

Scottish Parliament Region: South of Scotland

Case 200600528: Scottish Government Health Directorate¹

Summary of Investigation

Category

Scottish Government: Health; policy; NHS funded continuing care

Overview

The complainant (Mr C) raised a number of concerns about the way in which his grandmother (Mrs A) was assessed by Lanarkshire NHS Board (the Board) for NHS funded continuing care. Mr C also raised concerns that the Scottish Government's policy on NHS funded continuing care was unclear and that there was no way for somebody living in the community to be assessed as the policy only provided for assessment upon discharge from hospital.

Specific complaint and conclusion

The complaint which has been investigated is that the Scottish Government Health Directorate failed to take timely steps to update the guidance on NHS funded continuing care despite being aware of problems associated with it (*not upheld*).

Redress and recommendations

The Ombudsman has no recommendations to make.

¹ On 3 September 2007 Scottish Ministers formally adopted the title Scottish Government to replace the term Scottish Executive. The latter term is used in this report as it applies at the time of publication.

Main Investigation Report

Introduction

1. The complainant (Mr C) complained that he considered that the Scottish Executive Health Department (SEHD) policy on NHS funded continuing care, called the MEL (1996)²² (the MEL), was out of date and did not reflect best practice. In particular, he raised concerns that the SEHD had inappropriately failed to update the MEL to reflect recent English case law. Mr C considered that this had adversely impacted on his grandmother (Mrs A) who suffered from vascular dementia and lived in a care home.

2. The complaint from Mr C which I have investigated is that the Scottish Government Health Directorate (SGHD) failed to take timely steps to update the guidance on NHS funded continuing care despite being aware of problems associated with it.

3. This complaint has been investigated in conjunction with Mr C's complaint against Lanarkshire NHS Board (the Board) (case 200502797) about the assessment of Mrs A for NHS funded continuing care.

4. Mr C's complaint was originally submitted to the office in January 2006. I very much regret that the process of considering this complaint has taken much longer than it should have done. I apologise to Mr C and the SGHD for that.

Background Legislation, Case Law and Guidance

5. The National Health Service (Scotland) Act 1978 (the 78 Act), section 1, outlines the general duty of the Secretary of State (now the Scottish Ministers) to promote a comprehensive and integrated health service and to provide or secure the effective provision of services for that purpose. Section 36 of the 78 Act relates specifically to the provision of nursing and other services considered necessary to meet all reasonable requirements (see Annex 3). The duty placed on local authorities in Scotland by the Social Work (Scotland) Act 1968 (the 68 Act) is to promote social welfare by making available advice, guidance and assistance as appropriate (this will include the provision of residential and other establishments). Both the 68 Act and the 78 Act are relevant to the decisions in this case.

6. Each NHS board in Scotland has a duty to meet the healthcare needs of people in its geographical area who require continuing healthcare. This care is

commonly referred to as NHS funded continuing care and can be provided in a number of settings but is paid for entirely by NHS boards.

7. Each NHS board also has a duty to ensure any necessary arrangements are in place for in-patients prior to discharge. Responsibility for making these arrangements will vary according to the particular needs of each patient. The decision to discharge is made by the doctor responsible for the patient's care and is a clinical decision. In some cases it will also involve joint working between hospital staff, the GP and social services staff (in fulfilment of their obligations under the 68 Act). Where there are costs involved in meeting the particular needs identified these can be met in a number of ways including self-funding by the patient (or the patient's family), local authority funding (which will vary according to need and circumstance) or NHS funded continuing care as appropriate.

8. A circular was issued in 1996, the MEL, by the then Scottish Office Department of Health, setting out both the responsibilities of the NHS to arrange discharge and the criteria for NHS funded continuing care. Annex A of the MEL states that (health boards) should arrange and fund an adequate level of service to meet the needs of people who because of the 'nature, complexity or intensity of their healthcare needs will require continuing inpatient care ... in hospital ... or in a nursing home'.

9. The MEL sets out in greater detail a number of criteria which all health boards must cover for their locality. Paragraph 16 of the MEL sets out the nature of the assessment of health needs which is to be carried out. Paragraph 20 sets out the eligibility criteria for NHS funded continuing care. Paragraph 5 of Annex A to the MEL sets out similar general principles. As relevant to Mrs A's situation the conditions can be summarised as applying to those circumstances where either: a patient needs ongoing and regular specialist clinical supervision on account of the complexity, nature or intensity of his or her health needs; a patient requires routine use of specialist healthcare equipment or treatments requiring the supervision of NHS staff; or a patient has a rapidly degenerating or unstable condition which means they will require specialist medical or nursing supervision.

10. At the time the MEL was issued, similar guidance was issued for England and Wales. The situation in England and Wales has developed significantly since 1996 as a result of a number of important judgements by the Court of

Appeal and the High Court in England including the Coughlan Judgement (see Annex 4) and reports issued by the Health Services Ombudsman for England in January 2003 and December 2004. These developments attracted considerable media attention as a result of which the NHS in Scotland received a number of complaints about continuing care funding. The SEHD issued a letter (DKQ/1/44) to all NHS Chief Executives on 13 June 2003, outlining the process for handling such complaints. In summary, during the time this complaint was being pursued by Mr C, the position with regard to guidance issued by the SGHD on NHS funded continuing care in Scotland remained limited to that set out by the MEL.

11. On 7 February 2008, the SGHD issued a circular entitled CEL 6 (2008) (the CEL). This provides revised guidance on NHS funded continuing care and replaces the previous guidance contained in the MEL. The CEL states that its purpose is not to alter existing NHS responsibilities for continuing healthcare but to update and clarify guidance to take account of the legislative and policy changes in care provision since 1996. The criteria for eligibility for NHS funded continuing care remain the same as in the MEL. However, the CEL does provide for assessments to be made in the community in circumstances other than discharge from hospital; specifically a GP, community nurse or social worker may request that one be carried out. The CEL is clear about what information about the assessment should be recorded in a patient's medical records and clarifies that, due to the level of specialist treatment required, it is expected that NHS funded continuing care will generally be provided in a hospital ward, hospice or contracted in-patient bed.

Relevant English Case Law

R v North and East Devon Health Authority ex parte Pamela Coughlan [2000] 2 WLR 622 (the Coughlan Judgement)

12. The court found that a local authority can provide nursing services but that this is limited to such services which are provided as ancillary to the accommodation provided by the local authority in fulfilment of a statutory duty. The court also considered the eligibility criteria for NHS funded continuing care and noted that health department guidance could not alter a legal responsibility under the National Health Service Act 1977. In particular it drew attention to a danger of excessive reliance in the health department guidance on the need for specialist clinical input. The court concluded that whether it is lawful to transfer care from NHS to local authority responsibility depends generally on whether

the nursing services are incidental/ancillary to the local authority provision and of a nature which the local authority can be expected to provide.

R (on the application of Maureen Grogan) v Bexley NHS Care Trust and Others [2006] EWHC 44

13. The court ruled that the eligibility criteria for NHS funded continuing care were unlawful as they contained no guidance as to the test or approach to be applied when assessing a person's health needs in determining eligibility.

14. The Ombudsman has received legal advice in relation to NHS funded continuing care cases. It states that decisions of courts in England, other than the House of Lords, cannot bind Scottish courts as they are decisions of a different legal jurisdiction; however, they may be persuasive. The cases described above were decided in English courts. The first is a decision of the Court of Appeal and the second is a decision of the High Court. These decisions are not binding on a Scottish court. However, what they have to say may be persuasive depending on the precise nature of the Scottish case before the court. The legal advice concluded that it was in no way clear that the SGHD were under any legal obligation to review the Scottish guidance in light of the Coughlan and Grogan judgments.

Parliamentary and Health Service Ombudsman (England) Report into NHS Funding for the Long Term Care of Older and Disabled People

15. In 2003 the English Ombudsman produced this report which found that some NHS bodies were struggling and failing to conform with the law and guidance which followed on from the Coughlan case and this was resulting in actual or potential injustice arising to frail elderly people.

Investigation

16. Investigation of this complaint involved making enquiries of the SGHD, considering the MEL and the CEL, and examining other relevant documentation concerning the review of the MEL.

17. The Ombudsman has received a number of complaints on the subject of NHS funded continuing care. This complaint has been investigated in the context of those complaints. The Ombudsman has also taken legal advice in relation to the issues surrounding NHS funded continuing care and I have taken this into account in reaching my decision on this case.

18. I have not included in this report every detail investigated but I am satisfied that no matter of significance has been overlooked. Mr C and the SGHD were given an opportunity to comment on a draft of this report.

Complaint: The SGHD failed to take timely steps to update the guidance on NHS funded continuing care despite being aware of problems associated with it

19. Mr C initially complained to the Board because he considered that Mrs A, who suffered from vascular dementia and resided in a care home, should qualify for NHS funded continuing care. He considered that the cost of the care home should be funded by the NHS because her primary need was for healthcare.

20. As Mr C pursued his complaint against the Board, he became aware of the MEL. Mr C was concerned that the MEL had not been updated to reflect recent English case law.

Background

21. The MEL was issued on 6 March 1996 and was not reviewed until the issue of the CEL on 8 February 2008. Much has changed in that period in terms of how the NHS is organised, how care is provided and the surrounding statutory and policy context.

22. The lack of a formalised process for NHS funded continuing care assessment under the MEL meant the public were often unable to obtain clear information about the qualification criteria for NHS funded continuing care. There was a lack of clarity about when a patient should be the subject of a multi-disciplinary assessment under the MEL. This assessment generally occurred at the time of a patient's discharge from hospital. Not every patient discharged required to be assessed under the MEL but there was no clear guidance on how the decision on whether or not to assess was made. Decisions about whether patients need to be assessed for eligibility for NHS funded continuing care are properly made by consultants as part of the process of deciding whether they can be discharged from hospital. There was no formal requirement under the MEL for such decisions to be documented and where documentation exists it tends to be sparse. This resulted in a lack of transparency and potential inconsistency in the decisions made.

23. The lack of a formalised process for NHS funded continuing care assessment under the MEL also resulted in a lack of clarity about how somebody who was not being discharged from hospital could access the NHS funded continuing care assessment process under the MEL. The NHS has moved to work more closely with local authorities on assessment of care needs. The MEL did not reflect any role for such activities in assessing the potential eligibility of those currently living in the community (rather than this being carried out by hospitals as part of their discharge procedures).

24. The fact that certain patients were not considered eligible to be assessed without being given any formal assessment resulted in confusion about the reasons for refusal of funding. The way in which the MEL functioned was not always clearly communicated to families and they were often not provided with details on how to appeal and request a review of the decision to refuse funding. Furthermore, if somebody was not considered eligible to be assessed under the MEL, there was no automatic right of appeal and no formal way in which the family or the patient could request an official assessment.

Particularities of this complaint

25. Mr C complained to the Board on 28 January 2004 that he considered that Mrs A's care home costs should be funded by the NHS as continuing care as her primary need was for healthcare. Mr C referred to recent English case law on NHS funded continuing care and asked how this applied in Scotland.

26. The Board responded that the relevant English case law did not apply in Scotland and went on to state that the responsibility for residential care lay with the local authority so Mr C should raise his concerns with them. The local authority responded to Mr C and explained that Mrs A had been subject to a community care assessment involving social work and health professionals on 17 December 2002 and the outcome of this was that she required nursing care in a home setting.

27. Mr C was keen to understand why Mrs A did not qualify for NHS funded continuing care. He exchanged several letters with the local authority and the Board requesting details of the assessment which had been carried out.

28. On 27 August 2004, Mr C again raised his concerns with the Board. The Board explained that Mrs A had been subject to a community care assessment which included the view of her consultant psychiatrist before she was placed in

a care home. They stated that the clinical decision was that Mrs A did not require NHS funded continuing care. They explained that the consultant psychiatrist, in consultation with all those involved in the patient's care, decides the level of mental health continuing care which is focused on those patients that require specialist nursing and medical input due to behavioural and/or psychological problems.

29. On 8 November 2004 Mr C raised a formal complaint with the Board about Mrs A's assessment for NHS funded continuing care. Mr C raised concerns that no formal assessment had been carried out against NHS funded continuing care criteria and that he considered that the guidelines in the MEL had not been followed.

30. I investigated a related complaint (case 200502797) about these issues but did not uphold the complaint as I found that Mrs A did not meet the criteria for NHS funded continuing care.

Action taken by the SGHD to review the MEL

31. On 13 June 2003, the SGHD wrote to all NHS Chief Executives, Directors of Finance, Directors of Public Health, Chief Legal Officers and Local Authority Directors of Social Work. The letter referred to the English Ombudsman's report 'NHS funding for long term care' and stated that there may be a potential for similar situations to arise in Scotland. As the Scottish Executive and the SPSO were being approached by members of the public with concerns about NHS funded continuing care, the letter provided guidance on how such complaints should be dealt with. They emphasised the importance of ensuring that the criteria used to assess patients referred back to the guidance within the MEL. The Scottish Executive also asked NHS boards to provide information about the number of complaints about the funding of continuing healthcare being received and the outcomes of these complaints.

32. On 7 June 2004, the SEHD wrote again and asked for information on the nature of complaints received in June and July that year. They also asked for any suggestions of issues which were not already covered by the MEL and whether they considered complaints arose due to a lack of clarity.

33. Some local authorities and NHS boards responded to the second letter. The majority did not raise any concerns about the MEL but some did explain the difficulties which they had with the MEL. These included:

- the nature of the difference between the situations in England and Scotland;
- the status of the English Ombudsman's decisions on NHS funded continuing care;
- the levels of care which should be provided to patients with dementia; and
- whether the existence of a chronic or severe health problem automatically gives an entitlement to NHS funded continuing care.

34. The SEHD thereafter conducted a review of all of the information which they had gathered in order to reach a view on what the revised guidance would contain. It is not clear when this review was conducted as the report produced is undated. However, I assume this was written towards the beginning of 2007 or the end of 2006, immediately prior to when a draft revised version of the MEL was produced. This review stated that the SEHD were in agreement with the Ombudsman's opinion that the MEL could be clearer. Thereafter, no further action was taken until the end of 2007 when the SGHD engaged in consultation with stakeholders with a view to issuing new guidance.

35. The new guidance, the CEL, was issued on 7 February 2008. The CEL does not change the criteria for NHS funded continuing care but does make provision for assessments to be made in the community and for specific details of the assessments to be recorded.

36. As part of my investigation of Mr C's complaint against the Board (case 200502797) I asked the Ombudsman's medical adviser (the Adviser) to review Mrs A's medical records and to advise me whether Mrs A met the criteria for NHS funded continuing care under the MEL or the CEL. The Adviser stated that Mrs A would not have qualified for NHS funded continuing care under either the MEL or the CEL.

Legal advice

37. The Ombudsman's legal adviser provided advice on NHS funded continuing care cases in general. When asked whether the English case law and Ombudsman report would give rise to any legal obligations on the SGHD or Scottish health boards, they stated that there is no actual direct effect. The Coughlan decision is not binding in Scotland and there has been no similar decision in the Scottish courts. Unless there is a Scottish decision in Coughlan-type terms, there is no legal imperative for the SGHD to update the Scottish guidance on this basis.

38. The Adviser explained that it is not sufficient to say that Scottish guidance should be changed because an English case has been decided or the position in England has moved on. Any review by the SGHD also has to take account of further new and different legislation in terms of Scottish legislation and the free personal and nursing care policy in Scotland.

39. The Adviser concluded that it is not directly applicable to use English case law and other developments to establish an argument for a policy change in Scotland.

Conclusion

40. The SEHD/SGHD took from June 2003 to February 2008 to produce updated guidance on NHS funded continuing care. The new guidance does not change the criteria for NHS funded continuing care but does make some administrative changes to the way in which an assessment for continuing care can be accessed and the details of the assessment which must be recorded.

41. I have received clinical advice that Mrs A would not have qualified for NHS funded continuing care under the MEL or the CEL. However, the CEL has made it easier for people to be assessed in the community and Mrs A may have been assessed in the community had an appropriate person considered it relevant to refer her. Even if this had occurred, however, Mrs A would not have qualified for NHS funded continuing care. It can, therefore, not be said that Mrs A suffered any injustice from the SGHD's delay in updating their guidance.

42. It is apparent that the complaint arises because of confusion caused by the differing English position.

43. The SEHD/SGHD were aware of the English case law and the concerns and complaints which were arising in Scotland. Nevertheless, the SEHD/SGHD did not update the policy for five years. I must determine whether the developments should have prompted the SEHD/SGHD to review the guidance more promptly. In the reviewed guidance the issues under dispute, the criteria for NHS funded continuing care, were not changed and remain different from the English criteria. The new guidance would, therefore, in all probability not have prevented this complaint from arising. It is not the role of this office to determine what direction government policy should take or the level of priority that should be accorded to policy updates.

44. Furthermore, the legal advice which the Ombudsman has received states that English case law and developments are not directly applicable in Scotland and that they would not put the SGHD under any obligation to change their policy or to bring it into line with the English situation.

45. As the CEL criteria are identical to the MEL criteria, I cannot conclude that the delay in updating the policy resulted in any injustice to Mr C or Mrs A and I, therefore, do not uphold this complaint. Furthermore, the SEHD/SGHD were aware of the English developments and had considered whether they applied in Scotland.

Explanation of abbreviations used

Mr C	The complainant
SEHD/SGHD	Scottish Executive Health Department/ Scottish Government Health Directorate
The MEL	MEL (1996)22
Mrs A	Mr C's grandmother, the aggrieved
The Board	Lanarkshire NHS Board
The 78 Act	The National Health Service (Scotland) Act 1978
The 68 Act	The Social Work (Scotland) Act 1968
The CEL	CEL 6 (2008)
The Adviser	The Ombudsman's medical adviser

Summary of legislation, policies, case law and reports considered

National Health Service (Scotland) Act 1978	Section 36 states: (1) It shall be the duty of the Secretary of State to provide throughout Scotland, to such extent as he considers necessary to meet all reasonable requirements, accommodation and services of the following descriptions - (a) hospital accommodation, including accommodation at state hospitals; (b) premises other than hospitals at which facilities are available for any of the services provided under this Act; (c) medical, nursing and other services, whether in such accommodation or premises, in the home of the patient or elsewhere
Social Work (Scotland) Act 1968	Under section 12 A (which was inserted by the National Health Service and Community Care Act 1990) a local authority has a duty to promote social welfare by making available advice, guidance and assistance as appropriate (this will include the provision of residential and other establishments)
MEL 1996(22)	Sets out the responsibilities of the NHS to arrange discharge and the criteria for eligibility for NHS funded continuing care. Issued by the then Scottish Office Department of Health
SGHD Circular No. SWSG10/1998	Scottish Office: Community Care Needs of Frail and Older People (Integrating Professional Assessments and Care Arrangements)

SGHD Circular
No. CCD 8/2—3

Choice of Accommodation – Discharge from
Hospital

SEHD Letter
DKQ/1/44

Directorate of Service Policy and Planning
letter to all NHS Chief Executives on
13 June 2003, outlining the process for
handling continuing care funding complaints

The Health Service
Ombudsman for England

HC399 (2002 – 2003) & HC144 (2003 - 2004)
Reports on NHS funding for long term care

CEL 6 (2008)

This letter was issued on 7 February 2008 and
provides revised guidance on NHS funded
continuing healthcare. It replaces the previous
guidance contained in MEL (1996)22

List of Case Law (and brief summary conclusions)

R v North and East Devon
Health Authority ex parte
Pamela Coughlan [2000] 2
WLR 622 (the Coughlan
Judgement)

The court found that a local authority can provide nursing services but that this is limited to such services which are provided as ancillary to the accommodation provided by the local authority in fulfilment of a statutory duty.

The court also considered the eligibility criteria for NHS funded continuing care and noted that health department guidance could not alter a legal responsibility under the National Health Service Act 1977. In particular it drew attention to a danger of excessive reliance in the health department guidance on the need for specialist clinical input.

The court concluded that whether it is lawful to transfer care from NHS to local authority responsibility depends generally on whether the nursing services are incidental/ancillary to the local authority provision and of a nature which the local authority can be expected to provide

R (on the application of
Maureen Grogan) v Bexley
NHS Care Trust and Others
[2006] EWHC 44

The court ruled that the eligibility criteria for NHS funded continuing care were unlawful as they contained no guidance as to the test or approach to be applied when assessing a person's health needs in determining eligibility