

NHS or social services and ordinary residence disputes?

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Issues to be covered

- In normal times - Health or social care?
- In current times – Health or social care?
- Mental health aftercare (s.117)
- Ordinary residence

Resources

National Framework for NHS Continuing Healthcare and NHS-funded Nursing Care (2018)

<https://www.events.england.nhs.uk/upload/entity/30215/national-framework-for-chc-and-fnc-october-2018-revised.pdf>

The National Health Service Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) Regulations 2012

<http://www.legislation.gov.uk/uksi/2012/2996/contents/made>

Hospital Discharge Service Requirements (19 March 2020)

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/880288/COVID-19_hospital_discharge_service_requirements.pdf

Care Act 2014 section 39

<http://www.legislation.gov.uk/ukpga/2014/23/section/39/enacted>

Care and Support statutory guidance, chapter 19

<https://www.gov.uk/government/publications/care-act-statutory-guidance/care-and-support-statutory-guidance#moving-between-areas-inter-local-authority-and-cross-border-issues>

The Care and Support (Ordinary Residence) (Specified Accommodation) Regulations 2014

<http://www.legislation.gov.uk/uksi/2014/2828/contents/made>

Coronavirus Act 2020 sections 14 and 15 and Schedule 12

<http://www.legislation.gov.uk/ukpga/2020/7/section/14/enacted>

<http://www.legislation.gov.uk/ukpga/2020/7/section/15/enacted>

<http://www.legislation.gov.uk/ukpga/2020/7/schedule/12/enacted>

In normal times - health or social care?

The divide: primary health need

NHS is responsible where the need is a “**primary health need**”

A primary health need is required to be met under the National Health Service Act 2006

Primary health need: CHC

CHC (**continuing health care**) is care that is arranged and funded solely by the NHS for individuals not in hospital but whose needs meet the primary health need criteria

Derives from *R v. North and East Devon Health Authority ex-parte Coughlan* [2001] QB 213

CHC eligibility

- Is determined by reference to the Framework Guidance and Standing Rules (2012)

- Duty to assess for CHC eligibility Rule 21
Standing Rules:

(2) A relevant body must take reasonable steps to ensure that an assessment of eligibility for NHS Continuing Healthcare is carried out in respect of a person for which that body has responsibility in all cases where it appears to that body that—

(a) there may be a need for such care; or

(b) an individual who is receiving NHS Continuing Healthcare may no longer be eligible for such care.

CHC eligibility (cont'd)

- Decision making structure is checklist, MDT (Rule 21(5)), DST, CHC panel decision
- Should be **collaborative** decision: Local Authority must be consulted, as practicable, see Framework Guidance at para.21 and Rule 22 of the Standing Rules

CHC (cont'd)

A CHC eligible patient has his health and social care needs funded by the NHS (including accommodation if that is an assessed need)

See page 7 of the National Framework guidance:

Where an individual has a primary health need and is therefore eligible for NHS Continuing Healthcare, the NHS is responsible for providing for all of that individual's assessed health and associated social care needs, including accommodation, if that is part of the overall need.

CHC (cont'd)

The key difference for a patient is that he will not be charged for NHS CHC provision

If he is not CHC eligible, and care and support is provided under the CA 2014, s.14 gives power to LA to charge (subject to financial assessment and capital threshold)

Care Act 2014: the mirror image provision

NHS is required to provide where need is primary health need, and **LA may not do so:**
CA 2014 s.22

(1) **A local authority may not meet needs** under sections 18 to 20 by providing or arranging for the provision of a service or facility that is **required to be provided under the National Health Service Act 2006 unless—**

- (a) doing so would be merely **incidental or ancillary** to doing something else to meet needs under those sections, and
- (b) the service or facility in question would be of a **nature that the local authority could be expected to provide**

In current times: normal rules suspended (up to a point...)

Coronavirus Act 2020

s.14: reduces duty to conduct CHC assessments under the Standing Rules to a power:

(1) A relevant body does not have to comply with—

(a) the duty imposed by regulation 21(2)(a) of the 2012 Regulations (assessment of eligibility for NHS Continuing Healthcare), or

(b) the duty imposed by regulation 21(12) of those Regulations (duty to have regard to National Framework), so far as relating to the duty referred to in paragraph (a).

Instead of CHC assessments...

The Hospital Discharge Service Requirements

The current legislation does not describe a specific timeframe for carrying out NHS CHC assessments of eligibility, or for individual requests for a review of an eligibility decision (i.e. Local Resolution and Independent Review).

Therefore, NHS CHC assessments for individuals on the acute hospital discharge pathway and in community settings will not be required until the end of the COVID-19 emergency period. Planned legislative change, as part of the COVID-19 Bill, will further support the NHS in relation to this.

The Government has agreed the NHS will fully fund the cost of new or extended out-of-hospital health and social care support packages, referred to in this guidance. This applies for people being discharged from hospital or who would otherwise be admitted into it, for a limited time, to enable quick and safe discharge and more generally reduce pressure on acute services.

The Service Requirements

- “discharge to assess” model
- Full government funding for new or extended out-of-hospital health and social care support packages, referred to in this guidance, for people being discharged from hospital or who would otherwise be admitted into it
- S.75 agreements can be used or varied for this purpose [10.9]
- **Funding under the SR should be separately identified [10.10]**

After care under s.117 MHA 1983

117 provision in normal times

- Purpose is to meet needs arising from the mental health condition and prevent relapse
- Duty imposed on LA and CCG concurrently
- Local agreements often exist re division of responsibility and dispute resolution
- Can include accommodation if sufficient connection to the MH condition
- No charge to the patient

s.117 MHA aftercare in current circumstances

No amendment to LA and CCG duties under s.117 MHA: see CA 2020 and section 3 of the easements guidance, updated on 20 May 2020.

Do the SR apply to s.117 discharges?

- A. Under the Framework Guidance the order of consideration as between s.117 and CHC is s.117 first, and CHC only if s.117 is not available: paras 313-5.
- B. CA 2020 and SR apply only to CHC assessment. If s.117 applies, CHC assessment not applicable
- C. Stated purpose of SR is to free acute and community beds: unlikely to be relevant to 117 provision

Patient with MH and non-MH needs – need to establish which are 117 and which (would be) CHC: possible that SR may apply to non-117 needs which would otherwise be the subject of CHC application

Hospital discharge: the patient who lacks relevant capacity

Hospital discharge: those lacking mental capacity

- No change to MCA 2005 in CA 2020
- Service Requirements make clear that BI decision is required where P lacks capacity to decide care and treatment [page 29]
- Potential for this to delay discharge

Ordinary Residence

OR in normal times

- S.39 CA 2014 & chapter 19 statutory guidance
- No definition of OR
- General rule - *Shah v Barnet* [1983] 1 All ER 226 (HL) test:

“Unless, therefore, it can be shown that the statutory framework or the legal context in which the words are used requires a different meaning, I unhesitatingly subscribe to the view that "ordinarily resident" refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or long duration”

OR in normal times: deeming provisions

Deeming provisions s.39 (2) (4) & (5) disapply the usual OR position in specified circumstances –

- (1) specified accommodation (see the Care and Support (Ordinary Residence) (Specified Accommodation) Regulations 2014) – care homes, supported living & shared lives placements
- (2) s.117 provision and
- (3) NHS accommodation

In current circumstances

- OR continues to be relevant where LA continues to apply the CA as enacted i.e. **where the CA easements are not in force (CA 2014 s.18)**
- Where the **easements are in force**, LA continues to owe a duty to those OR, or of no settled residence, to **meet needs in order to prevent a breach of human rights**
- S.117 MHA determines responsible LA by reference to OR

Last words (1)

- Who pays? Is complex in normal times and can lead to disputes between public bodies
- Often those disputes require analysis of decisions made many years previously as to under what statutory provision support was given to P, and the legal consequences for responsibility now, and financial adjustment
- In current circumstances the normal rules are to a limited extent disapplied: but not entirely.
- The new provisions are time limited
- There is real potential for decisions made now as to the basis upon which P is supported to impact future allocation of responsibility in terms of OR responsibility
- Therefore necessary to have clear recording of decisions including basis of support (117, CHC, applying SR etc.) so as accurately to inform current financial adjustment and also **any future decisions**
- This is a burden on stretched public bodies, but necessary to avoid future difficulties

Last words (2)

- Disputes are more difficult to resolve, evidentially, the more time has passed
- E.g. trying to establish that P was CHC eligible for X years while funded by LA requires evidence that for all of that time, the CHC criteria were met
- Disputes should be promptly identified and notified to other LA/ CCG to prevent those evidential difficulties

Thank you for listening