Background to the National Framework for NHS Continuing Healthcare

Standard Note: SN/SP/4643
Last updated: 22 November 2011
Author: Thomas Powell
Section: Social Policy

NHS continuing healthcare means a package of care arranged and funded solely by the NHS to meet physical and/or mental health needs that have arisen because of disability, accident or illness. Eligibility decisions for NHS continuing healthcare rest on whether someone's need for care is primarily due to health needs.

As services provided by the NHS are free whereas those arranged by local authority social services are means tested, the outcome of any decision as to who has responsibility for providing care can have significant financial consequences for the individual concerned. Since the early 1990s, the Parliamentary and Health Service Ombudsman has investigated a large number of complaints about local criteria used for making decisions about eligibility for NHS continuing healthcare. The legality of individual eligibility decisions has also been challenged in the courts on a number of occasions. In 2007 the Department of Health issued a *National Framework for NHS Continuing Healthcare*, to try and improve the consistency of approach taken by local NHS bodies, by providing a common framework for decision making and the resolution of disputes.

This note is intended to help Members to understand the background to the introduction of the Framework through an account of the preceding guidance and case law. It also provides some information on the retrospective review of cases, involving eligibility decisions made before April 2004 (prompted by a report by the Health Service Ombudsman in 2003). A separate Library note, *NHS Continuing Healthcare in England* (SN06128) provides information of the Framework itself, and the associated guidance, and is intended to help Members respond to queries from constituents about eligibility to NHS continuing healthcare.

The key Department of Health documents, and briefings from other organisations, are listed at the end of this note. The Department of Health guidance should be consulted for a fuller account of the rules and duties that apply to NHS bodies.

Contents

1 Background to the National Framework [1]

1.1 The 1995 guidance

For many years, eligibility criteria for NHS continuing healthcare were drawn up locally. Although there was some national guidance,[2] it was not until 1995 that the guidance required local NHS bodies to include written criteria as part of their local policies (with effect from April 1996). [3] Below is a brief account of the way national criteria have emerged since then.

The 1995 guidance, *NHS responsibilities for meeting continuing health care needs*, was issued to both the NHS and to local authorities in response to concerns expressed by the Health Service Ombudsman of the day, who upheld a complaint from a patient who had been refused long-term care by the NHS.[4] Although the guidance required the NHS to draw up policies locally, and thus did not set national criteria, it did list issues that the policies must address, including services that should be covered, for example: rehabilitation after acute treatment, palliative care, continuing inpatient care in a hospital or nursing home, and respite care.

The 1995 guidance also included some general principles. It said the NHS was responsible for arranging and funding in-patient continuing care in a hospital or nursing home, on a short or long term basis, for people:

- where the complexity or intensity of their medical, nursing care or other care or the need for frequent not easily predictable interventions requires the regular (in the majority of cases this might be weekly or more frequent) supervision of a consultant, specialist nurse or other NHS member of the multidisciplinary team;

---

1 As well as the documents specifically mentioned, general sources for this section include: Luke Clements and Pauline Thompson, *Community Care and the Law*, fourth Edition, LAG 2007 and The Health Service Ombudsman, *NHS funding for long term care*, HC 399 of 2002-3.

2 See, for example, HSG (92) 50, which distinguished between specialist and general nursing care.

3 HSG (95) 8 *NHS responsibilities for meeting continuing health care needs*: (Additional guidance was issued in 1996: EL (96) 8 and EL (96) 89.) .

4 Health Service Commissioner, *Failure to provide long term NHS care for a brain-damaged patient*, Parliamentary Commissioner for Administration, Second report for session 1993-94, Selected cases - volume 1, (HC 157). The Commissioner published another report on a similar theme in 1996, *Investigations of complaints about long term NHS care*, Fifth report for session 1995/96 (HC 504).

- who require routinely the use of specialist health care equipment or treatments which require the supervision of specialist NHS staff; or

- who have a rapidly degenerating or unstable condition which means that they will require specialist medical or nursing supervision.

The Department issued supplementary guidance in February 1996, which referred to the danger of eligibility criteria being over-restrictive[5] It specifically mentioned the risk of over-relying on the needs of a patient for specialist medical opinion when determining eligibility for continuing care. It said that there would be a limited number of cases where the complexity or intensity of nursing or other clinical needs might mean that a patient was eligible for continuing care even though that patient no longer required medical supervision.

1.2 The Coughlan judgment (1999)

The 1995 guidance was eventually replaced because of a Court of Appeal judgment in 1999, known as the *Coughlan* judgment,[6] which the National Framework still quotes today.[7]. Among the issues considered was whether local authorities could lawfully provide nursing care for a chronically ill patient as a social service or whether nursing care had by law to be provided as part of the NHS (the judgement on this case in a lower Court had said that nursing care could only be provided by the NHS).

The judgement in the Court of Appeal was that in some circumstances social services authorities could provide nursing care and thus there was not a precise dividing line between what the NHS and social services could provide. Whether it was lawful for a local authority to provide nursing care generally depended on whether the nursing services were:

(i) merely incidental or ancillary to the provision of the accommodation which a local authority is under a duty to provide and

(ii) of a nature which it could be expected that an authority whose primary responsibility is to provide social services could be expected to provide.

The judgment has generally been interpreted by the Department of Health to mean that where a person's primary need is a health need, responsibility for the care falls to the NHS and this is still the fundamental criterion for determining eligibility to NHS continuing healthcare.

As a preliminary response, in August 1999, the Department of Health issued guidance to say that health authorities should satisfy themselves that their policies, procedures and eligibility criteria were in line with the judgment and existing guidance.[8] In 2001 it issued new guidance designed to take the *Coughlan* judgement into account. But this was also called into question, not least by the Health Service Ombudsman (see below). The 2001 guidance did not remove local eligibility criteria but set out, in an annex, a list of issues for local NHS bodies to consider when establishing local criteria. The Annex said:

---

5 EL(96)8

6 R v North and East Devon Health Authority, ex parte Coughlan, Times Law Report, 20 July 1999; 2 WLR 622(1999); 2 CCLR 285.

7 The impact of the judgement is summarised in Annex B of the National Framework.

8 HSC 1999/180 *Ex parte Coughlan: follow up action*

All Health Authorities, in discussion with local councils, should pay attention to the details below when establishing their eligibility criteria for continuing NHS health care.

1. The eligibility criteria or application of rigorous time limits for the availability of services by a health authority should not require a local council to provide services beyond those they can provide under section 21 of the National Assistance Act (see point 20 of the guidance for the definition of nursing care used in the Coughlan judgement).

2. The nature or complexity or intensity or unpredictability of the individual's health care needs (and any combination of these needs) requires regular supervision by a member of the NHS multidisciplinary team, such as the consultant, palliative care, therapy or other NHS member of the team.

3. The individual's needs require the routine use of specialist health care equipment under supervision of NHS staff.

4. The individual has a rapidly deteriorating or unstable medical, physical or mental health condition and requires regular supervision by a member of the NHS multidisciplinary team, such as the consultant, palliative care, therapy or other NHS member of the team.

5. The individual is in the final stages of a terminal illness and is likely to die in the near future.

6. A need for care or supervision from a registered nurse and/or a GP is not, by itself, sufficient reason to receive continuing NHS health care.

7. The location of care should not be the sole or main determinant of eligibility. Continuing NHS health care may be provided in an NHS hospital, a nursing home, hospice or the individual's own home. [9]

1.3 The Health Service Ombudsman's report (2003) and the retrospective review of cases

A report published by the Health Service Ombudsman[10] in February 2003 suggested that the new guidance had not solved the problem; it left too much scope for local variation, and the overly restrictive criteria used by several NHS authorities might be illegal in the light of the *Coughlan* judgement.[11] The report recommended that local NHS authorities should review decisions made since 1996, when written criteria became mandatory, and that people who had been wrongly refused NHS care should be entitled to redress. It said that the Government guidance lacked clarity. It also recommended that the Department of Health should review its guidance on eligibility, making much clearer the situations where the NHS had to provide funding and those where local NHS bodies had discretion.

The Ombudsman's report of 2003 prompted several developments. One was a retrospective review of cases dating back to 1996 to see if they were in line with the *Coughlan* judgment. These reviews of PCT (and before them, local health authority) decisions were conducted by Strategic Health Authorities and focused on eligibility decisions made before April 2004, or which involve a period of time falling mainly before April 2004. The process came to an end

---

9 *NHS and Local Councils' responsibilities* HSC 2001/015:

10 A different individual from the one who provoked the 1995 guidance but the same office.

11 http://www.ombudsman.org.uk/pdfs/care03.pdf: .

in November 2007 - unless it could be shown that there were exceptional circumstances.[12] Those who had been wrongly refused were entitled to be recompensed. A Written Answer in January 2008 said that PCTs had paid out over £180 million as a consequence of the retrospective reviews and that funding for this had been made available by the Department.[13]

A second major consequence of the Ombudsman's report was the development of eligibility criteria at Strategic Health authority level. The Government's initial response to the Ombudsman's report had not been favourable to the development of national criteria. It first asked each Strategic Health Authorities to review the criteria of PCTs within its area, in order to ensure that they were consistent both with the *Coughlan* judgment and within the Strategic Health Authority area. The SHAs thus took over from PCTs the responsibility for setting the eligibility criteria although PCTs retained the job of applying them.

It was not until December 2004 that the Government announced that it was taking steps to develop a nationally consistent approach.[14] The announcement was made at the time the healthcare Ombudsman's published a follow-up report, which argued that there was a compelling case for establishing clear, national, minimum criteria for determining who was eligible for continuing care funding. [15] Also published in December 2004 was a report commissioned by the Department of Health on the review and restitution process. Among its findings from the sites that it visited was a strongly held desire for national criteria and concern about the variability that still remained between SHA criteria.[16]

1.4 The Grogan judgment (2006)

In 2006, another Court judgement, known as the Grogan judgment, highlighted continuing problems with the system.[17] This stimulated further Department of Health guidance, which was primarily designed to highlight the conclusions of the judgment and to ask NHS bodies to review their eligibility criteria in the light of already existing guidance.[18] The "Grogan guidance" did not set out new policy but referred to the fact that a national framework was being developed and reaffirmed that the overarching 'test' to be applied by decision-makers must be whether an individual's primary need was a health need (following the *Coughlan* judgment) and that this should feature very prominently in SHAs' eligibility criteria.

The Grogan judgment was yet another criticism of the lack of clarity in Government guidance. It also highlighted some more general points, for example, that there was no individually enforceable legal entitlement to a particular level of care from the NHS, and it examined the relationship between NHS continuing healthcare and NHS-funded nursing care. The following points that it made, relating to NHS continuing healthcare, are still referred to in the current National Framework.

- The local NHS did not have – and did not apply- criteria that properly identified the test or approach to be following in deciding whether Maureen Grogan's primary need was a health need.

---

12 See the Dear Colleague Letter sent out by the NHS Chief Executive on 31 July 2007
13 HC Deb 16 January 2008 c1370W
14 HC Deb 2004 c108WS
15 The Health Service Ombudsman, *NHS funding for long term care: follow-up report*, HC 144 of 2004-05
16 Continuing health care: Review, revision and restitution - independent research review by Melanie Henwood, December 2004
17 R v Bexley NHS Care Trust, ex parte Grogan, 25 January 2006.
18 For NHS continuing healthcare, the existing guidance was: HSC 2001/015.

- There could be an overlap, or a gap, between social care and NHS provision, depending on the test, or tests, applied. The court accepted that the extent of the Secretary of State's duties was governed by NHS legislation, not the upper limits of local authority lawful provision, and therefore that there was a potential in law for a gap between what the Secretary of State provided and those 'health services' that the local authority could 'lawfully' supply.

- If the policy of the Secretary of State was that there should be no gap, then when applying the primary health need approach, this should be considered against the limits of social services lawful provision, not just by reference to a 'primary health need'.[19]

2 The National Framework

The *National Framework for NHS Continuing Healthcare* was published in June 2007[20] and became mandatory from 1 October 2007. Instead of each Strategic Health Authority (SHA) having its own rules for determining eligibility, the National Framework introduced a national approach for the NHS in England, with a common process and national "tools" to support decision making.[21] The Secretary of State issued Directions requiring PCTs, SHAs and local authorities to comply with key aspects of the new policy. The relevant Directions, as updated in 2009, are:

- *NHS Act 2006, Local Authority Social Services Act 1970: The NHS Continuing Healthcare (Responsibilities) Directions 2009*

The following Directions also contain relevant provisions:

- *The Delayed Discharges (Continuing Care) Directions 2009*

- *The National Health Service (Nursing Care in Residential Accommodation) (Amendment) (England) Directions 2009*

As well as dealing with the arrangements for NHS continuing healthcare, the National Framework simplified the arrangements for *NHS-funded nursing care* (that is, care provided by a registered nurse in a nursing home for someone not otherwise funded by the NHS - sometimes known as the Registered Nursing Care Contribution). The National Framework made clear that in all cases, individuals should be considered for eligibility for NHS continuing healthcare before a decision is reached about the need for NHS-funded nursing care.

At the time that the National Framework was published, the Department of Health said that it would lead to fair and consistent access to NHS funding across England, irrespective of location, diagnosis or personal circumstances. It would also mean that "thousands of people" in England were likely to receive more help towards their care costs. The Framework was expected to cost up to £220 million in the first year of operation:

> Thousands of people in England are likely to receive more help towards their care costs, said Care Services Minister, Ivan Lewis, today.

---

19 Department of Health, *NHS Continuing Health Care: Action following the Grogan judgment*, 3 March 2006

20 Written Ministerial Statement : HC Deb 26 June 2007 20-21WS and Department of Health Press Notice, "Streamlining the system for NHS continuing care," 26 June 2007:

21 See the final page of the note for a list of the current associated documents.

> The new National Framework for NHS Continuing Healthcare, published today, has been developed in close consultation with voluntary groups, professional bodies and patient/user groups and will make funding decisions on who is eligible for NHS continuing care fairer, faster and easier to understand.
>
> It will create consistent access to fully funded care with clear national policies for deciding eligibility. It also abolishes different nursing bands for free nursing care - freeing up more time for nurses and cutting down on repeated patient assessments. The Framework will be put into action by the NHS and Local Authorities from October this year, and is expected to cost up to £220 million in the first year of operation.
>
> Care Services Minister, Ivan Lewis, said:
>
> "We understand that families do have to make difficult and emotional decisions when someone has to go into residential care and this can be made worse by having to consider how this will be funded."
>
> At present, people with identical care needs can receive different decisions on whether they are eligible for fully funded continuing care, based purely on where they live.
>
> The new system will address these anomalies and will introduce one national system for everyone needing this type of care in England.[22]

Following a Government commitment to review the National Framework after one year, a revised Framework was published in July 2009. The revised document says that the main change concerns fast track treatment for people with a rapidly deteriorating condition entering a terminal phase. If an appropriate clinician considers a person to have a *primary health need* arising from such a situation and has given a completed *Fast Track Pathway Tool* to the PCT, that PCT is required to determine that the person is eligible for NHS continuing healthcare, until such time as a full assessment is completed using the standard *Decision Support Tool*. The revised document also includes some changes to processes, for example, in relation to obtaining a review of an initial screening decision, but the main basis of eligibility was not changed.

3 Other sources of information

A separate Library note *NHS Continuing Healthcare in England* (SN06128) provides information of the Framework itself, and the associated guidance, and is intended to help Members respond to queries from constituents about eligibility to NHS continuing healthcare.

The following Department of Health guidance, together with the Directions from the Secretary of State mentioned in the text of this note, should be consulted for a fuller account of the rules and duties of NHS bodies to provide NHS continuing healthcare.

- The National Framework for NHS Continuing Healthcare and NHS-funded nursing care (revised July 2009): This sets out principles and processes for establishing eligibility.
- Healthcare Checklist (September 2009): This is a screening tool to help establish who might need a full assessment of eligibility.
- Decision Support Tool (September 2009): This is a detailed questionnaire to help assess eligibility.

---

22 Department of Health Press Notice, *Streamlining the system for NHS continuing care*, 26 June 2007

- Fast Track Pathway Tool for NHS continuing healthcare (September 2009): This is for urgent assessments of those with rapidly deteriorating, possibly terminal, conditions.

- NHS continuing healthcare practice guidance (April 2010): This provides a practical explanation of how the Framework should operate on a day-to-day basis and cites examples of good practice.

- Training materials for the revised National Framework for NHS Continuing Healthcare and NHS-funded Nursing Care (December 2009): These training materials have been developed to support local training on specific issues.

- NHS continuing healthcare: refunds guidance (March 2010): This sets out the approaches to be taken by PCTs and local authorities when a decision is awaited on eligibility for NHS continuing healthcare or there is a dispute following a decision. It explains responsibilities for providing services during these periods and for refunding the costs of services provided.

There are several introductory sources that constituents may find useful, for example:

- *NHS continuing healthcare and NHS-funded nursing care*, NHS public information booklet;

- NHS Choices website: *What is the National Framework for NHS Continuing Healthcare and NHS-funded Nursing Care?*;

- Age Concern factsheet 20, *NHS continuing healthcare and NHS-funded nursing care* (September 2010); and

- *When does the NHS pay for care? Guidance on eligibility for NHS continuing healthcare funding in England*, Alzheimer's Society (2011).