

Advisory Note: Coronavirus (Scotland) (No. 2) Act 2020

Emergency Directions

Emergency Intervention Orders

**Powers to Purchase Care Home and
Care at Home Services**

Introduction

1. The Coronavirus (Scotland) (No. 2) Act 2020 is emergency legislation which sets out a range of provisions that ensure swift interventions in care homes where there is a serious risk to individuals. These are:

- **Emergency Directions** - Health Boards can make specific asks of care home providers where they believe there is a material risk to health within the care home due to coronavirus. These asks must relate directly to reducing the risk to health. Where the Health Board believes they haven't been complied with, it can, subject to the court's approval, take steps to ensure they are carried out.
- **Emergency Intervention Orders** - Ministers may apply to the Court to appoint a nominated officer to temporarily take over the operation of a care home if there is a serious risk to life, health or wellbeing within the home; where there is an imminent and serious risk to life or health Ministers can exercise the powers before making an application to the Court.
- **Powers to purchase care home and care at home services** - Putting beyond doubt the powers available to Local Authorities to purchase a care home or care at home services and Health Bodies to purchase a care home by agreement. These are for voluntary purchases only and do not grant powers for compulsory purchases.

2. The powers are all related to coronavirus and can only be used in a situation where coronavirus is a factor in the failure of service. They are also included in emergency legislation meaning that the provisions which create these powers only last for as long as the 2020 Act remains in force. The powers will be available for the duration of the Act, which is presently due to last for 6 months unless extended. The Act came into force on 27 May 2020.

3. This note sets out each of these powers and provides practical information on how they should be used and the process in doing so. The provisions in the emergency legislation apply to all care homes, i.e. provision for both adults and children, and care at home services (in relation to the purchasing power provisions). This note only applies to adult services, and it is not presently envisaged that further information will be developed for children's services. However, any enquiries relating to children's residential care should be directed to the Scottish Government's Office of the Chief Social Work Adviser.

4. The powers that have been put in place allow certain public bodies and Scottish Ministers to make the swiftest of interventions where required to do so. The circumstances in which we would expect these powers to be used, however, are rare. The standard and quality of care in Scotland is predominately high and the circumstances which these powers relate to are where there are significant failings or serious/ imminent risk to life, health or wellbeing. These powers are additional to the processes which are currently in place. The Scottish Government will continue to work alongside local systems to agree actions and next steps. In the rare situations that these powers may be used, the Scottish Government will work with the local systems to ensure they have the appropriate support. Where there are concerns about individual care homes, these should be directed to Scottish Government via CareHomesCovidSupport@gov.scot.

5. During this pandemic it's important to recognise that the Care Inspectorate, Local Authorities, Health Boards and other statutory and professional bodies that work in the social care sector, continue to carry out their roles and responsibilities, although these may be discharged differently due to the circumstances.

6. When exercising powers set out in this advice, consideration to existing guidance must be given. The Scottish Government continues to work with Health Protection Scotland, Care Inspectorate and other bodies to ensure that all relevant guidance for the social care sector is published and kept up to date. This includes but is not restricted to:

- Information and guidance for care home settings.
- Incident or outbreak control tool for social or community care or residential settings.
- Advice for social or community care and residential settings staff.
- Interim guidance on Covid-19 PCR testing in care homes and the management of positive residents and staff.
- Adult support and protection guidance for chief officers relating to COVID19

7. This note should be read alongside other relevant published guidance. Up to date guidance for care homes and the wider care sector can be found on the websites for [Health Protection Scotland](#), the [Scottish Government](#) and the [Care Inspectorate](#).

8. In making any decisions to intervene it is important that there is a balance between clinical and care priorities. There is a need to balance the clinical approach to safeguard life while also protecting human rights and ethical principles, including engagement, choice and control. This ensures that health needs are not being met to the detriment of a person's mental health or wellbeing. To do this it will require a holistic approach which will be best delivered by the multi-disciplinary decision making groups which are in place. Integrated working across clinical and social care professional groups to make the most appropriate decisions is critical.

9. These provisions are specifically about making interventions in externally procured care however, where there are failures in service, it is expected that the relevant interventions would be made irrespective of the ownership of the service i.e. public, private or third sector. The powers are intended for care services run by the private or third sector to ensure there are appropriate procedures in place for Ministers or public bodies to intervene immediately when there is a need to do so.

10. We would expect a Local Authority or Health Board run home to make similar directions and put in place appropriate procedures where there are any concerns regarding quality. The enhanced oversight arrangements that have been put in place do not differentiate between homes depending on ownership, nor do our expectations about the standards of care being delivered.

Care Homes: Emergency Directions

11. A Health Board can direct a care home, for reasons attributable to coronavirus, to take specific actions where they find this to be necessary in circumstances where there is a material risk to the health of individuals at a care home. These would be steps which are required to be carried out within a specified time frame and must relate directly to reducing the risk to the health of those in the care home whilst ensuring that residents' care needs are also met. A formal written direction setting this out would be sent by the Health Board to the care home provider. Scottish Government officials will be made aware that specific requirements are being made at the time a direction is issued¹⁷.

12. This is in addition to the statutory functions of the Care Inspectorate as the scrutiny body and regulator for social care and social work services, and Local Authorities which have the statutory duty for social care under the Social Work (Scotland) Act 1968 and for adult support and protection. Duties under the Adult Support and Protection (Scotland) Act 2007, such as the duty to inquire where there are concerns about an adult's safety and wellbeing, or undertaking Large Scale Investigations where there are concerns that there may be systemic issues, should continue to be undertaken. However, it will be important to ensure these duties are considered in the context of the additional supports and powers now in place where these are exercised. Any further enquires relating to pre-existing duties or functions should be directed to the Scottish Government's Office of the Chief Social Work Adviser.

Care Home Clinical and Care Professional Oversight Group

13. The Scottish Government has convened multi-disciplinary teams in each Health Board and Local Authority area including the following senior professional roles:

- The NHS Director of Public Health
- Executive Nurse Lead
- Medical Director
- Chief Social Work Officer
- Health and Social Care Partnership Chief Officer: providing operational leadership

14. This group of professionals in each partnership area will form a Care Home Clinical and Care Professional Oversight Group (CHCCPOG). This Group are expected to be supported by their Health Board, Local Authority, and healthcare associated infection (HAI) lead, to hold discussions about the quality of care in each care home in their area, with particular focus on infection prevention and control, but also to provide appropriate expert clinical support to residents who have Coronavirus:

1. Care needs of individual residents
2. Infection prevention and control measures, including PPE and cleaning requirements
3. Staffing requirements including workforce training and deployment
4. Testing arrangements for outbreak management and ongoing surveillance.

15. These senior leaders are responsible and accountable for the co-ordination and provision of multi-agency professional oversight, analysis of issues, development and implementation of solutions required to ensure care homes remain able to sustain services during this pandemic and can access expert advice on, and implementation of, infection prevention and control and secure responsive, clinical and other appropriate support when needed.

16. This Group may make recommendations and provide advice on particular action required in individual care homes to the provider. Where these actions are agreed by the Group as proportionate and reasonable, and a risk has been identified to the health of those in the home, the Health Board will make a direction to the care home to adopt these particular actions.

17. This Group meets daily during the current situation and reports to the Scottish Government via the Directors of Public Health, on a weekly basis, including such information as the total number of care homes discussed and the number of homes presenting a clear and present risk to the health and wellbeing of people at the home. Where any intervention is to be made Scottish Ministers must be made aware at the time a direction has been made, this should be via reporting to the Scottish Government Care Home Policy team: CareHomesCovidSupport@gov.scot.

18. It will be for the range of professionals within the Group to make a judgement on the specific actions that may be requested of a care home. Examples of these requests may include:

- Deep cleaning of a care home where there has been an outbreak or where there is a reason to believe this is necessary in this particular home to prevent outbreak.
- Utilising staffing from either the Health Board or Local Authority. This could be to augment existing staffing, to provide leadership and to offer additional training and support, particularly in matters relating to infection control and protection, if it was felt required.
- Ensure training and support, and the necessary records are up to date.

Amend or Withdraw a Direction

19. Where these directions have been made the Health Board can change or withdraw the direction for intervention at any point. This may be on the basis that the steps taken are suitable to produce improvement.

Consideration of Guidance

20. When issuing a direction to a specific care home the Health Board must have regard to any guidance which has been issued by the Scottish Ministers in relation to their application.

Taking Action

21. Providers of care homes are committed to continuous improvement and the delivery of high quality care, and work closely with health and social care partnerships to ensure standards are met. We would expect in any instance where a Health Board has made a specific recommendation or ask of an individual care home that the care home provider will respond positively and will act on those recommendations. Where specific requirements have been made through emergency directions, we would also expect these requirements to be met.

Actioning recommendations and specific requests made through directions, provides assurance to statutory bodies, residents and their families, and staff that the care home is proactively ensuring that those in the home continue to be safe and that any adult at risk of harm is supported and protected.

22. In the instance that a Health Board is not satisfied that the necessary steps have been taken, the Health Board can, amongst other things, enter the home and carry out this function themselves, recovering the costs incurred from the provider. If a provider does not cooperate or allow the Health Board to enter the care home then the Health Board can apply to a sheriff for a warrant to gain access to allow those specified steps not satisfactorily carried out to be taken. Where a warrant is granted this will expire 28 days after the day on which it was granted, or earlier if the specified steps have been completed. Where a provider does not comply with a warrant, this would constitute a relevant offence for which the Care Inspectorate would be entitled to seek cancellation of a care home provider's registration

23. There may be instances where a provider thinks they have taken the necessary steps, as requested, but the Health Board does not believe those steps to be satisfactory. In those instances, the care provider and the Health Board would be expected to discuss the outstanding issues and agree a way forward. Where the Health Board is ultimately not satisfied, they can amend their direction to provide further detail on the steps required, take the further specified steps themselves or issue a further direction in order to require the necessary action to be taken. If the terms of a direction are not complied with, the Health Board may again take steps to carry out the necessary action themselves.

Care Homes: Emergency Intervention Orders

24. Where there is a serious risk to life, health or wellbeing to persons in a care home, Scottish Ministers can apply to the Sheriff Court or Court of Session for an emergency intervention order. This intervention order will appoint a nominated officer to take over the operational leadership of a care home.

25. The Scottish Ministers will normally ask the Court to appoint the Chief Social Work Officer (CSWO) of the Local Authority as the nominated officer. This is in recognition of the unique responsibilities of the CSWO to provide leadership and governance across the full range of social care and social work services. The CSWO has responsibility for functions provided directly by the Local Authority, either through delegation to another statutory body or in partnership with other agencies. Where social work and social care services and support are procured on behalf of the Local Authority, including from the independent and voluntary sector, the CSWO has a responsibility to advise on the specification, quality and standards of the commissioned services and support.¹

26. Factors which may be considered when making a decision on whether it would be appropriate to intervene could include, but are not restricted to:

- Where the Care Inspectorate have raised significant concerns regarding serious imminent risk to life, health or wellbeing to Scottish Ministers, or have made clear their intention to apply for the cancellation of a care home services registration or have made an application for cancellation to the Sheriff Court.
- Under new powers, the Care Inspectorate must report to the Scottish Parliament fortnightly on the care homes which have been inspected. The Care Inspectorate must also inform Scottish Ministers, no later than 24 hours before an inspection is scheduled to take place. These reports will provide details where there are any concerns which may lead to consideration of intervention.
- Where the Care Inspectorate have used enforcement powers to issue an improvement notice and/or a suspension has been placed on the service due to a lack of improvement.
- Actions or requirements from any relevant criminal investigations or proceedings
- Where members of the senior leadership in the partnership and the Care Home Clinical and Care Professional Oversight Group² raise significant concerns via their Health Board to Ministers.
- Where Scottish Ministers have been made aware of serious concerns either from an individual, Local Authority or Health Board, media or other route, they may request the Care Inspectorate to carry out an unannounced inspection or consider immediate intervention. The findings from this may lead to consideration of further intervention.

¹ Further details on the role of the CSWO can be found here: <https://www.gov.scot/publications/role-chief-social-work-officer/pages/5/>

² Members of the Care Home Clinical Care and Professional Oversight Group: the NHS Director of Public Health, Executive Nurse Lead, Medical Director, Chief Social Work Officer, HSCP Chief Officer: providing operational leadership

27. As well as receiving regular updates from the Care Inspectorate and from NHS Directors of Public Health, informed by the Care Home Clinical and Care Professional Oversight Groups, Scottish Ministers can obtain information that is relevant to the use of these powers from Local Authorities, Health Boards (including Healthcare Improvement Scotland), the Care Inspectorate, Scottish Social Services Council, Mental Welfare Commission, Nursing and Midwifery Council and Police Scotland. The information that can be obtained is any that Ministers consider may be relevant to their decision to use the powers to intervene.

28. The Adult Support and Protection (Scotland) Act 2007 confers statutory powers and duties on named bodies, including Local Authorities, the Care Inspectorate, Health Boards, the Mental Welfare Commission and Police Scotland to co-operate in order to protect adults at risk, and these bodies may hold information relevant to decision making. The Nursing and Midwifery Council and Social Services Scotland Council have investigatory functions relating to individuals and their professional conduct, which may mean that they also hold relevant information. It will be crucial that any relevant information is provided to Scottish Ministers as quickly as possible if requests for information are made.

29. The majority of care in Scotland is delivered to a high quality, therefore the need to exercise these powers is only envisaged to be required in extreme situations. Providers of care homes, and those working in them, are committed to delivering high quality, compassionate care and keeping those who live, visit and work there safe from harm. If there are any concerns at any stage, to life, health or wellbeing our expectation is that providers, the Care Inspectorate, Local Authorities and Health Boards would work together to ensure these can be addressed promptly. If an emergency intervention had been put in place, we would expect providers to be willing and agreeable to working with any nominated officer, and their team.

30. In the exceptional circumstances that a provider is unwilling to work with any nominated officer and/or their team and other partners, these powers provide assurance that swift interventions can be made. They also ensure the continuity of care for residents in care homes and reduce the risk of residents having to be moved out of their current care setting, their home. Moving residents can cause a detrimental impact on an individual's health and wellbeing and in the current situation, any plan to transition an individual to a new home becomes more difficult with the risk of transmission and/or infection.

Nominated Officer

31. It is the role of the nominated officer to take operational leadership of the care home, ensuring the relevant improvements are made to the quality of care being provided. They will perform this function for the time specified in the order, which can be for a period of up to 12 months. The duration of an order may be extended by the court by a further period of up to 6 months. The service provider must comply with any directions made by the nominated officer in relation to the care home service being delivered by the provider. Scottish Ministers will normally nominate the Chief Social Work Officer due to their statutory responsibilities described in paragraph 25 and the provision of social care being a statutory responsibility of Local Authorities.

32. There are only a small number of statutory roles that would be qualified to undertake this role – the Chief Social Work Officer or Chief Executive of either the Health Board or Local Authority. It is expected that Scottish Ministers will consult with the Local Authority Chief Executive and Chief Social Work Officer ahead of proposing or confirming this appointment. Where a Chief Social Work Officer is not appointed but the Chief Executive of the Local Authority or Chief Executive of the Health Board were asked, Scottish Ministers will likewise discuss this with them prior to confirming their nomination.

33. Although appointed by Scottish Ministers, where the nominated officer is an officer of a Local Authority or Health Board, they are acting on behalf of the Local Authority or Health Board respectively. For example, if the nominated officer is the Chief Social Work Officer, they are acting on behalf of the Local Authority and remain accountable to the Chief Executive of the Local Authority.

34. Whilst an individual will be made the nominated officer, it is recognised that a range of professionals from across the health and social care sector will be involved with the care and support of care home residents. We would expect in any instance where a nominated officer has taken over the operation of a care home that the care home provider will respond positively and act on their directions. We would also expect individuals from the Local Authority, Health Board, and other partners to work with the nominated officer, to ensure that they can carry out the required functions.

35. To perform the required functions, the nominated officer is authorised to:

- Enter and occupy the accommodation;
- Direct and control the provision of the care home service;
- Do anything considered necessary to ensure the service is provided to an appropriate standard.

36. It will be for the nominated officer to use their professional judgement when making decisions in regards to the operational leadership of the care home. They will be required to look at a range of options and powers available to them.

37. The role of the nominated officer is to provide operational leadership. Due to other duties the nominated officer may be required to perform, it is unlikely that they would be available and present in the care home to carry out the day-to-day operation of the service. Therefore, the nominated officer can delegate aspects of the role to other, suitably qualified, individuals. The nominated officer will continue to be accountable for action taken under the emergency intervention order.

38. Whilst the nominated officer acts on behalf of their respective body, they continue to be accountable to Scottish Ministers regarding the ongoing progress and required action in the care home. As such, the nominated officer will be required to provide regular updates to the Scottish Ministers regarding the current situation in the care home, the actions taken to address the issues and future measures that may be required. The reporting requirements will either be agreed with the nominated officer or set out in the application to the Court for an Emergency Intervention Order.

39. It may be deemed appropriate for the Scottish Government to provide resource to the nominated officer in order to carry out this role. Further support for this will be discussed as part of the overall package of support being made available to nominated officers from the Scottish Government.

40. It is critical that the role of nominated officer must be covered if there was to be any absence. It would be for the nominated officer to inform Scottish Government of contingency plans to cover this role. This would be expected in normal circumstances for the officer's general duties, but is important to emphasise the need for clear contingency plans to ensure this role is covered in exercising the emergency intervention order.

41. Contractual arrangements, or those set out within a Memorandum of Understanding, between the provider and the Local Authority or Health Board should cover matters of indemnity insurance for the nominated officer. Advice will differ subject to the specific context and individual circumstances. Where this power is being used and additional information is sought, queries should be directed to the Scottish Government via CareHomesCovidSupport@gov.scot.

Application

42. Where the Court is satisfied that unless the order is made, for a reason relating to coronavirus there will be a serious risk to the life, health or wellbeing of persons at the accommodation, the Court can make such interim order as it thinks fit. This will allow urgent action to be taken if necessary before the Court's final determination of the Application.

43. Scottish Ministers may intervene prior to making an application to the Court where they are satisfied that it is essential to do so to prevent an imminent and serious risk to the life or health of people at the accommodation for reasons relating to coronavirus. Where Scottish Ministers intervene, they must make an application to the court within 24 hours of exercising this power. If Scottish Ministers decide to exercise their powers prior to making an application, Scottish Ministers must notify the affected provider and appropriate authorities ⁴⁴, as soon as practicable. It will be important at this point to work closely with the provider and the Care Inspectorate to agree an approach to communicating with staff, residents and their families. It is crucial that people are kept aware of the circumstances at the appropriate times and are provided the relevant support and assurance.

44. Appropriate authorities comprise the Care Inspectorate, the Local Authority and Health Board where the care home is located, and Healthcare Improvement Scotland.

45. The court must make an emergency intervention order if it agrees that, unless the order is made, there is a serious risk to the life, health and wellbeing of those at the accommodation for reasons relating to coronavirus. The court may also include such incidental provisions as it thinks fit, for example, prohibiting the sale of the accommodation or disposal of assets used in the provision of care at the accommodation.

46. Where the court makes an intervention order, which can be granted in the absence of a provider, Scottish Ministers must then give a copy, as soon as practicable to the affected provider and to those appropriate authorities. The order will begin with immediate effect, unless specified differently.

Varying, Extending or Revoking an Intervention Order

47. The court may vary, extend or revoke an intervention order and interim intervention order on the application of the Scottish Ministers or the affected provider. An order can be extended for a further period of up to 6 months and may be revoked either immediately or on a date specified by the court.

48. There are a number of reasons why a court may extend the order, such as the provider failing to co-operate with the nominated officer fully in order to allow the care home to be returned to, and maintained at, an appropriate standard within the original period of up to 12 months; or failing to address the concerns that led to the intervention. Likewise, there are a number of instances where an order may be revoked, particularly if there has been sufficient improvement made and assurance given that there would no longer be a risk to the life, health or wellbeing of those people in the care home should the provider resume control of operations.

49. There will be various factors to consider when making a judgement on whether the relevant improvement has been made and advice will be sought from the nominated officer, Care Inspectorate, Local Authority, Health Board and Healthcare Improvement Scotland to allow the Scottish Ministers to make that decision. As well as the views of these public bodies, it will be important to consider the willingness of the care provider to learn and improve, the steps taken by the provider to put necessary steps in place, and the views of the clinical and professional team working in the partnership area. In coming to any judgement of whether to revoke an Order, Scottish Ministers and the Court would need to be persuaded that there would be no serious risk to the life, health or wellbeing of persons should the service continue in operation.

50. If an order is revoked, the provider may resume control of the operations of the service. Following this, the Care Inspectorate may decide to increase or adjust the frequency of inspections of the care home rather than in the current 12 month cycle. It would be expected that there be continued dialogue with the care home and the relevant statutory bodies to ensure that a high standard of care is continued to be delivered.

Financial implications

51. Where an emergency intervention is made, the provider of the care home service remains liable for all outgoings. Where any additional costs are incurred by the nominated officer, those costs can be recovered from the provider.

52. Although it will be for the lead intervening delivery organisation to decide upon, it is important that proper consideration is given to the appropriateness of recovering any costs from the provider. If recovering financial costs would be at the detriment to individuals in the home, then there should be caution in doing so. For

example, if recovering costs would see the provider go into financial distress and ultimately administration, then there should be caution and careful consideration as to whether this would be appropriate.

Appeal process

53. Where an application for an emergency intervention order, or an interim order, is granted or refused, the usual rights of appeal from decisions of a Sheriff apply as set out in the Court Reform (Scotland) Act 2014. Similarly, where an application for an emergency intervention order, or an interim order is determined by the Court of Session, the usual rights of appeal against decisions made by a Court of Session judge, as set out in the Court of Session Act 1988, will apply.

Compensation Claims

54. No right of action can arise on the basis of loss, injury or damage incurred by a provider or individual due to Scottish Ministers exercising or failing to exercise their functions under 65A of the 2010 Act or in obtaining information from the bodies set out.

55. Where the Local Authority is the leading intervening body and where there are concerns that the insurance they hold is insufficient to cover liabilities for intervening in the care home then they are able to join the Clinical Negligence and Other Risks Indemnity Scheme (CNORIS). If further advice is required on these circumstances, questions can be directed to the Scottish Government Office of the Chief Social Work Advisor.

Further Provision

56. Scottish Minister may, by regulations, make further provisions to the emergency intervention orders.

57. Section 65B provides that Scottish Ministers may make further provisions to the emergency intervention orders in Section 65A by laying regulations before the Scottish Parliament. Those regulations are subject to the 'made affirmative' procedure. This means that the regulations will take effect when they are made (signed) and will cease to have effect if they are not approved by the Scottish Parliament within a 28 day statutory period of the day on which they were made.

Powers to purchase care home and care at home services

58. If a care home or care at home service is unable to continue to care for individuals, it is essential that there are plans in place to ensure that people using the service continue to receive care. There are many local initiatives that may support services, particularly from the relevant Local Authority and Care Inspectorate.

59. Provisions within the Coronavirus (Scotland) (No.2) Act 2020 put beyond doubt that where a provider is unable to continue to deliver care due to a failure of service either due to: financial distress; risk to the life, health or wellbeing of an individual; or that the provider has recently stopped providing services, that a Health Board (directed by Scottish Ministers) can purchase a care home or a Local Authority can purchase a care home or a care at home service, where a provider is willing to sell. Purchases may also include the assets or liabilities of the service provider.

60. These powers can only be used for a voluntary purchase where the provider is willing to sell. They do not allow for a compulsory purchase. These provisions bolster the purchasing powers already available to Local Authorities and Health Boards. It is therefore expected that pre-existing guidance and advice on purchasing a care home or care at home service, upon agreement of a provider willing to sell, be considered alongside this advisory note. Where there are specific queries on individual circumstances the Scottish Government expects to work closely with local partners to support where necessary. Specific enquires should be directed to Scottish Government via CareHomesCovidSupport@gov.scot.

61. During the Covid-19 pandemic it is critical that sufficient powers are available to public bodies to ensure that a voluntary purchase can be made of a care home or care at home service where there is a failure to continue to deliver services. This is particularly critical in care homes where it can cause a detrimental impact on an individual's health and wellbeing, to move them from their home. In the current situation, any plan to transition an individual to a new home becomes more difficult with the risk of transmission and/ or infection. It was therefore important to put beyond doubt that both Local Authorities and Health Boards had the power to make such interventions, if required.

62. These emergency purchasing powers ensure the continuity of care for the people using these services by allowing them to stay in their current care settings and by continuing to receive care from familiar staff. They also provide reassurance to the families of those who use services and to the staff who provide these.

Local Interventions

63. It is recognised that a range of professionals from across health and social care are involved with the care and support of those who use care home and care at home services. Where a service is struggling to provide the high levels of care that are required, we would expect a partnership approach to be taken in order to provide support to the service.

64. There are local interventions available to support care services before these powers would be required to be used. The Scottish Government has implemented a range of measures to support the social care sector, including initial funding of £50 million to address challenges highlighted by Integration Joint Boards' mobilisation plans. Should a care service encounter difficulties however, further local support can be provided by Local Authorities, Health Boards and/ or the Care Inspectorate. This support can include the provision of extra staff, staff training or providing oversight to the managing of services. Should these difficulties result in the standards of care falling, the Care Inspectorate may choose to issue an improvement notice. This gives the care provider the opportunity to address the issues identified by the Care Inspectorate with the support of partners.

Circumstances in which the powers may be used

65. Although there is extra support and alternative measures available to support the sector, these purchasing powers provide a safeguard for the worst case scenario. For the avoidance of doubt, they do not relate to circumstances which predate the Coronavirus (Scotland) (No.2) Act 2020 which are attributable to long standing financial sustainability or performance related failures.

66. A provider is deemed to be in financial difficulty if it notifies the Care Inspectorate of an insolvency event under regulations 6A, 6B or 6C of the Social Care and Social Work Improvement Scotland (Requirements for Care Services) Regulations 2011. As soon as practicable after receiving a notification of such an insolvency event, the Care Inspectorate is required to inform the Local Authority and Health Board where the care home is located, the Common Services Agency (NHS National Services Scotland) and Healthcare Improvement Scotland.

67. Where there is a threat to life, health or wellbeing, this would be determined by the Local Authority or Health Board or both, which must act reasonably in reaching that view. Before making any decision to purchase a provider and/ or its assets or liabilities, the Local Authority or Health Board (whoever intends to make the purchase) must consult the following stakeholders to ensure they are making an informed decision:

- The Care Inspectorate;
- Any other Local Authority or Health Board in whose area the services are being provided;
- Common Services Agency;
- Healthcare Improvement Scotland;
- Anyone else it considers appropriate.

68. Consulting in this instance, is to take consideration of the views of the appropriate bodies and stakeholders rather than a formal consultation process.

69. Types of measures which bodies may consider when discussing an impact of service failure due to risk to life, health or wellbeing of an individual could include:

- Where the Care Inspectorate have raised significant concern to Scottish Ministers, or have made clear their intention to apply for the cancellation of a

care home service's registration or have made an application for cancellation to the Sheriff Court.

- Where the Care Inspectorate have used enforcement powers to issue an improvement notice and/or a suspension/ moratorium has been placed on the service due to a lack of improvement.
- Actions or requirement following any relevant criminal investigations or proceedings.
- Where members of the senior leadership in the partnership and the Care Home Clinical and Care Professional Oversight Group³ raise serious concerns via their Health Board to Ministers.
- The effectiveness of the alternative measures taken to address the issues facing the care home or care at home service.

70. The Care Inspectorate is already working with care providers across Scotland and their inspection reports identify any necessary improvements and will be an essential tool in determining the threat to life, health or wellbeing. If such a scenario was occurring, it could be that the Care Inspectorate would have already issued improvement notices, applied for the service to be deregistered or informed Scottish Ministers of a serious risk to those at the care home, in which case, Scottish Ministers may temporarily intervene using the new emergency intervention powers. There may be cases however, where due to the nature of a crisis situation, events unfold quickly. Therefore these interventions by the Care Inspectorate are not a necessity before the purchasing powers can be used but may be considered as alternatives if not already done so.

71. Where a provider has recently ceased providing services, this may be another consideration for a Health Board, directed by Scottish Ministers, or a Local Authority to purchase a care provision.

Staffing

72. Where a Health Board or Local Authority purchases a service using these powers, it is expected that the new owner will continue to employ the same staff, should the staff choose to remain, to ensure the continuity of care. The Transfer of Undertakings (Protection of Employment) Regulations 2006, as amended, (TUPE) will apply.

Further Considerations and Financial Implications

73. Ultimately when acquiring any business or asset there are a number of factors which should be considered when making a decision on whether it would be appropriate to purchase. This includes:

- Impact on individuals
- Viability to continue to deliver services within the current infrastructure
- Operational Management
- Current configuration of provision in the area

³ Members of the Care Home Clinical Care and Professional Oversight Group: the NHS Director of Public Health, Executive Nurse Lead, Medical Director, Chief Social Work Officer, HSCP Chief Officer: providing operational leadership

- Financial costs
- Value for Money on any public sector purchase must be shown and whether this approach is affordable.

74. The final decision to pursue a voluntary purchase will lie with the service provider and the purchasing body – either the Health Board (which may be directed by Scottish Ministers) or the Local Authority.

75. A Health Board or Local Authority can purchase a care home, where there is agreement and a Local Authority can also purchase a care at home service, where there is agreement. Where a Health Board or Local Authority considers that they would require financial support to make a purchase we would expect that body to engage with Scottish Government very early in the process to ensure requirements for financial support are discussed and options explored.

76. Where a provider goes into administration, rather than an individual service failure, there would require to be further consideration from multi-agency partners to agree the best approach in providing support. The factors above would be relevant but there would be additional information sought, for example, whether this is a provider based only in Scotland or one that provides services across the UK. Pursuing a voluntary purchase would also depend on what alternative options are available and what is in the best interests of the care home or care at home service users.

77. If there was a failure of a provider in Scotland which connected to a number of services the initial step would be for the National Contingency Planning Group (NCPG)⁴ to convene to discuss practical next steps. The NCPG continues to be the forum where relevant parties discuss individual matters or concerns on an ad-hoc and required basis. It is not for this group to make decisions or to provide advice but this Group has a role in bringing together relevant bodies nationally to understand the position and potential impact as best as possible. There are a range of measures which may be discussed, and depending on the outcome of these conversations the relevant bodies – the Local Authority, Health Board or Scottish Ministers, in their individual respective roles - will consider whether using these purchasing powers are deemed necessary. Ultimately, the purchasing body, or that which has been directed by Scottish Ministers, will make the judgement on purchasing multi-services as part of a provider going into distress.

78. With the agreement of the provider, the purchasing body may purchase any asset or liability of the provider, this could include a single service of a franchise or a multi-owned service. The terms of purchasing a single service would be part of the discussions and negotiations which take place as part of the transaction.

79. Where a Health Board is the lead in making a purchase it will also be important to consider the point of charging people who use the service. The powers put in place to purchase services are not new, but they put beyond doubt the ability

⁴ The National Contingency Planning Group is chaired by COSLA and comprises representatives from Health and Social Care Partnerships, service providers, regulators, national and local government and unions.

for Health bodies and Local Authorities to do so. When agreeing to purchase a provision due to service failure relating to coronavirus the same considerations should continue to be made as they would do at any other time. This would include matters such as charging people who use the service.

Purchasing a Service

80. If the Local Authority is to lead on the purchase of either a care home or care at home service then they need agreement from the service provider. If the Health Board is to lead on the purchase of a care home then they need agreement from the service provider and may receive a written and published direction from Scottish Ministers. This direction can be varied or revoked by Scottish Ministers if deemed necessary. Care at home services may not be purchased by Health Boards.

81. The new owner will be held to the same standards as any other operator of these services and will be required to address the issues that led to the sale.

Conclusion

82. Any further enquiries regarding any of the powers set out in this advice can be directed to CareHomesCovidSupport@gov.scot. As set out, the powers that have been put in place allow for swift interventions to be made where it is required to do so. Due to the thresholds in place surrounding the circumstances of using these powers such as a serious or imminent risk to life, health or wellbeing or that of a service failure, the likelihood of the powers being used are rare. They are also additional to the processes which are currently in place, to be used in extreme scenarios. Therefore not all matters will be picked up in this advisory note. Where there are individual enquiries relating to a local situation where these powers may be considered, these queries should be sent to CareHomesCovidSupport@gov.scot.



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