NHS Continuing Healthcare: Assessing Eligibility Retrospectively

A significant number of our Primary Care Trust (PCT) clients have contacted us recently for advice on how to deal with requests from patients or their estates for a retrospective assessment of the patient’s care needs with a view to obtaining a reimbursement of sums paid by the patient towards their care. To respond to such requests PCTs need to be familiar with the case law and guidance relating to NHS Continuing Healthcare and how to apply eligibility criteria correctly. This briefing note has been prepared to assist PCTs with this challenging task.

Background

In February 2003 the Health Service Ombudsman (“the Ombudsman”) issued a report entitled ‘NHS Funding for Long Term Care’ (‘the Report’). The Report dealt in general with the handling of complaints arising from assessments for fully funded NHS continuing care (‘NHS Continuing Healthcare’), and contained a specific recommendation that Strategic Health Authorities (‘SHAs’) and Primary Care Trusts (‘PCTs’) should:

- review the criteria used by their predecessor bodies, and the way those criteria were applied, since 1996, taking into account the relevant judgments and Department of Health guidance issued since then; and

- make efforts to remedy any consequent financial injustice to patients where the criteria or the way that the criteria was applied were not clearly appropriate or fair.

Following the Report, the Department of Health issued instructions to SHAs to review all existing criteria in their areas and integrate these into a single set of eligibility criteria for each SHA. PCTs were instructed to undertake retrospective reviews of eligibility for funding in cases where funding might have been wrongly refused. This process ought to have been completed by 31 March 2004.

However, new cases for retrospective review continue to come to light, and the recent case of Mike Pearce (see web link at the end of this document) has once again drawn attention to this highly contentious issue. Mr Pearce’s mother Ruby, an Alzheimer’s sufferer incapacitated by a stroke, had been assessed as ineligible for NHS Continuing Healthcare, requiring Mr Pearce to sell her home to pay for nursing home care. Mr Pearce successfully pressed Torbay Care Trust to review retrospectively their assessment of his mother,
ultimately obtaining £50,000 from the Trust in respect of nursing home fees that should have been funded by the NHS.

PCTs will need to be prepared to undertake retrospective assessments of patients’ eligibility for NHS Continuing Healthcare in response to such complaints. Where a patient is found to have been incorrectly deemed ineligible for NHS Continuing Healthcare, PCTs will be expected to reimburse either the patient or their estate to the extent of any financial loss that they may have suffered as a consequence.

The approach to be adopted

The broad approach of PCTs to such retrospective assessments ought to be as follows:

1. Identify which set of eligibility criteria ought to be relied upon in assessing the individual’s eligibility for NHS Continuing Healthcare.
2. Identify the correct test to apply when assessing eligibility.
3. Ensure that that test and the eligibility criteria are now correctly applied retrospectively in reassessing eligibility over the full period of that individual’s care, following the Ombudsman’s Checklist (see below and web link at the end of this document).

Which eligibility criteria to use?

On 16 October 2006 the Department of Health issued guidance entitled ‘NHS Continuing Healthcare: Transitional Arrangements Following NHS Reorganisation and Pending National Framework Implementation’ (‘the Transitional Arrangements’). These Transitional Arrangements make it clear that:

- the NHS Continuing Healthcare eligibility criteria set by a former SHA will remain in force in relation to the areas covered by that former SHA;
- until their new appropriate SHA reviews the inherited criteria and establishes a new set, the eligibility criteria that PCTs are required to apply will generally be the criteria that were established by the former SHA for the area in which the PCT is situated;
- where this leads to a PCT having two sets of applicable criteria following PCT reorganisation, the PCT and SHA between them, after consultation with the Local Authority, should decide which one of these sets of criteria should be used.

PCTs will need to be clear as to which set of eligibility criteria they are to apply, and should clarify this with their appropriate SHA.

The correct test for eligibility for NHS Continuing Healthcare

The judgment in Grogan v Bexley NHS Care Trust [2006] EWHC 44 (Admin) identified the correct legal test to be applied when assessing an individual for eligibility for NHS Continuing Healthcare. This test is referred to as the ‘Primary Health Need Approach’ and is also the test to be applied when assessing eligibility retrospectively.

The Primary Health Need Approach states that a person will be eligible for NHS Continuing Healthcare where the nursing or other health services they require to meet their health needs:

- are more than incidental or ancillary to the provision of accommodation or other care services which the local authority is empowered to provide under their responsibilities as a social services authority; and
• are of a nature beyond that which a local authority could be expected to provide under their responsibilities as a social services authority, but for section 49 of the Health and Social Care Act 2001 (i.e. it should be assumed for the purposes of the Primary Health Need Approach that a local authority is still permitted to provide registered nursing care).

This Primary Health Need Approach should be referred to directly both in the SHA’s eligibility criteria and in any assessments undertaken, including retrospective assessments.

Matters to disregard when applying the Primary Health Need Approach.

It is important to remember that the location of care is not relevant to any consideration of Primary Need.

Also, the issue of Registered Nursing Care Contributions (“RNCC”) and the RNCC bandings should only be considered after the Primary Health Need Approach has been applied and eligibility or otherwise for NHS Continuing Healthcare has been established.

The process for assessing eligibility retrospectively - the Ombudsman checklist

The Ombudsman has issued a Checklist to be followed by PCTs when undertaking retrospective assessments of eligibility. The suggested procedure may be summarised as follows:

1. Gather and scrutinise all available evidence. This will include all the patient’s health and social care records for the appropriate timeframes of the case, together with any evidence submitted by the patient and/or their family/carers. Where relevant documentation is for some reason not available, a record must be made of all attempts to obtain that documentation.

2. Compile a robust and accurate needs portrayal for each timeframe of the case. A list of the patient’s specific health needs should be drawn up and the SHA’s eligibility criteria applied to each one in order to build a picture of the totality of the patient’s health needs for each timeframe of the case. The applicant and/or their family/carers ought to be involved as far as possible in building the needs portrayal. Any contemporaneous records used as the basis for the needs portrayal ought to be annexed to the assessment documentation.

3. First panel stage. This should involve a review of the needs portrayal by clinical/multi-agency staff, applying the Primary Health Need Approach to the totality of the patient’s health needs. If the totality of the patient’s needs for any given timeframe indicate a Primary Health Need, then the patient should be deemed eligible for NHS Continuing Healthcare for that timeframe. The deliberations of the panel should be fully recorded.

4. Decision letter. This should set out the rationale for agreeing/refusing the claim, explaining in appropriate detail why the SHA’s eligibility criteria were or were not met.

5. Second review/appeal stage. This should be demonstrably independent of the first stage process, with appropriate clinical advice sought where necessary. The second stage panel should examine all aspects of the first stage process, including the adequacy/accuracy of the needs portrayal and the robustness of the decision taken. Claimants should be allowed to make submissions and put forward information to the second stage panel. The panel’s deliberations should be fully recorded.
6. **Decision letter.** This should be a clear and evidenced full explanation of the rationale for the second stage panel’s recommendation/decision. Reference should be made to key evidence in support of the outcome and to the patient’s needs based on the needs portrayal and contemporaneous records. The SHA’s core eligibility criteria should be discussed, with reference to evidence relevant to each one. Where the patient is deemed ineligible for NHS Continuing Healthcare but then found to be eligible for High Band RNCC, this should be explained with reference to Department of Health Guidance on such cases.

**Possible outcomes**

The PCT may determine that it’s original assessment was correct and the patient was at no time eligible for NHS Continuing Healthcare.

However, it may equally be determined that the patient was in fact eligible for NHS Continuing Healthcare for the full period of the care that they received or that the patient was initially not eligible, but subsequently became eligible due a deterioration in health.

If either of these latter outcomes is indicated, the PCT will be expected to reimburse the patient or their estate for any financial loss they incurred as a consequence of having to pay for their care.

**Comment**

The case law and guidance on NHS Continuing Healthcare are extensive and complex, and the recent high profile of this issue in the national media means that complaints to PCTs concerning the outcome of assessments are increasingly common.

PCTs will need to develop local procedures for undertaking retrospective assessments in response to complaints received, following the procedure outlined above.

PCTs may wish to seek advice prior to reaching a final determination in sensitive cases.

**Going forward: the proposed National Framework**

Public consultation on the proposed 'National Framework for NHS Continuing Healthcare and NHS-funded Nursing Care in England' ran from 19 June to 22 September 2006. The Government’s Response to the consultation is still awaited and as yet it remains unclear when the National Framework might come into force.

**Links**

The Mike Pearce case:  
[http://news.bbc.co.uk/1/hi/england/devon/6228865.stm](http://news.bbc.co.uk/1/hi/england/devon/6228865.stm)

The Parliamentary and Health Service Ombudsman’s investigation tool checklists for retrospective continuing care funding complaints:  
[http://www.ombudsman.org.uk/make_a_complaint/health/continuing_care_templates.html](http://www.ombudsman.org.uk/make_a_complaint/health/continuing_care_templates.html)

This briefing is intended as general guidance and is not a substitute for detailed advice in specific circumstances.