

NHS CONTINUING HEALTH CARE: ACTION FOLLOWING THE *GROGAN* JUDGMENT

Summary

1. This guidance sets out the immediate action that Strategic Health Authorities (SHAs), Primary Care Trusts (PCTs) and local authorities should take following the High Court judgment in the case of *R (Grogan) v. Bexley NHS Care Trust* which was given on 25 January 2006. The High Court ruled that the eligibility criteria for NHS Continuing Healthcare used by the Care Trust were unlawful since the criteria contained no guidance as to the test or approach to be applied when assessing a person's health needs in determining their eligibility. The Judge also referred to the potential for confusion in the understanding and application of Departmental policy guidance in this area by decision makers. A summary of the facts of the case and of the decision judgment is at Annex A. Paragraph 10 below summarises the main points in the judgment.
2. This interim guidance is issued pending the publication of the National Framework for NHS Continuing Healthcare and NHS-funded Nursing Care later in the year, on which the Department of Health intends to consult.

Action

3. **SHAs, in consultation with PCTs, and where appropriate, local authorities, should review their local eligibility criteria for NHS Continuing Healthcare and satisfy themselves that their eligibility criteria, and the way in which they are applied locally, are in line with the *Grogan* judgment and this guidance, taking any further legal advice necessary for this purpose.**

SHAs, PCTs and local authorities should work together in partnership to ensure that the needs of their local population are met, and to ensure that service users do not fall into a 'gap' between services as identified in the judgment. No treatment or care should be delayed by uncertainty or ambiguity about funding responsibilities.

4. **SHAs and local authorities, in consultation with each other, and where appropriate PCTs, should review any central continuing care policy (including, in particular, the interaction between NHS Continuing Healthcare and NHS-funded Nursing Care) to ensure that correct procedures are followed.**

5. **Where SHAs, PCTs or local authorities identify a need to revise their eligibility criteria or local procedures in light of the judgment, they should make arrangements to do so. They should also consider whether there are service users who should be re-assessed in consequence, and if so, local partners should decide the steps to take to achieve this.**
6. **SHAs/PCTs should identify those cases in which there is a risk that wrong decisions may have been made in relation to individuals or groups of individuals under the previous criteria and procedures. Having identified these service users, SHAs/PCTs should take steps to re-assess their eligibility for NHS Continuing Healthcare and take any action required as a result of that reassessment.**

These 'at risk' groups of individuals are those in respect of whom there is the potential for a different decision as to eligibility for NHS Continuing Healthcare to have been made if either;

- a) the amended criteria; or
- b) the amended process,

had been in place at the time of the previous assessment. An example might be a person who was assessed in the high band of NHS-funded nursing care without consideration of whether all of the nursing needs could have been properly provided by the local authority, but for section 49 of the Health and Social Care Act 2001¹.

Where the SHA/PCT identifies a need for revision of either criteria or process, anyone who asks for a review of his eligibility for NHS Continuing Healthcare under the new process should be granted one.

7. **SHAs should look to local good practice already developed through work with the Ombudsman's office to ensure that reviews and re-assessments are managed smoothly.**
8. **SHAs should copy this circular to their Continuing Care Review Panel Chairs for internal information.**

¹ Health and Social Care Act 2001, Section 49 - **Exclusion of nursing care from community care services**

- (1) Nothing in the enactments relating to the provision of community care services shall authorise or require a local authority, in or in connection with the provision of any such services, to-
 - (a) provide for any person, or
 - (b) arrange for any person to be provided with, nursing care by a registered nurse.
- (2) In this section "nursing care by a registered nurse" means any services provided by a registered nurse and involving-
 - (a) the provision of care, or
 - (b) the planning, supervision or delegation of the provision of care other than any services which, having regard to their nature and the circumstances in which they are provided, do not need to be provided by a registered nurse.

The *Grogan* Judgment – key points

9. SHAs, PCTs and local authorities should have regard to the full judgment of the High Court. A summary of the facts and decision is attached for information at Annex A. A copy of the full judgment can be obtained via the following link:

<http://www.bailii.org/ew/cases/EWHC/Admin/2006/44.html>

10. The main issues covered by this judgment are summarised as follows:
- a) Departmental guidance – namely HSC 2001/015 *Continuing Care: NHS and Local Councils' Responsibilities* and *NHS-funded Nursing Care: Practical Guide and Workbook* – lacks clarity and this could lead to confusion on the part of decision makers.
 - b) The policy and approach of NHS Continuing Healthcare is based on whether a person's primary need is a health need. Where that is established, the NHS will be responsible for meeting that need, and for the accommodation, if that is part of the overall need (referred to by the Judge as the 'Primary Health Need Approach').
 - c) A decision whether a person qualifies for NHS Continuing Healthcare requires an assessment of all of a person's relevant needs, not just his needs for nursing by a registered nurse or by others. That assessment should not be based on generalisations or classes.
 - d) In applying the "Primary Health Need Approach", the elements of quality and degree (i.e. nature, complexity, intensity etc. of the need) should be considered against the limits of the lawful provision of social services by the local authority, and not in isolation. This is explained further below, at paragraph 13.
 - e) A decision maker must decide first of all whether a person is eligible for NHS Continuing Healthcare. It is only if he is not so eligible that a determination of the registered nursing care contribution to his care should be undertaken. At both stages, the decision maker must have regard to the nature and extent of the person's actual needs for nursing and other care (including care by a registered nurse).
 - f) There is no individually enforceable legal entitlement to a particular level of care from the NHS.
 - g) The extent of the duty to provide health services as part of the NHS is governed by health legislation, not by the limits of local authorities' powers.

- h) The criteria drawn up by the SHA were found to lack the necessary guidance on the tests to be applied in deciding whether a person's health needs qualified them for NHS Continuing Healthcare. In particular, there was no express reference to:
- i. the "Primary Health Need Approach"; and
 - ii. the incidental or ancillary etc. "test" set out in the *Coughlan* judgment concerning what services a local authority could lawfully provide in connection with the provision of accommodation (see further, paragraph 13, below).
- i) In failing to give any effective guidance as to the test or approach to be applied, it was not clear what test the decision maker was supposed to apply or whether the Care Trust had, in fact, applied the Primary Health Need Approach.
- j) The Care Trust's decision that Mrs Grogan did not qualify for Continuing NHS Healthcare was set aside and remitted for a fresh consideration. The Judge stated that the Care Trust should:
- i. identify the test it applies;
 - ii. consider whether all of the nursing needs (including the registered nursing care contribution ("RNCC")) could, applying *Coughlan*, have been lawfully provided by the local authority but for s. 49 of the Health and Social Care Act 2001 (c. 45) ("the 2001 Act"); and,
 - iii. address the effect of the answer to point (ii) on the decision to award NHS Continuing Healthcare (see next section below).

NHS Continuing Healthcare Eligibility - further guidance and background

11. In evaluating their continuing care policies and eligibility criteria with reference to the judgment, authorities should refer to the guidance set out in HSC 2001/015, this guidance and to the correspondence sent to SHAs on 28 November 2005 in relation to the correct procedures to be applied for assessing registered nurse's contribution to care (RNCC). A copy of this letter is available on the Department's website at the following address:

http://www.dh.gov.uk/PublicationsAndStatistics/LettersAndCirculars/DearColleagueLetters/DearColleagueLettersArticle/fs/en?CONTENT_ID=4125309&chk=Ny7JYR

12. The decision to grant NHS Continuing Healthcare is based on whether an individual's primary need is a health need (as referred to in *Coughlan*). This

is the overarching 'test' to be applied by decision-makers, and should feature very prominently in SHAs' eligibility criteria.

13. A primary health need signifies that the individual's overall care needs are such that, leaving aside the effect of section 49 of the 2001 Act, the responsibility for those needs cannot be met by the Local Authority and so must be the responsibility of the NHS, if anyone. In other words, there will be a primary health need if the nursing or other health services required by the individual are more than incidental or ancillary to the provision of accommodation which a local authority is under a duty to provide, and are of a nature beyond that which an authority whose primary responsibility is for social services could be expected to provide, but for s.49 of the 2001 Act, as part of a social services package. This issue can only be addressed by assessing the totality of the relevant needs and answering the question as to whether the nature and degree of the nursing care alone or together with other factors means that the Local Authority cannot lawfully provide it in its totality, and therefore, if it is to be provided its provision falls on the NHS.
14. An assessment of an individual's relevant needs for the purposes of considering his eligibility for fully-funded NHS Continuing Healthcare involves looking at the totality of his relevant needs. Those needs include, but are not limited to, his actual need for nursing care, including nursing care required from a registered nurse.
15. The nature, degree and intensity of nursing required, whether alone or with other factors, can amount to a primary health need, for which the NHS is responsible.
16. If an individual is eligible for NHS Continuing Healthcare because his primary need is a health need, then the NHS is responsible for providing or arranging those services required to meet all the assessed care needs, including the accommodation, where that is part of the overall need. This approach should be reflected in local policies.
17. The Government announced in November 2004 that it would create a single National Framework for the provision of NHS Continuing Healthcare. A three-month public consultation on the terms of this framework, including both NHS Continuing Healthcare and NHS-funded Nursing Care, is due to begin in spring 2006, with a view to publication of the National Framework later in the year.

Application of the Criteria and the Assessment Process

18. The correct sequential process for assessing eligibility for NHS Continuing Healthcare and NHS-funded nursing care is contained in Departmental Guidance HSC 2003/006, and summarised in correspondence sent to all SHAs on 28 November 2005 (a copy of which can be accessed via the link

at paragraph 11). This assessment framework states that the first step in the process is to identify an individual's care needs and to consider if he is eligible for NHS Continuing Healthcare. Only then, and only if it is decided that the individual is not so eligible, is there a determination of the registered nurse's contribution to care of that individual in a care home providing nursing care. This is part of the planning and provision of care, after it has been decided that the individual does not qualify for NHS Continuing Healthcare, applying the Primary Health Need Approach.

19. In short, the RNCC determination takes place only once it has been established that the nursing care needed is not such as to qualify that individual for NHS Continuing Healthcare. For example, the individual requires a placement in a care home providing nursing care to manage their various needs, but their primary need is not a health need (as described in paragraph 13).
20. SHAs should ensure that clear protocols for assessment and decision-making are in place. These should lead to a record of a rationale for decisions, which demonstrate the comparison of the nature, intensity, complexity and unpredictability of the person's health care needs to the incidental and ancillary "test", so that a consistent approach can be demonstrated.

Registered Nurse's Contribution to Care (RNCC)

21. If the quality and quantity of nursing (including registered nursing) provided to manage the individual's nursing needs are within the limits set out in *Coughlan* (that is that they are incidental or ancillary to the provision of accommodation which a local authority is under a duty to provide, and are of a nature which social services could be expected to provide, but for s.49 of the 2001 Act) and it has therefore been decided that the individual is not eligible for NHS Continuing Healthcare, the next step is to determine in which one of the RNCC bandings an individual's nursing needs fall.
22. The needs described in the RNCC bands are requirements for care from a registered nurse, not overall care needs as in the criteria for NHS Continuing Healthcare, which are met by the whole multi-disciplinary team. The high band should be quantified at the high end of the span of registered nurse requirements within care that is incidental or ancillary to the provision of accommodation, as described in paragraph 20. It may be helpful to benchmark the need for care, monitoring and review by the registered nurse against the average of one hour per day nurse involvement (i.e. provision of care or the planning, supervision or delegation of care) in care homes providing nursing care, on which the funding linked to the medium band is based.

23. Higher than average registered nurse involvement may be needed when particular aspects of the care are likely to lead to an additional requirement for the nurse's professional skills. For example, a complex medication regime which requires the skills of a registered nurse to monitor compliance, interactions and dosage. The aspects of a person's condition which affect the level and quality of registered nurse support needed should also be considered. For example, factors which increase unpredictability increase the requirement for professional expertise to monitor, assess and react to unexpected events.
24. The registered nurse's involvement (on average around one and a half hours within 24 hours for the high band) with the person's care will generally be limited to one or two areas of their care which require a nurse's time. As well as the quantity and quality of registered nurse involvement, both of which are greater in the high band, the main factor differentiating the high band from the medium band is the need for ongoing assessment, review and action where necessary from the registered nurse because of the risk of change and deterioration in condition.
25. The medium band will cover someone whose requirement for care from the registered nurse will be more predictable, with lower risk. The low band continues to represent someone whose care could be provided in another setting with minimal intervention from a registered nurse.
26. To the extent that the descriptions of the high band and of the medium band in the "workbook" (NHS Funded Nursing Care: Practice Guide and Workbook) use similar wording to the criteria for full funding, and might appear to describe a need for nursing care beyond that which could be deemed incidental and ancillary, they should be disregarded.
27. When reviewing RNCC determinations, the potential for full funding should always be considered and a full assessment carried out where necessary. A screening tool can support a proportionate consideration.
28. The RNCC bandings are not relevant to, and should not influence, the assessment of a person's eligibility for fully funded NHS Continuing Healthcare; in particular, there should be no concept that the nursing needs contained within the bandings represent a further criterion which impacts on fully funded NHS Continuing Healthcare. Authorities are referred to paragraphs 3(2) and 5(2) of **the National Health Service (Nursing Care in Residential Accommodation) (England) Directions 2001**.
29. Any suggestion that the description of the RNCC bands operate on the decision to award NHS Continuing Healthcare should be removed from criteria.

Further Queries

30. Please direct queries to:

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ANNEX A

The Queen on the application of Maureen Grogan v. Bexley NHS Care Trust

Summary of the judgment

Maureen Grogan has multiple sclerosis, dependant oedema with the risk of ulcers breaking out, is doubly incontinent, is a wheelchair user requiring two people for transfer, and has some cognitive impairment. After the death of her husband her health deteriorated, she had a number of falls and was admitted to hospital on 14 November 2002 with a dislocated shoulder. There it was decided that she was unable to live independently and she was transferred directly to a care home providing nursing care on 18 February 2003.

Subsequent assessments indicated that Mrs Grogan's condition was such that she did not qualify for fully funded NHS Continuing Healthcare. She was initially determined to be in the medium band of NHS-funded nursing care, and remained in this band with the exception of one determination which placed her in the high band from April to October 2004.

Mrs Grogan argued that the decision to deny her full NHS funding was unlawful, since the eligibility criteria put in place by South East London SHA were contrary to the judgment in the *Coughlan* case. She also submitted that the level of nursing needs identified in the RNCC medium and high bandings (in which she had been placed) indicated a primary need for health care which should be met by the NHS.

The Court concluded that in assessing whether Mrs Grogan was entitled to NHS Continuing Healthcare, the Care Trust did not have in place or apply criteria which properly identified the test or approach to be followed in deciding whether her primary need was a health need. The Trust's decision that Mrs Grogan did not qualify for NHS Continuing Healthcare was set aside and the question of her entitlement to NHS Continuing Healthcare was remitted to the Trust for further consideration. There was no finding, or other indication, that Mrs Grogan in fact met the criteria for NHS Continuing Healthcare.