

Case 200800078: Ayrshire and Arran NHS Board

Summary of Investigation

Category

Health: Continuing Care

Overview

The complainant (Mr C) complained on behalf of his stepmother (Mrs A) about the assessment made of her condition on 15 October 2007, which led to Ayrshire and Arran NHS Board's (the Board) decision that she was not entitled to NHS Continuing Care, despite having qualified for a previous period in England. Mr C also complained that the benefits of moving to be closer to him as her only surviving relative were discounted by the Board and he also complained about how the Board handled the matter. Sadly, Mrs A died on 26 January 2008.

Specific complaints and conclusions

The complaints which have been investigated are that:

- (a) the assessment on 15 October 2007 was inadequate (*not upheld*);
- (b) the Board discounted the benefit of Mrs A's move to be closer to her family (*not upheld*); and
- (c) the Board failed to explain properly the decision not to award continuing care funding (*upheld*).

Redress and recommendations

The Ombudsman recommends that the Board;

- (i) apologise to Mr C for failing to explain the decision properly;
- (ii) undertake a retrospective assessment of Mrs A's eligibility for NHS Continuing Care from the point of her transfer to Scotland;
- (iii) consider whether they now have a preferred or standardised format for decisions relating to and documentation of assessments for NHS Continuing Care;
- (iv) consider what procedures they have in place to assess cross border transfers where there is no request or need for NHS Continuing Care;

- (v) consider what procedures they now have in place to ensure that all care home residents are routinely assessed at the point of entry and thereafter, with regard to their eligibility for NHS Continuing Care;
- (vi) consider under what circumstances they will consider retrospective requests for NHS Continuing Care; and
- (vii) review the instructions they give to their staff on the handling of assessments relating to extraordinary issues such as cross border patient movement.

The Board have accepted the recommendations and will act on them accordingly.

Main Investigation Report

Introduction

1. On 19 August 2003 Mrs A was admitted to hospital in England, where she lived at the time. Following treatment for a stroke, Mrs A was discharged from hospital on 23 September 2003 to an NHS bed at a nursing home in England (Nursing Home 1). Mrs A remained in Nursing Home 1, however, following rehabilitation, this changed to a self funding basis from 1 November 2003 until 4 January 2005, when she moved to a nursing home (Nursing Home 2) within the area of Ayrshire and Arran NHS Board (the Board), also on a self funding basis. Whilst in Nursing Home 1, Mrs A had been considered not to be eligible for NHS Continuing Care (fully funded by the NHS). On 15 February 2007 the complainant (Mr C) appealed against that decision to an Independent Review Panel, who wrote to Mr C on 23 March 2007 upholding his appeal. The Independent Review Panel found that Mrs A had not been assessed appropriately and was entitled to NHS Continuing Care from 1 November 2003 to 4 January 2005 (when she moved to Nursing Home 2). The fees which she had paid to Nursing Home 1 during this period were refunded by the NHS. On 11 September 2007 Mr C wrote to Mrs A's GP enclosing the appeal papers. He asked for Mrs A to be assessed for NHS Continuing Care. On 15 October 2007 a consultant physician in geriatric medicine (the Consultant) visited Mrs A in Nursing Home 2 to carry out the assessment. The Consultant found that Mrs A did not satisfy the Scottish criteria for NHS Continuing Care. Mr C complained to the Board, who responded to his complaints, but Mr C remained dissatisfied and on 3 April 2008 Mr C complained to the Ombudsman.

2. The complaints from Mr C which I have investigated are that:
- (a) the assessment on 15 October 2007 was inadequate;
 - (b) the Board discounted the benefit of Mrs A's move to be closer to her family; and
 - (c) the Board failed to explain properly the decision not to award continuing care funding.

Background Legislation, Case Law and Guidance

3. 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.

4. 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 Continuing Care and can be provided in a number of settings but is paid for entirely by NHS boards.

5. A circular was issued in 1996, MEL(1996)22 (the MEL), by the then Scottish Office Department of Health, now the Scottish Government Health Directorates (SGHD), setting out both the responsibilities of the NHS to arrange discharge and the criteria for NHS 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'.

6. 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 Continuing Care. Paragraph 5 of Annex A to the MEL sets out similar general principles. The conditions, as relevant to Mrs A's situation, 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.

7. 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 (the Coughlan and Grogan judgments - see Annex 4) and reports issued by the Health Service 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 SGHD Directorate of Service Policy and Planning 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 Continuing Care in Scotland remained limited to that set out by the MEL. The guidance said that a patient currently receiving NHS care who wished to appeal against the decision to discharge them should have their case reviewed in the first instance by the Board's Director of Public Health. If a complaint was received from a person who was no longer in receipt of NHS care the matter should be handled through the NHS complaints system including review by independent assessors.

8. However, on 7 February 2008, the SGHD issued a circular entitled CEL 6 (2008) (the CEL). This provides revised guidance on NHS 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 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 Continuing Care will generally be provided in a hospital ward, hospice or contracted in-patient bed.

9. The Ombudsman has received legal advice in relation to NHS 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.

Investigation

10. In order to investigate this complaint I have had access to Mrs A's clinical records (from January 2005 onwards) from her GP Practice and the local hospital, as well as her notes from Nursing Home 2 and the complaint correspondence. I have obtained clinical advice from two advisers to the Ombudsman who are hospital consultants in medicine for the elderly, one in England (Adviser 1) and one in Scotland (Adviser 2). 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 Board were given an opportunity to comment on a draft of this report.

(a) The assessment on 15 October 2007 was inadequate

11. In response to Mr C's letter of 11 September 2007, Mrs A's GP wrote to the Consultant. He asked the Consultant if she could review Mrs A for an assessment for NHS Continuing Care. He said that Mrs A was living in England when she suffered a stroke secondary to atrial fibrillation. This required hospitalisation and subsequent admission to a nursing home. The GP said that it would appear that Mrs A was turned down for NHS Continuing Care at that time. In January 2005 Mrs A moved to Nursing Home 2. Mr C had subsequently won an appeal which agreed that Mrs A should have had NHS Continuing Care and she was retrospectively awarded backdated monies up to the date of transfer to Nursing Home 2. At Nursing Home 2 Mrs A was assessed and offered free personal care (£65 per week for social care and £145 per week for nursing care) which she continued to receive. The GP said that Mrs A had fitted in well at Nursing Home 2 and he felt that she required nursing care, as did the nurses involved. He asked the Consultant to consider whether Mrs A required full NHS Continuing Care. The GP sent the Consultant a copy of papers relating to the appeal, which Mr C had sent to him.

12. The Consultant replied to the GP on 16 October 2007. She confirmed that she had been to Nursing Home 2 the previous day to see Mrs A, who was up and dressed and in the day room when she visited. The Consultant said that Mrs A walked quite quickly to a room to see her, with the help of one nurse. The Consultant said that Mrs A had not required to be admitted to hospital since she came from England nearly three years previously. Mrs A had had several day attendances at the plastic surgery clinic, for removal of a lesion and skin grafting to her leg, a few weeks before. The Consultant said that Mrs A had a degree of dementia but they had a simple and clearly sensible conversation. The Consultant said that she understood from the nurse that Mrs A needed

straightforward help to eat the standard nursing home diet. Mrs A's skin was intact and she did not require a special mattress. The Consultant said that Mrs A was on antidepressants but no other psychotropic drugs. She was doubly incontinent but that seemed to be managed well using pads and regular toileting; for example, she did not smell of urine and her skin was intact. The Consultant said that Mrs A did not appear to fit the criteria for NHS Continuing Care.

13. The Consultant said that the criteria for the assessment were those laid down in MEL. They could be considered by answering the following questions:

- Was the patient terminally ill or did they have an expectation of life of 6 months or less?
- Did the patient have a condition which required more care than that which could have been provided by a GP or general nursing staff, i.e., were patients with requirements similar to the patient's currently being managed in the community?
- Whether there were mental health problems which required specialist care?
- Did the patient require specialist intervention from any discipline on a regular basis, or nursing care or observations because of these specialist interventions?
- MEL document suggests weekly intervention from specialist care as a frequency which would suggest a need for NHS Continuing Care.

14. The Consultant said that, based on her assessment of Mrs A and discussion with the senior nurse, she would answer 'no' to the five questions and, therefore, she did not believe that Mrs A satisfied the criteria for NHS Continuing Care.

15. Mr C said that he disagreed. He considered that after Mrs A moved to Nursing Home 2 her needs continued to be for health care rather than social care and, therefore, he felt that the NHS should still be responsible for funding the full cost.

16. Following a meeting with Mr C on 19 February 2008, the Board's Assistant General Manager wrote to him on 12 March 2008. He confirmed that the Consultant's assessment was based on the criteria in MEL (1996). He agreed that the assessment was based on one visit to Mrs A, who was not known to the

Consultant. However, the nurses caring for Mrs A, who would have had more background information regarding her condition, were also asked to comment and their opinions were taken into account as part of the assessment. He went on to say that the Consultant visited Mrs A to assess her physical and functional needs. Based on her assessment and discussion with the nursing staff, the Consultant concluded that Mrs A did not require NHS Continuing Care. The Consultant did not carry out a formal assessment of Mrs A's cognitive state, however she stated in her letter that Mrs A appeared lucid. The Consultant referred to a conversation with Mrs A and had clarified that this was a fairly simple conversation about how long she had been in Nursing Home 2 and the reasons for her move from England. The nursing staff had not highlighted any concerns regarding Mrs A's cognitive state.

17. Adviser 1 reviewed Mrs A's hospital records and the complaint correspondence. (The records from Mrs A's GP and Nursing Home 2 had not been recovered at this stage.) Adviser 1 said that the Consultant's assessment was brief, superficial and not conducted in a consistent and meaningful way which identified all of Mrs A's care needs so that the evidence could be formally measured against the relevant criteria. Adviser 1 indicated that, while he did not disagree with the Consultant's decision that Mrs A's care needs as assessed by her did not meet the criteria for Scotland or England, it was important for the assessment to be carried out in a detailed and comprehensive manner, particularly as Mrs A's status had changed from that found by the Independent Review Panel. Adviser 1 said that while many of the criteria were indirectly assessed, ie, mobility, continence, communication and feeding, some were given no evidential backing. Adviser 1 said that, apart from the dressings on her leg, Mrs A's nursing needs were not identified. The Consultant did not carry out any simple mental testing, such as the Abbreviated Mental Test (AMT) or Mini-Mental Score Examination (MMSE) to give some measurable assessment of Mrs A's level of dementia, only estimating her interaction in conversation. Adviser 1 said that he would have expected an assessment of any variability in behaviour, mood or levels of alertness which might have been unpredictable or frequent and require special handling. Adviser 1 noted that Mrs A was on antidepressants. He said that the Consultant could have carried out a simple measured assessment of Mrs A's mood, for example, the Geriatric Depression Scale (GDS) (a 15 answer questionnaire, which takes less than five minutes to complete). Adviser 1 said that no evidence from Mrs A's nursing notes was referred to and there was no mention of Mrs A's expressive dysphasia from her previous stroke. Adviser 1 said that he would also have

expected the Consultant to have obtained a copy of Mrs A's previous assessment from England.

18. In response to my written enquiries, the Board's Executive Nurse Director wrote to me on 18 August 2008. She said that she had obtained a further statement from the Consultant, who said that she had not sought Mrs A's previous assessments from England as Mrs A's level of dependence appeared to be significantly above the level where she would require a long term NHS hospital bed and that level appeared to have been stable for some time. The Consultant believed that these assessments would not have assisted her. The Consultant said that she had not assessed Mrs A's AMT or MMSE for two reasons. Firstly, she had been assessing Mrs A's physical state only. Secondly, the tests were intended to be some measure of a patient's cognition but they were not intended to assess factors which often make a difference between someone needing hospital or nursing home care, such as behavioural difficulties or level of supervision. That was also why the Consultant had not performed specific assessments in relation to variability of behaviour, mood or levels of alertness which may have been unpredictable or frequent or require special handling. The Consultant had spent some time speaking with the nurse in charge at Nursing Home 2, who appeared to know Mrs A well, and they had also reviewed the current nursing care plans. The Consultant said that she could provide no written evidence of this but that the nurse could corroborate if asked. The Consultant said that she did not consider expressive dysphagia further (see paragraph 16). She did not consider that this would have affected her decision as to Mrs A's level of dependence. The Consultant believed that the answers Mrs A gave made sense and it did not affect their conversation.

19. I asked Adviser 2 to review the response I had received from the Executive Nurse Director. I also asked him to review Mrs A's notes from Nursing Home 2 and from her GP Practice, to ascertain whether they disclosed any evidence which would lead him to believe that Mrs A satisfied the Scottish criteria for NHS Continuing Care.

20. Adviser 2 confirmed that the criteria outlined in the MEL were applicable in October 2007. Adviser 2 said that the Consultant's summary of the criteria in her review letter was appropriate and correct. Adviser 2 said that the Consultant based her opinion appropriately on a combination of a brief personal assessment of and conversation with Mrs A, who could only give an incomplete account of her situation and needs, and discussion with those providing care for

her in Nursing Home 2. Adviser 2 said that in Scotland there was no requirement to undertake any specific test or tests as part of the assessment for NHS Continuing Care. Adviser 2 said that the use of standardised tools such as MMSE, AMT or GDS were not routinely used to make decisions regarding care needs and were not designed for that purpose. The more accurate and reliable method was the one the Consultant used, namely: a discussion with the care staff regarding the level of nursing input that Mrs A actually required to mobilise, dress, toilet and feed; whether there were any additional nursing needs relating, for example, to skin care or swallowing difficulties; whether there were specific behavioural difficulties which required specialist or higher level nursing input; whether Mrs A required to be seen frequently by medical staff or had been hospitalised frequently; and whether there had been significant fluctuations in Mrs A's health in recent months.

21. I asked Adviser 2 if the Consultant would have been expected to retrieve and consider previous assessments from England. Adviser 2 said that would depend on the purpose of the assessment. If the purpose was to review current needs and entitlement, then review of previous assessments was not necessary. If, however, the purpose was to review retrospective entitlement since transfer from England in 2005, then review of previous assessments would have been desirable. Adviser 2 noted that Mr C requested an 'NHS Continuing Care assessment' from the local Social Work Department in his letter of 29 August 2007. In a telephone conversation with Mrs A's GP, a 'continuing care medical assessment' was requested by Mr C. Adviser 2 said that, although neither of these requests was specifically for a retrospective review, Mr C might have reasonably assumed that they could have been regarded as such. The referral letter from the GP to the Consultant noted the result of the appeal in England and that Mr C was requesting 'further funding input' but did not specifically ask the Consultant to provide a view regarding retrospective eligibility. Adviser 2 said that the Consultant could reasonably consider that her role was to assess Mrs A's current and future care needs. Adviser 2 said that he did not consider it would be reasonable to criticise the Consultant for considering that the request was to review Mrs A's current and future eligibility alone. It was not necessary, therefore, for her to review previous assessments. (In their letter to Mr C on 23 March 2007, the English Health Authority said that the Independent Review Panel was faced with the difficulty that there was no contemporaneous assessment of Mrs A's needs). Adviser 2 said that, having reviewed all of the available information in some detail, he was of the clear view that Mrs A was not eligible for NHS Continuing

Care in Scotland either at the point of transfer from England or at the time of the Consultant's assessment in 2007.

(a) Conclusion

22. Although Adviser 1 considered that more formal tests should have been carried out, Adviser 2 confirmed that the Consultant's assessment was adequate and in accord with standard practice in Scotland at the time. Having taken into account the relevant position in Scotland and having considered the matter carefully, I do not uphold this complaint.

(b) The Board discounted the benefit of Mrs A's move to be closer to her family

23. Mr C said that Mrs A's move to Nursing Home 2 in January 2005 had been for personal as well as health reasons. He felt that, as the only family Mrs A had, she would benefit from being closer to himself and his wife. However, this had not been taken into account in the assessment. Mr C raised this point at his meeting with the Board's Service Director, Care of the Elderly, on 19 February 2008. He asked about cross border responsibility and whether the Health Authority in England had a responsibility to continue to fund Mrs A's care, following her move to Nursing Home 2.

24. On 12 March 2008 the Assistant General Manager wrote to Mr C. He said that, based on the guidance, Mrs A would have been entitled to six months payment of her fees by the Health Authority in England, providing she had not been discharged from NHS care. However, as Mrs A had been transferred on non-clinical grounds, clarity and agreement on funding should have been sought prior to the transfer taking place. He said that no application for retrospective funding by the Board could now be made for the period prior to Mrs A's assessment in October 2007 but that Mr C may wish to follow up with the Health Authority in England the six months payment of fees for the period immediately following Mrs A's transfer.

25. Adviser 1 said that Mr C's intention to move Mrs A to Scotland to be near his family was not unreasonable. I asked the Board why the Consultant had not taken this into account. The Nurse Director wrote to me on 22 September 2008. The Consultant said that at the time of the assessment she had not considered factors relating to Mrs A's move from England as it had happened two years previously. The Consultant was responding to Mrs A's GP's request

that she assess whether Mrs A qualified for an NHS bed at the time of the assessment.

26. Adviser 2 said that, in his view, the Consultant was responding to a request to review Mrs A's current and future funding (see paragraph 20). The effects of the move, some two years previously, were therefore not relevant as it was the current position at the time of the assessment which fell to be considered. Adviser 2 said that as Mrs A was self-funding in England at the time of her transfer (Mr C's appeal had not been decided at that point) and was noted on her admission form to be entering Nursing Home 2 as a self-funding patient, that would not trigger an NHS Continuing Care assessment. Adviser 2 said that at the time of Mrs A's move NHS Continuing Care was generally only available in NHS facilities in Scotland. Mrs A would not have been eligible for NHS Continuing Care in Nursing Home 2. Adviser 2 noted that Mrs A was assessed for and received free personal care in Nursing Home 2. Unless an assessment was requested, normally only a change in a patient's condition which might lead a nursing home to believe that they could no longer provide appropriate care would trigger an NHS Continuing Care assessment to decide an appropriate placement for a patient. As Mrs A was being managed appropriately in Nursing Home 2, there was no requirement to do an NHS Continuing Care assessment before Mr C requested one in 2007. Adviser 2 noted from the correspondence that Mr C was taking up the matter of a further six months funding following Mrs A's transfer with the English Health Authority, which was appropriate.

(b) Conclusion

27. The advice I have received is that the position at the time the assessment was carried out, falls to be considered under the NHS Continuing Care criteria. The benefits to Mrs A of a move to be nearer her family would have been a relevant factor to be considered at the time of her move if an assessment had required to be done at that time. By the time of the Consultant's assessment, however, it was no longer relevant as it had happened some two years previously. The Consultant acted appropriately in not taking it into account. The Board's response to the complaint, however, did not make this clear and although I do not uphold this complaint I will deal with the Board's response in the next section.

(c) The Board failed to explain properly the decision not to award NHS Continuing Care funding

28. On 19 November 2007 Mr C wrote to the Board's Director of Strategic Planning. His letter clearly stated that he wished to make a claim for refund and future payments of the nursing home fees in respect of Mrs A's care, on the grounds that her primary need was for health care.

29. The Director of Strategic Planning replied that she had passed his letter to the Director of Public Health, who would contact him.

30. On 17 December 2007 Mr C wrote to the Director of Strategic Planning again. He said that he had heard nothing from the Director of Public Health and asked how to get in touch.

31. The Director of Strategic Planning replied on 20 December 2007, providing the contact details. On the same day a consultant in public health medicine, on behalf of the Director of Public Health, wrote to Mr C to apologise for the delay. She said that they had been considering the best route to deal with his request. She said they felt it would be best to clarify the requirement for a further multi-disciplinary assessment for Mrs A, to enable them to identify her needs clearly and establish if they fell within the criteria of the NHS in Scotland for NHS Continuing Care. Mr C's letter had, therefore, been sent to the Executive Nurse Director who was responsible for NHS complaints procedures under which his concerns could be addressed.

32. On 15 January 2008 the Executive Nurse Director wrote to Mr C to clarify that he wished to complain about the Consultant's assessment.

33. Mr C responded on 18 January 2008 that he did not agree with the Consultant's assessment. Mr C referred to English case law and said that the NHS in England had recently refunded Mrs A's fees because her primary need was for health care rather than social care.

34. Mr C met with the Service Director, Care of Elderly Services and the Assistant General Manager on 19 February 2008. In her subsequent letter to Mr C on 12 March 2008, the Assistant General Manager said that at the meeting they had discussed the imminent review of the criteria in the MEL and she sent Mr C a copy of the new guidance which had been published on 7 February 2008, which had replaced MEL (1996) 22. She also sent him a copy

of NHS HDL (2004) 15 NHS Scotland: *Guidance on Establishing the Responsible Commissioner*. She said that, as Mrs A was transferred on non-clinical grounds, clarity and agreement on funding should have been sought prior to the transfer taking place. There was no opportunity for a retrospective application for funding. She said that if Mr C wished to pursue his complaint about the assessment he should write to the Assistant Director in the Complaints Department.

35. Mr C replied on 14 March 2008 asking for clarification of the points raised in the Assistant General Manager's letter. He asked what was meant by 'non-clinical grounds'; whose agreement he should have sought; the grounds for there being no opportunity for retrospective funding, given that the NHS in England had refunded the fees; and he also questioned the information regarding the formal assessment of Mrs A's cognitive state.

36. The Assistant Director of Nursing wrote to Mr C on 26 March 2008. He said that 'non-clinical grounds' meant personal reasons; that Mr C should have sought the agreement of both the English Health Authority and the Board prior to Mrs A's transfer; and that, as a result of this failure, there was no opportunity to apply for refund of fees. He told Mr C that he had a number of options available to him under the new guidance. He had the right to a retrospective assessment by another suitably qualified practitioner if he disagreed with the Consultant's assessment, which would clearly have to be undertaken as an assessment of clinical records only (Mrs A having died in the meantime). He also had the right to use the complaints procedure or he had the right at any point to make a complaint to the Ombudsman.

37. In his letter of 18 April 2008 Mr C said that the reason he disputed the Board's decision was that his understanding was that where a person's primary need was for health care and they were placed in nursing home accommodation, the NHS was responsible for the full cost of the package. He believed that when Mrs A was admitted to Nursing Home 2 her primary need was a health need.

38. Adviser 2 said that the Board failed to recognize that this was a complex and unusual situation. Whether review by the Director of Public Health or the use of the complaints procedure was the correct avenue depended on whether the patient was in NHS care or not. At the point of review in Scotland she was not. At the point of transfer she (retrospectively) was. The choice of process

used could be argued either way. The fact of the matter is that the method chosen neither took into account the complexity of the situation nor undertook an independent second opinion on eligibility either at the point of assessment or at the point of transfer.

39. Although Mr C was initially appropriately directed to the Director of Public Health, the Director of Public Health chose to manage this matter under the NHS complaints procedure rather than in terms of the review procedures set out in the MEL which, at section 30, set out the review procedure for patients who wished to appeal. This included the first instance review by the Director of Public Health and further review by an independent clinician. Adviser 2 said that it would have been appropriate to have undertaken a review of Mrs A's care needs and, if necessary, to have sought an independent second opinion. Adviser 2 said that although the Board appeared to note that Mr C was making a claim for a refund and for future payments, the Board did not appear to understand that there were unusual circumstances involved in Mrs A's case. Adviser 2 said that because the Board chose to deal with this matter in terms of the complaints procedure rather than as an appeal against the decision not to award NHS Continuing Care, they simply arranged a meeting with Mr C. Adviser 2 said that much of the subsequent confusion might have been avoided if the matter had been managed by the Public Health team.

40. Adviser 2 said that in her 12 March 2008 letter the Assistant General Manager did not appear to recognise that Mrs A was self-funding at the time of her transfer to Scotland. The guidance to which the Assistant General Manager referred (NHS HDL (2004) 15 NHS Scotland: *Guidance on Establishing the Responsible Commissioner*), therefore did not apply. Adviser 2 said that the information provided to Mr C caused considerable confusion. In addition, if the statement that there was no opportunity for a retrospective application for funding was based on failure to secure the agreements referred to in the guidance, that did not apply in this case. Adviser 2 said that the proper action would have been for the Board to have undertaken a retrospective review of Mrs A's needs from the point of her transfer to Scotland.

(c) *Conclusion*

41. Throughout the complaint process Mr C referred to his belief that the criteria for NHS Continuing Care was that Mrs A's health required her to be nursed in a nursing home. I can find no evidence that Mr C was informed about the circumstances which would require to exist before Mrs A was eligible to

receive NHS Continuing Care in Scotland. It was, therefore, not surprising that Mr C failed to understand the Consultant's assessment, as he did not understand what criteria were being applied. Adviser 2 said that the information provided by the Assistant General Manager was not relevant and caused further confusion. I have not seen evidence that the Board explained the position appropriately to Mr C and, therefore, I uphold this complaint.

(c) Recommendations

42. The Ombudsman recommends that the Board:

apologise to Mr C for failing to explain the decision properly;

- (i) undertake a retrospective assessment of Mrs A's eligibility for NHS Continuing Care from the point of her transfer to Scotland;
- (ii) consider whether they now have a preferred or standardised format for decisions relating to and documentation of assessments for NHS Continuing Care;
- (iii) consider what procedures they have in place to assess cross border transfers where there is no request or need for NHS Continuing Care;
- (iv) consider what procedures they now have in place to ensure that all care home residents are routinely assessed at the point of entry and thereafter, with regard to their eligibility for NHS Continuing Care;
- (v) consider under what circumstances they will consider retrospective requests for NHS Continuing Care; and
- (vi) review the instructions they give to their staff on the handling of assessments relating to extraordinary issues such as cross border patient movement.

43. The Board have accepted the recommendations and will act on them accordingly. The Ombudsman asks that the Board notify him when the recommendations have been implemented.

Explanation of abbreviations used

Mr C	The complainant
Mrs A	The complainant's stepmother
The Board	Ayrshire and Arran NHS Board
Nursing Home 1	The nursing home in England where Mrs A was resident between 23 September 2003 and 4 January 2005
Nursing Home 2	The nursing home in the Board's area where Mrs A was resident from 4 January 2005 until her death on 26 January 2008
The Consultant	The consultant physician in geriatric medicine who assessed Mrs A on 15 October 2007
The 78 Act	The National Health Service (Scotland) Act 1978
SGHD	Scottish Government Health Department
The CEL	A circular, CEL 6 (2008), issued by the Scottish Government Health Department
AMT	Abbreviated Mental Test
MMSE	Mini-Mental Score Examination
GDS	Geriatric Depression Scale
Adviser 1	A hospital consultant in medicine for the elderly in England
Adviser 2	A hospital consultant in medicine for the elderly in Scotland

Glossary of terms

Atrial fibrillation	A fast and erratic heart beat
Expressive dysphasia	Word finding difficulty
Independent Review Panel	The panel which considers final stage appeals against the decision that a patient does not qualify for NHS Continuing Care in England
Stroke	A serious medical condition which occurs when the blood supply to the brain is disturbed

List of legislation and policies considered

MEL(1996)22

National Health Service (Scotland) Act 1978

CEL 6 (2008)

NHS HDL (2004) 15 NHS Scotland: *Guidance on Establishing the Responsible Commissioner*

Relevant English Case Law

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 Grogan judgement)

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