

Disability Law Service

Offering free, confidential legal advice and
representation for disabled people

NHS Responsibilities

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Introduction

The National Health Service (NHS) provides medical and nursing services as well as services to provide aftercare (care after treatment or an operation). These services are provided in community settings as well as in nursing and care homes and seek to prevent illness. They include community nursing, continence services, palliative care (care for terminally-ill people), respite care (short-term care to give someone's carer a break), chiropody and physiotherapy. However, the NHS responsibilities are not affected by community care laws. This means that if an individual is assessed as eligible for a residential service under **s21 of the National Assistance Act or s2 Chronically Sick and Disabled Persons Act**, then the provision of those services is enforceable by way of judicial review proceedings. This contrasts with the nature of the duty on the NHS to provide NHS services under the National Health Service Act 2006, which is a target duty and the courts will not try and enforce performance. This means that waiting lists in themselves are not unlawful, under the NHS.

NHS Legal Duties

The NHS duties are more general than social services' duties.

Section 1(1) of the **National Health Service Act 2006** says that the Secretary of State must continue to promote an NHS with a full range of services for your physical and mental health; and preventing, diagnosing and treating illness in line with this act. So, section 1(1) does not say that the Secretary of State must provide a full health service. Their duty is 'to continue to promote' a full health service. In general, health services must be provided free of charge. The Secretary of State has the authority to:

1. Provide services they consider appropriate to fulfil their responsibilities under the act; **and**
2. Do anything that will help them carry out these responsibilities.

The Secretary of State has a general responsibility to provide any services he considers necessary to meet the

reasonable conditions of the act. Section 3 says the Secretary of State is responsible to provide the following services throughout England;

1. Hospital accommodation;
2. Accommodation for any service provided under this act;
3. Medical, dental, nursing and ambulance services;
4. Services or facilities for pregnant women, women who are breastfeeding and young children, as part of the health service, as appropriate;
5. Services or facilities to prevent illness, to provide care for people suffering from illness and their aftercare, as part of the health service, as appropriate; **and**
6. Services or facilities to diagnose and treat illness.

Although these legal responsibilities are set out as the Secretary of State's responsibilities, it is also the responsibility of the relevant health authorities and trusts.

Strategic Health Authorities cover large areas. There are ten in England which are responsible for developing plans for improving health services in their local area, making sure local health services are of a high quality and are performing well and increasing how many people local health services can treat.

Primary Care Trusts (PCTs) control 80 per cent of the NHS budget. They directly provide a range of community-health services, provide funding for GPs, dentists, prescriptions and so on and also buy hospital and mental-health services from appropriate NHS trusts or from the private sector. PCTs are responsible for working with local authorities and other agencies that provide health and social care locally to make sure that the local community's needs are being met.

NHS Trusts provide services locally – the main ones are hospital services, ambulance services and mental-health services.

Special health authorities provide a health service throughout England. Examples include the National Blood Authority, Health Protection Agency and the Mental Health Commission.

Continuing Care

The use of jargon and various medical terms can be confusing. The following are useful definitions.

‘Continuing care’ (or ‘long-term care’) is a general term that describes the care which people need over a long period, as the result of disability, accident or illness to cover their physical and mental-health needs. It may include services from the NHS or social care. It can be provided in a range of settings (for example, at home or in nursing homes). It is different from intermediate care (which has specific results for rehabilitation or recuperation for a limited period) and transitional or interim care (care as the patient recovers and returns home or goes into a nursing home from hospital), where the care setting is temporary and different from where people are expected to receive any continuing care they need.

‘Continuing health and social care’ describes a package of care that involves services from the NHS and social care. NHS continuing care services are provided by the NHS free of charge, but services provided by Social Services will usually be provided in line with a means assessment. Strategic Health Authorities must bring together continuing care review

panels to review a decision made about your entitlement to NHS continuing care. The review panels make sure authorities have followed the proper procedures to reach their decisions about providing you with continuing NHS health care and applied the appropriate eligibility conditions to assess you for it.

‘Continuing NHS health care’ describes a package of care arranged and funded by the NHS. The conditions people must meet to qualify for it are set by a level of overall care needs (including, but not limited, to care provided by a registered nurse), which means that the person must have a **‘primary need’** (a serious need) for health care and needs more specialist care than the care social services are able to provide under section 21 of the National Assistance Act 1948.

This is care that is provided by the NHS over an extended period of time to those aged over 18 to meet physical or mental health needs due to illness, disability. Eligibility for Continuing Healthcare is established using the *‘National Framework for NHS Continuing Healthcare and NHS funded Nursing Care’*. This contains the principles for deciding whether someone has a ‘primary health need’. The following factors need to be considered when establishing whether or not there is a primary health need.

- The nature of the needs, including type of help required;
- Intensity including extent and severity of the needs;
- Complexity – how the needs arise and whether they require monitoring;
- Unpredictability – the degree to which needs fluctuate.

Health needs are recorded on a document called a 'Decision Support Tool'.

The Framework advises that decisions on eligibility for Continuing Care should be made within two weeks. PCTs must inform anyone who they decide is not eligible for NHS continuing healthcare of the circumstances and manner in which he may apply for a review of the decision. There is a right to apply to the SHA for an independent review panel (IRP) where the parties have been unable to resolve the matter informally through the local dispute resolution procedures. At this stage you should consider getting advice and/or an advocate to support you. The IRP will review your case and make recommendations to your PCT. The National Framework says that in all but the most exceptional circumstances, the PCT should accept the recommendations. If you

remain unhappy, then you can take your case to the Parliamentary and Health Service Ombudsman.

At the moment, the NHS legislative framework does not allow a right to Direct Payments, although government policy is moving in that direction with the new Health Bill.

Nursing Care

Even if you do not qualify for fully funded NHS care, the NHS is responsible for funding the cost of the nursing provided by a registered nurse. Section 49 **Health and Social Care ('HSC') Act 2001** says that local authorities are prohibited from providing, in connection with their community care services, nursing care which falls within the definition. Section 49 (2) **HSC Act 2001** defines nursing care from a registered nurse as any services provided by a registered nurse and involving:

1. The provision of care; **or**
2. Planning, supervising or employing others to provide care except services which would not normally be provided by a registered nurse.

The NHS contributes to the cost of a nursing home placement to reflect the cost of the registered care provided there.

A trained nurse will carry out one assessment to decide if nursing care is the most appropriate care and what level is needed. Before carrying out that assessment, the PCT must consider whether the duty to carry out an NHS Continuing Healthcare assessment has been triggered, and if so, carry out that assessment. Since October 2007 there has just been a flat rate for the Registered Nursing Care Contribution, currently set at the rate of £106.30 (but for people on the earlier, high rate band there is a transitional rate of £146.30). Payment is made to the home, which must pass it on to you or reduce your fees by that amount. The PCT can provide nursing care without a prior assessment if there is an urgent need.

Joint Working

Local authorities and health authorities have a legal responsibility to consult and cooperate with each other – you should never have to contact one on behalf of the other. You should never be told that there is nothing social services can do ‘because it’s not their responsibility’.

You should never have to wait for services after an assessment while health and social services argue over who is responsible for these services. In this type of situation, they must make temporary care arrangements until they have agreed who is responsible and have taken the relevant action.

Local authorities and health authorities must agree jointly how they assess who is eligible for continuing health and social care, setting out each of their responsibilities for meeting these care needs. This makes sure that services are consistent. Authorities must coordinate care and make sure that a full range of services are available to everybody who needs them. They should also set out clearly who is responsible for providing each service so that if there is a problem, you know who to contact.

NHS Complaints Procedure

There is now a new, simplified NHS Complaints Procedure, which came into force in April 2009.

If you're not happy with the care or treatment you've received, or you've been refused treatment for a condition, you have the right to complain, have your complaint investigated and be given a full and prompt reply.

The NHS Constitution explains your rights when it comes to making a complaint. You have the right to:

- have a complaint dealt with efficiently and have it properly investigated;
- know the outcome of any investigation into the complaint;
- take your complaint to the independent Parliamentary and Health Service Ombudsman if you are not satisfied with the way the NHS has dealt with your complaint;
- make a claim for judicial review if you think you have been directly affected by an unlawful act or decision of an NHS body; **and**
- receive compensation where you have been harmed.

Who should I complain to?

You can complain either to the service you are unhappy with or you can complain to your local primary care trust (PCT) who commission the service.

When should I complain?

As soon as possible. Complaints should normally be made within 12 months of the date of the event you're complaining about or as soon as the matter first came to your attention.

The time limit can be extended sometimes (so long as it is still possible to investigate the complaint). An extension might be possible, for example, in situations where it would have been difficult for you to complain earlier, such as if you were grieving or undergoing trauma.

Where do I start?

As of April 1 2009, the Healthcare Commission is no longer responsible for reviewing patients' unresolved complaints about the NHS. Instead, the government has introduced a new, simplified process that involves just two stages.

- Ask your hospital or trust for a copy of their complaints procedure, which will explain how to take things forward. Your first step will normally involve raising the matter, either orally or in writing, with the practitioner, e.g. the nurse or doctor concerned, or with their organisation, which will have a complaints manager. This is called local resolution and most cases are resolved at this stage.

If you're still unhappy with the outcome, you can refer the matter to the Parliamentary and Health Service Ombudsman, who is completely independent of the NHS and government. Call 0345 015 4033

Who can help?

Making a complaint can feel like rather a daunting process, but there is help available.

- The **Patient Advice and Liaison Service (PALS)** which is located in each NHS trust, can advise you on how to take your complaint forward or help you to resolve it informally. It can't take it up for you.
- The **Independent Complaints Advocacy Service (ICAS)** is a free, confidential and independent service which can help you make a formal complaint about NHS services. You can contact your local ICAS directly. Find it in the phone book, through the hospital manager, or through PALS.
- Or Contact the **Disability Law Service**. We may be able to take your case on, depending on various factors such as eligibility for Legal Help, where you live and our capacity. You can call us on 0207 791 8900 and ask to speak to the Legal Access Team. Alternatively, go to our website www.dls.org.uk or e-mail advice@dls.org.uk

Complaints about GP's

GPs have to have their own complaints procedure for their practice. There are national conditions which they must keep to, including:

1. Providing you with information;
2. Responding to your complaint within two days; **and**
3. Providing an explanation within two weeks.

Health Service Ombudsman

The Health Service Ombudsman looks into complaints about the NHS failing to provide you with a service or a service which has not treated you fairly and so on. The Ombudsman will not normally agree to look into your complaint unless you have gone through the relevant trust's or health authority's complaints procedure first. A health authority can refer a case directly to the Ombudsman under section 10 of the Health Service Commissioners Act 1993, if they think that this will provide you with a more satisfactory response.

You should make your complaint to the Ombudsman within 12 months of the event you are complaining about. This time limit can be increased, usually when the health authority or NHS organisation has taken an unreasonably long time to respond to you through their own complaints procedure.

More information on the Ombudsman can be obtained from www.ombudsman.gov.uk

For detailed advice on any of the issues covered in this factsheet please contact the Disability Law Service on 0207 791 9800.

This factsheet was prepared with the assistance of the MS Society.

Legal Disclaimer

Although great care has been taken in the compilation and preparation of this work to ensure accuracy, DLS cannot accept responsibility for any errors or omissions. All information provided is for education / informative purposes and is not a substitute for professional advice. Any organisations, telephone numbers and links to external web-sites have been carefully selected but are provided without any endorsement of the content of those sites.

For further advice on these matters please contact:

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