such as nursing care, and non-regulated activities. The term “other regulated activities” in this instance meant activities that are already regulated by the Homes and Communities Agency (HCA) and Monitor.

We have updated the guidance to make the description of this ‘segmental’ reporting clearer and, following consultation with Monitor, have removed the requirement to provide separate financial information for activities regulated by them. The separate groups of ‘profit and loss’ information that are required in the template are now called: Residential Care, Non-Residential Care, Activities regulated by the HCA and Other Activities.

We still believe that the provision of this segmental information is important due to the different financial and quality risk indicators applicable to residential and non-residential care businesses, and because it will help us identify where there is a reliance on other non-care activities. Also, the information will help us understand where our duties may cross over with other regulators, to avoid duplication of work and ensure a coordinated approach to any concerns.

Supplementary balance sheet information

In order to reduce the burden on providers, we have refined the supplementary balance sheet information requested in the Financial Submission Template, and included functionality so that most of this information is carried forward in the template and only has to be updated if it has changed.

In relation to property leases, we have now more clearly defined our requirements in the Financial Submission Template. We are now only asking for information in relation to residential properties in the Group which are leased via operating leases. Details of finance leases or operating leases for photocopyers, motor vehicles etc. do not need to be provided.

Also, we have enabled lease information to be entered into the Financial Submission Template in portfolio groupings to avoid the need for numerous entries. These groupings can either be based on properties which have the same lease terms (i.e. they were all part of the same sale and leaseback transaction), have similar lease terms (i.e. they have the same landlord) or are part of the same security Group (i.e. rental obligations are cross-guaranteed).

We have considered the request to report on lease commitments as done in statutory account reporting. However, we feel more detailed information is required in relation to lease terms, landlords and security provided in order for us to understand the risk profile of the lease obligations.

Reconciliation to statutory accounts

The quarterly financial information entered into the Financial Submission Template will be based on unaudited management information.

Therefore, the annual reconciliation to the statutory accounts is the only control we have to ensure the information that we are being provided is accurate and complete.
