NHS Continuing Healthcare

Transitional Arrangements Following NHS Reorganisation and Pending National Framework Implementation

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For Recipient's Use			

NHS Continuing Healthcare

Transitional Arrangements Following NHS Reorganisation and Pending National Framework Implementation

Introduction

1. The purpose of this guidance is to:

   - ensure that the NHS and Local Authorities are aware of their ongoing responsibilities in relation to continuing care;
   - consolidate guidance 'NHS Continuing Healthcare: Action Following the *Grogan* Judgment', published on 3 March 2006; and
   - provide information to the NHS and Local Authorities on the transitional arrangements for local Continuing Care policy in the light of the organisational changes in NHS structure taking place between July and October 2006.

Action

2. Strategic Health Authorities (SHAs), in consultation with Primary Care Trusts (PCTs) and Local Authorities, where appropriate, should ensure that they have satisfied themselves that their local eligibility criteria and processes for NHS Continuing Healthcare are compliant with the *Grogan* judgment, following guidance published on 3 March 2006. Where legal advice indicated that amendments or clarifications to existing guidance was required, this should have been implemented, including any requirement for local consultation.

3. In accordance with the post-*Grogan* guidance above, and the Department's letter of 28 November 2005[1], PCTs should ensure that they have satisfied themselves that all individuals in receipt of high-band Registered Nursing Care Contribution (RNCC) have been reviewed for potential eligibility for NHS Continuing Healthcare. The outcome of these reviews and rationales for those decisions should be communicated to the individual, their family/carer and the Local Authority, where appropriate.

4. In accordance with this guidance and the associated Directions, SHAs should continue to operate the eligibility criteria for the provision of continuing care inherited from the former SHAs whose areas they cover, pending any review of those policies by the new SHA. PCTs should similarly act in accordance with such inherited criteria pending the establishment of a single set of criteria for the new SHA area. In a small number of cases, SHAs and PCTs will need to choose which of more than one inherited set of criteria to adopt (see paragraphs 16-17).

[1] The November 2005 correspondence can be found at: http://www.dh.gov.uk/PublicationsAndStatistics/LettersAndCirculars/DearColleagueLetters/DearColleagueLettersArticle/fs/en?CONTENT_ID=4125309&chk=Ny7JYR

5. Taking into account the backdrop of public consultation on the proposed National Framework, new SHAs should review their inherited criteria over a reasonable period, and consider whether it would be practical or beneficial, given all relevant considerations, to establish a single set of criteria for their area. See paragraphs 19-22 for further information.

6. New SHAs retain their role in local review procedure, including the responsibility for operating Independent Review Panels (IRPs). In accordance with the Directions, new SHAs should appoint standing chairmen and reserve standing chairmen in relation to each of the inherited eligibility criteria (this may be achieved through the retention of existing appointments). PCT and Local Authority panel members appointed by the former SHAs can remain on the panel until their term of office comes to an end. See paragraphs 23-32.

Background

Ongoing responsibilities of PCTs and SHAs

7. SHAs and PCTs will be aware that the Government announced work to create a National Framework for NHS Continuing Healthcare in December 2004. The Government's proposals for the National Framework for NHS Continuing Healthcare and NHS-funded Nursing Care in England were published for a three-month public consultation on 19 June 2006. Consultation documents can be accessed via the following link:

   http://www.dh.gov.uk/Consultations/LiveConsultations/LiveConsultationsArticle/fs/en?CONTENT_ID=4136175&chk=fOAfTD

8. A timetable for implementation of the National Framework for NHS Continuing Healthcare has not yet been agreed, and is dependent upon the outcome of the public consultation exercise, which finished on 22 September 2006. The Department will publish further guidance in due course on the progress and timetable for implementation of national policy.

9. Pending such further policy developments, the responsibilities of SHAs and PCTs in relation to continuing care continue to be governed by;

   - The Continuing Care (National Health Service Responsibilities) Directions 2004[2] ("the 2004 Directions").
   - Health Service Circular (HSC) 2001/015/Local Authority Circular (LAC) (2001)18: Continuing Care: NHS and Local Councils' Responsibilities[3].

[2] The 2004 Directions can be accessed at:
http://www.dh.gov.uk/PublicationsAndStatistics/Publications/PublicationsLegislation/PublicationsLegislationArticle/fs/en?CONTENT_ID=4077239&chk=OcAIYw
[3] HSC 2001/015: LAC (2001)18 can be accessed at:
http://www.dh.gov.uk/PublicationsAndStatistics/LettersAndCirculars/HealthServiceCirculars/HealthServiceCircularsArticle/fs/en?CONTENT_ID=4004312&chk=yBbC8I

Action following Grogan

10. Departmental guidance *Action Following the Grogan Judgment* was published on 3 March 2006 in response to the High Court ruling in the case of R ex parte (Grogan) v. Bexley NHS Care Trust. The Court ruled that the local eligibility criteria for NHS Continuing Healthcare operated by the defendant Trust were unlawful, since the policy contained no guidance as to the overall test or approach to be applied when assessing an individual's care needs to determine their eligibility.

    Subsequent guidance advised all SHAs to review their local policies and ensure that both content and application were compliant with the judgment. This guidance is available in full at the following web address:

    http://www.dh.gov.uk/PublicationsAndStatistics/Publications/PublicationsPolicyAndGuidance/PublicationsPolicyAndGuidanceArticle/fs/en?CONTENT_ID=4131162&chk=2u2FYp

    Following the issue of this guidance, SHAs sought legal advice to satisfy themselves that their local eligibility criteria for NHS Continuing Healthcare, and the way in which they are applied, were compliant with the terms of this judgment. It is expected that this process of review will have satisfied the immediate need for a review of existing criteria but new SHAs may want to satisfy themselves as to the steps taken.

The implications of reorganisation for Continuing Care criteria and review panels

11. NHS organisational restructuring from 1 July 2006 reduced the number of SHAs from 28 to 10, and the number of PCTs from 303 to 152 from 1 October 2006. This guidance note sets out the effect of these changes on the operation of the 2004 Directions and informs SHAs and PCTs of transitional arrangements set out in further Directions (attached).

Application of Continuing Care criteria

12. Under the 2004 Directions, SHAs are responsible for establishing eligibility criteria for the provision of continuing care. PCTs are responsible for applying those criteria through individual assessments and decisions. This division of responsibilities will continue during this transitional period.

13. Following the merger of SHAs on 1st July 2006, each SHA has inherited more than one set of continuing care criteria from the SHAs which they have replaced. Under the terms of the Order establishing the 10 new SHAs[4] the continuing care eligibility criteria established by the former 28 SHAs are treated as if they had been established by the 10 new SHAs. The Department takes the view that the effect of this is that the continuing care eligibility criteria set by a former SHA remain in force in relation to the areas covered by that former SHA.

[4] The Strategic Health Authorities (Establishment and Abolition) (England) Order 2006 (S.I. 2006/1408 – see in particular, article 8 (provision for continuity in the exercise of functions).

14. At first sight, this might appear to be a breach of the requirement in the 2004 Directions for each SHA to establish a "single set of eligibility criteria" for each PCT and NHS trust in its area. However, the Department takes the view that it is not, provided that each of the new SHAs takes reasonable steps to review the inherited criteria with a view to merging them into a single set over a reasonable period. This is because the duty to establish criteria had to be complied with by 30th April 2004. The continuing requirement on SHAs is not to establish such criteria but to review them as appropriate. Further guidance on such reviews is set out in paragraphs 19-22 below. Pending such a review the continuing care eligibility criteria for each SHA will be the 2, 3 or (in one case) 5 sets of criteria which it has inherited.

15. As far as PCTs are concerned, until their new appropriate SHA[5] reviews the inherited criteria and establishes a new set, the eligibility criteria for the provision of continuing care which they are required to apply by the 2004 Directions will generally be the criteria which were established by the former SHA in which they were situated.

16. Following PCT reorganisation earlier this month, the strict application of this rule leads to some new PCTs being required to operate more than one set of criteria. This might arise for example where a new PCT was formed from the merger of 2 PCTs from different former SHAs; or where a new PCT was created from the areas of old PCTs which had been in different SHA areas. The Department takes the view that this is not desirable. The attached Directions accordingly provide that in cases where a PCT established on 1st October 2006 covers areas from more than one former SHA, then the PCT and the appropriate SHA between them, after consultation with the Local Authority, should decide which one of the sets of criteria should be used.

17. In choosing one policy to apply locally, PCTs and SHAs should have regard to the following:

    a. Whether the policy chosen to be applied was operated by one of the former SHAs which constitute the new SHA in which the PCT is located. For instance, where a new PCT located in the new South Central SHA has the potential for more than one relevant former policy to be operated; it should choose the policy of either the former Thames Valley or Hampshire and Isle of Wight SHAs. This should ensure policy ownership at SHA level and continuity in dispute resolution procedures.

    b. Whether the policy chosen is consistent with that used prior to 1 October 2006 in the Local Authority area with which the new PCT is co-terminous. Again, this should ensure continuity and minimise differences.

    c. Whether the policy chosen minimises the number of different policies operated in the SHA area.

[5] "Appropriate Strategic Health Authority" has the same meaning as in the 2004 Directions.

18. For the same reasons as set out above, the "relevant eligibility criteria" to be used by NHS bodies for the purposes of the Delayed Discharges (Continuing Care) Directions 2004[6] will be the criteria inherited from the former appropriate SHA pending the issue of a single new set of eligibility criteria by the new SHA.

Review of SHA criteria

19. The 2004 Directions require SHAs to review their Continuing Care criteria as frequently as is appropriate, to ensure that the operation of policy is lawful.

20. As indicated above, SHAs will need to review their inherited criteria – all of which should be *Grogan* compliant (see above) – over a reasonable period after 1st July 2006 with a view to establishing a single set of criteria for their area. In deciding what is a reasonable period, SHAs will want to have regard to:

    a. the likelihood and timescale for new criteria being introduced on a national basis (the 'National Framework'). The longer the period is likely to be, the more reasonable it will be for the SHA to review and amalgamate its own criteria in the interim;

    b. the need to promote consistency on a local level and reduce the potential for misapplication and misunderstanding as far as possible;

    c. the scope of any changes required to align the inherited policies; and,

    d. the extent of any consultation which might be required in relation to new criteria. Under the terms of the 2004 Directions, any changes to the criteria will have to be agreed, if possible with the PCTs and Local Authorities in the SHA's area. If changes were to be substantial and affect the way in which services are provided, wider consultation may be required.

21. Given the backdrop of consultation on the introduction of the National Framework, and the timescales required to achieve harmonisation of SHAs' inherited criteria, the Department's view is that it is reasonable for new SHAs to keep changes to their criteria to the minimum necessary, pending further information on the timetable for implementation of national policy.

22. This view should not preclude SHAs from undertaking a review of their inherited criteria at an earlier stage, if considered desirable or practical by the SHA. Any changes to inherited criteria should take account of the Department's position (as set out in public consultation documents), and should of course take account of the post-*Grogan* guidance referred to above.

[6] Delayed Discharges (Continuing Care) Directions 2004 can be accessed at: http://www.dh.gov.uk/PublicationsAndStatistics/Publications/PublicationsLegislation/PublicationsLegislationArticle/fs/en?CONTENT_ID=4077240&chk=ZxWAfe

Review Procedures – new SHAs

23. New Strategic Health Authorities retain their role in local review procedure, including the responsibility for operating Independent Review Panels (IRPs).

24. Since each new SHA will, at least initially, have responsibility for operating more than one set of eligibility criteria, the new body should retain those individuals (e.g. standing chairman) and structures (e.g. IRPs) which relate to each of those former Continuing Care policies. The interim Directions provide that the new SHA should appoint a standing chairman and a reserve standing chairman in relation to each of the inherited sets of eligibility criteria; in practice, this will usually entail the retention of the existing post-holders.

25. Where the new SHA moves to a single set of eligibility criteria for its area, it retains the discretion to keep more than one standing chairman should the SHA so wish, for example to reduce the logistical burden of covering a wide geographic area. In this case, the total number of standing and reserve chairmen per SHA should not exceed the number of its constituent former SHAs.

26. The structure, role and legal status of IRPs does not change, nor the SHA's responsibilities in relation to the formation, administration and maintenance of the panels which operate within their area.

27. From 1 October 2006, under the terms of the Order establishing the new PCTs[7]:

    a. decisions in relation to continuing care taken by the former PCTs which constitute a new PCT are treated as decisions of the new PCT; and,

    b. panel members appointed in respect of former PCTs which constitute a new PCT are treated as appointees of the new PCT.

28. Following article 4(4)(b) of the 2004 Directions, in choosing which new PCT member to include in any panel, the new SHA must not include:

    a. Where the decision being reviewed is, or is treated as being, that of a new PCT, any panel member who has been appointed either by that new PCT or by one of the former PCTs which constitute the new PCT whose decision is being reviewed.

    b. Where the decision being reviewed is that of an NHS Trust, anyone appointed by the new PCT in whose area all of most of the hospitals etc of that NHS Trust are situated, or by any of the former PCTs which constitute that new PCT.

29. In choosing the Local Authority member to include in a review panel, the new SHA should not include a person appointed in respect of the Local Authority which covers any part of the area of the new PCT whose decision is being reviewed.

[7] S.I. 2006/2072. See article 7 (provision for continuity in the exercise of functions).

Review Procedures – new PCTs

30. New PCTs should continue to operate local review procedures with as little disruption as possible to individuals involved.

31. Where, as a result of PCT reorganisation, a new PCT inherits more than one individual included on the panel list, each of those individuals may continue to be panel members until such a time as their term of appointment comes to an end. At such a time, that individual will only be eligible for reappointment provided that there is no other member for that new PCT. Consequently, over time it is envisaged that panel list numbers will reduce to one per new PCT.

32. In the rare cases where more than one new PCT is formed by splitting one former PCT, one individual may be included on panel lists for more than one new PCT. In these circumstances, the new PCTs, in discussion with the individual concerned, should seek to agree through local arrangements which of those new PCTs the individual should continue to represent.

Further Queries

33. Please direct any further queries to:

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