

### NHS Continuing Healthcare and Section 117 After-care

Under the National Health Service Act 2006<sup>[1]</sup> the Secretary of State has a duty to provide health services for the care of persons suffering from illness, to such extent, as he considers necessary to meet all reasonable requirements. This duty includes the provision of accommodation for the purposes of health services provided under that Act. Alongside this duty, local authorities have a duty to assess and, where appropriate, provide community care services, including residential accommodation, to persons who by reason of age, illness or disability are in need of the care and attention that is not otherwise available to them<sup>[2]</sup>.

Historically, difficulties arose where these community care services were required. There was confusion about who was responsible for commissioning and funding such services, was it the local authority or was it the NHS under the National Health Service Act 2006? After the completion of a number of high profile cases<sup>[3]</sup> the Department of Health issued guidance on how to decide which body was responsible. *The National Framework for NHS Continuing Healthcare and NHS Funded Nursing Care* confirms that "Where a person's primary need is a health need, they are eligible for NHS continuing healthcare... Where an individual [is] eligible for NHS continuing healthcare, the NHS is responsible for providing all of that individual's assessed needs - including accommodation, if that is part of the overall need"<sup>[4]</sup>.

Accordingly, where an individual's assessed need is primarily a health need, the NHS is responsible for providing their whole package of care, including any accommodation. This package of continuing care, funded solely by the NHS, is referred to as 'NHS continuing healthcare'. Together with the *Framework*, the Government has also produced a *Decision Support Tool*<sup>[5]</sup> that aids professionals in assessing whether an individual's need is primarily a health need. Healthcare professionals both in the NHS and in the private sector will, as a consequence of this guidance be relatively familiar with the concept of NHS continuing healthcare and the potential for individuals to have their accommodation and care in the community fully funded by the NHS.



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An area of potential difficulty with NHS continuing healthcare concerns individuals who have previously been detained under the Mental Health Act 1983. When a patient is discharged from detention, they are automatically entitled to free after-care services pursuant to section 117 of that Act. The duty under section 117 is held jointly between Primary Care Trusts ("PCT") and Local Authorities (LA), and the after-care must be provided until such time as those bodies are both "satisfied that the person concerned is no longer in need of such services....".[6].

After-care services are not defined in the 1983 Act but case law has indicated that "they would normally include social work, support in helping the ex-patient with problems with employment, accommodation or family relationships, the provision of domiciliary services and the use of day centre and residential facilities"[7].

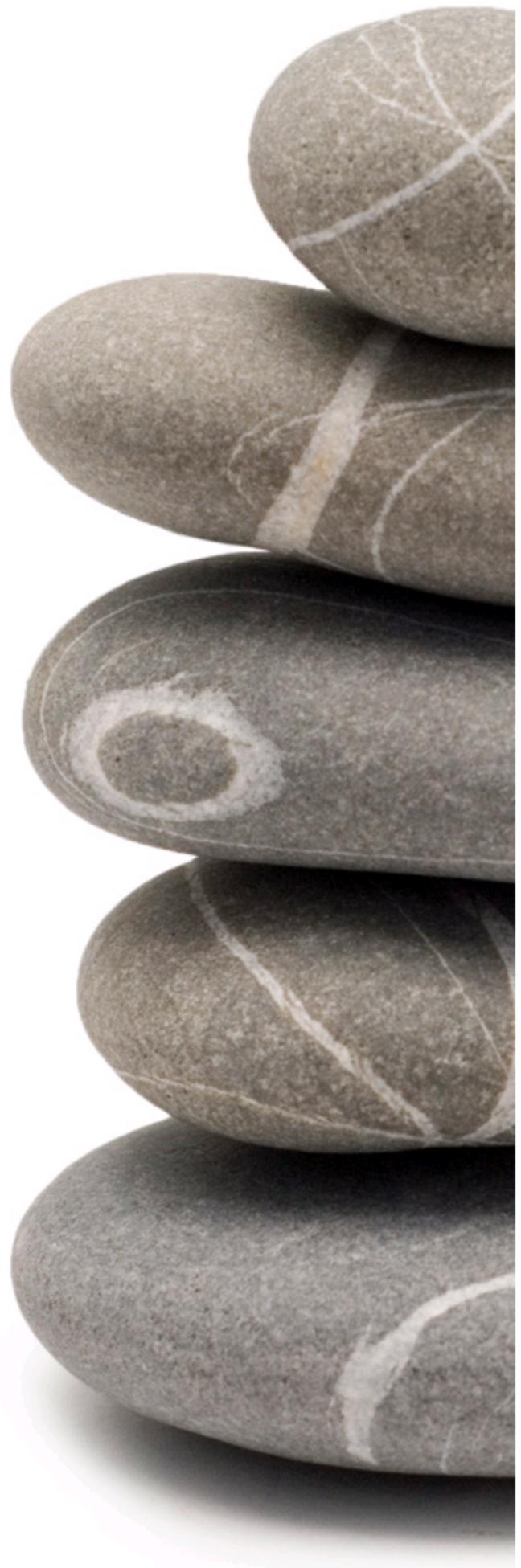
Commentators have suggested that after-care services are those services that are "(1) provided in order to meet assessed needs that arise from a person's mental disorder and; (2) aimed at reducing that person's chance of being re-admitted to hospital for treatment for that disorder." [8] Accordingly, when a patient is discharged from detention under the Mental Health Act 1983, they are entitled to receive free after-care services in the community, which could include some form of residential accommodation. The question that arises is how does the duty under section 117 interact with the duty held by the NHS under the National Health Service Act 2006 to provide NHS continuing healthcare?

The *National Framework* provides helpful guidance on this issue at paragraphs 112-116. Paragraph 115 of the *Framework* confirms the following: -

"There are no powers to charge for services provided under section 117, regardless of whether they are provided by the NHS or LAs. Accordingly, the question of whether services should be "free" NHS services rather than potentially charged for social services does not arise. It is not, therefore, necessary to assess eligibility for NHS continuing healthcare if all the services in question are to be provided as after-care under section 117."

The *Framework* goes on to confirm that there may be situations where an individual is in receipt of section 117 after-care but may, in addition, have a need for continuing care which does not relate to their mental disorder and which may, therefore, not fall within the scope of section 117.

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The example given by the *Framework* is an individual who was already receiving NHS continuing healthcare in relation to a physical health problem before being detained under the 1983 Act and whose physical health problems remain the same on discharge. The *Framework* confirms that where such need exists, it may be necessary to assess the individual for NHS continuing healthcare on top of the provision of care provided under section 117.

In light of the guidance provided by the *Framework*, the general position is that where an individual has been discharged from detention under the Mental Health Act 1983, any after-care package which is related to their mental disorder, falls within the duty under section 117. There is no requirement to assess the patient's eligibility for NHS continuing healthcare unless the individual has some form of ongoing physical health problem that is unconnected to their mental disorder. In those cases consideration will then need to be given to the individual's eligibility for NHS continuing healthcare.

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## Footnotes

1. See Sections 1 -3
2. See Section 47 of the National Health Service and Community Care Act 1990 and Section 21 of the National Assistance Act 1948.
3. R -v- North and East Devon Health Authority ex parte Coughlan [1999] and R -v- Bexley NHS Trust, ex parte Grogan [2006]
4. The National Framework for NHS Continuing Healthcare and NHS Funded Nursing Care (July 2009), para 25.
5. See Decision Support Tool for NHS Continuing Healthcare, July 2009
6. Mental Health Act 1983, s117(2)
7. Clunis -v- Camden and Islington Health Authority (1998) 1 C.C.L.R 215, 225.
8. Richard Jones, Mental Health Act Manual Eleventh Edition, para 1-1083, page 443.

## Assisted Suicide

The Suicide Act 1961 makes assisted suicide illegal. However, the House of Lords have given Judgment in the case of Debbie Purdy and have held that the DPP was acting unlawfully by refusing to issue a policy on whether Mrs Purdy's husband would be prosecuted if he accompanied her to the Dignitas Clinic in Switzerland. No one has previously been prosecuted but Mrs Purdy was seeking clarification from the DPP as to whether her husband would face prosecution. As a result of this case the DPP will be issuing an interim policy in the near future before consulting on a longer term policy which will clearly be of assistance to those who have a terminal illness or incurable disease and decide to have an assisted suicide in a country where it is legal. The DPP has stated that the finalised policy will be published in spring 2010.

## New Practice Note

On 13th August 2009 the Law Society published a practice note advising solicitors who are providing legal advice to clients appearing before the First Tier Tribunal (Mental Health) in England, and the Mental Health Review Tribunal for Wales. It covers issues such as referrals, client capacity, disclosure of documents and delay. There is specific reference to the conduct of solicitors attending hospitals. A copy of the practice note is available at [www.lawsociety.org.uk](http://www.lawsociety.org.uk)

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