

Who pays for Section 117 Aftercare? You may think you know ... but are you sure?

Tempting as it is to assume that finalised guidance is the same as the draft you first set eyes on several months previously, the August publication of *Who Pays? Determining Responsibility for Payments to Providers* provides a salutary warning to anyone inclined to add “final” documents to the one day-next day-sometime-never reading pile with which busy managers are necessarily all too familiar.

After all, it's scarcely a good use of your day to do a word for word comparison, is it? Don't you have more pressing calls on your always insufficient time? And most of the time, you will be right. For the fateful remainder, we can do no better than borrow from Ellen de Generes: “You should never assume. You know what happens when you assume? You make an ass out of you and me ...”

The final guidance is much briefer and offers little assistance in deciphering the complexities of the NHS Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) Regulations 2012. In this briefing we guide you through the rules on who is now responsible for commissioning mental health aftercare services for different groups of patients

Background

Section 117(1) and (2) of the Mental Health Act 1983 (the Act) imposes a duty on CCGs and local authorities, in co-operation with relevant voluntary agencies, to provide or arrange for the provision of aftercare services for individuals who have left hospital after ceasing to be detained under sections 3, 37, 45A, 47 or 48 of the Act.

Section 117(3) goes on to explain how the responsible CCG and the local authority, upon whom this duty falls, should be identified:

In this section “the clinical commissioning group”... means the clinical commissioning group ... and “the local social services authority” means the local social services authority, for the area in which the person concerned is resident or to which he is sent on discharge by the hospital in which he was detained.

The case of *R v MHRT ex parte Hall (1999)*, from a time when the duty rested on the relevant PCT and local authority, made it clear that these words do not leave the choice in the hands of the hospital that effects the patient's discharge. The latter limb – the area to which the patient is sent on discharge – only comes into play where the patient has no place of residence at the time he is detained. This might apply to an individual who is detained when they have become homeless, for example.

A wealth of case law then built up on the back of *Hall*, expounding the nuances of the word “resident” in this particular context and providing disparate forms of ammunition in the event of inter-PCT dispute.

And so things remained until the overhaul of commissioning earlier this year, when further subsections were introduced into s117 by the Health and Social Care Act 2012.

Health and Social Care Act 2012 amendments to s117 Mental Health Act 1983

Section 117(2E) and (2F) provide as follows:

(2E) The Secretary of State may **by regulations** provide that the duty imposed on the clinical commissioning group by subsection (2) is, in the circumstances or to the extent prescribed by the regulations, to be imposed instead on **another clinical commissioning group or the National Health Service Commissioning Board**.

(2F) Where regulations under subsection (2E) provide that the duty imposed by subsection (2) is to be imposed on the National Health Service Commissioning Board, subsection (2D) has effect as if the reference to the clinical commissioning group were a reference to the National Health Service Commissioning Board.

Enter stage left the NHS Commissioning Board and Clinical Commissioning Groups Regulations 2012 (the 2012 regulations):

Regulations bring another CCG into the frame

Part 4 of the 2012 regulations provides as follows:

Circumstances in which duty may be imposed on another CCG

14.—(1) The duty imposed by subsection (2) of section 117 of the 1983 Act on a CCG (CCG A) to arrange for the provision of after-care services for a person (P) to whom section 117 applies is to be imposed **instead** on another CCG (CCG B) in the circumstances below.

(2) These circumstances are where CCG B has responsibility for P by virtue of—

- (a) section 3(1A) of the 2006 Act; or
- (b) regulation 4 of, and sub-paragraph (c), (g), (h), (i) or (j) of paragraph 2 of Schedule 1 to these Regulations.

Circumstances in which duty may be imposed on the Board

15.—(1) The duty imposed by subsection (2) of section 117 of the 1983 Act on a CCG to arrange for the provision of after-care services for a person (P) to whom section 117 of the 1983 Act applies is to be imposed instead on the Board in the circumstances below.

(2) These circumstances are where P is receiving an after-care service under section 117 which, if it were being provided under the 2006 Act, would be a service whose provision the Board had a duty to arrange.

Leaving aside the circumstances in which the duty to commission s117 aftercare services is to fall on the Board, which should be fairly self explanatory, let us continue to focus on Regulation 14.

Instead of identifying the responsible CCG by looking at where the individual was resident at the time of detention, under Regulation 14 we must now look at who has responsibility for the patient by virtue of

section 3(1A) of the NHS Act 2006 or by virtue of Regulation 4 and the specified subparagraphs of Schedule 1, paragraph 2, listed above.

Regulation 14(2)(a): s3(1A) National Health Service Act 2006 determines responsibility

Section 3(1A) provides as follows:

3 Duties of clinical commissioning groups as to commissioning certain health services

(1A) For the purposes of this section, a clinical commissioning group has responsibility for—

- (a) persons who are provided with primary medical services by a member of the group, and
- (b) persons who usually reside in the group's area and are not provided with primary medical services by a member of any clinical commissioning group.

The effect of the 2012 regulations and s3(1A) now means that a CCG will be responsible for commissioning s117 aftercare services for any such patients registered with a member GP practice and for individuals usually resident in the CCG area but not registered with any GP practice, in each case regardless of where the patient was resident at the point of detention. This applies even if the patient is, for example, detained in Cumbria but discharged to Cornwall. Yet the rules applying to identification of the responsible local authority remain unchanged – leaving the local authority, in our example, in Cumbria to liaise with the CCG in Cornwall – so much for joined up commissioning!

One assumes that the intended logic was that a single CCG will be responsible for commissioning all of the patient's non-primary care needs rather than, as was often the case previously where a patient moved to another part of the country post-discharge, one responsible for commissioning the s117 aftercare health services and another commissioning "everything else". What is less clear, though, is what happens where the individual's condition changes whilst they are in receipt of s117 aftercare services and their needs can only then be met by an out of area placement. Does responsibility remain with the "placing CCG" or does it move on again to sit with the "receiving" CCG with whose member GP practice the individual subsequently registers? If responsibility does not move on, then there will be a further splitting off of responsibility, with s117 commissioning responsibility remaining with the "placing" CCG but all other secondary care becoming the responsibility of the "receiving" CCG. Yet if responsibility were to transition with every GP re-registration, there would undeniably be a huge incentive for cash-strapped CCGs to keep placing vulnerable individuals out of area. We are hoping to obtain some clarity on this issue from the Department of Health and will update you when we have more information.

If, this issue aside, you thought that the residence/GP registration determinant at least had the merit of simplicity, then the same can certainly not be said of the second limb of Regulation 14(2), where the responsible commissioner for the patient groups mentioned in subparagraphs (c), (g), (h), (i) and (j) of Schedule 1 should be identified as follows:

Regulation 14(2)(b)

While some s117 patients who are discharged to or wind up in the CCG's area and register with a GP there (or not, as the case may be) will be the s117 responsibility of that CCG, this will not always be the case. The combination of Regulation 4 and parts of Schedule 1 means that s117 commissioning responsibility for some categories of persons rests with the "placing CCG", not the "receiving CCG":

First, the simpler categories: These include:

- o Anyone resident outside the UK, not provided with GP services by a member of any CCG but present in the CCG's area.

- Every person resident in Scotland, Wales or Northern Ireland and present in the CCG's area who is a qualifying patient within the meaning of s130C of the 1983 Act and not provided with GP services by a member of any CCG.
- Anyone who is a qualifying patient within the meaning of s130C and liable to be detained under the 1983 Act in a hospital or registered establishment in the CCG's area.

So far, so relatively straightforward then: presence in the CCG's area, or being a qualifying patient and being liable to be detained in the CCG's area, is sufficient to place s117 commissioning responsibility with that CCG.

But then it gets a little more complicated (brace yourselves):

For the two groups of children set out below, responsibility for s117 commissioning remains with the "placing" or "originating" CCG, even once the child registers with a GP in a different ("receiving") CCG area:

- Any child with regard to whom (1) a local authority has made an arrangement before 1 April 2013 by virtue of which the child is provided with accommodation at a school in the area of another CCG, to which the child is admitted in accordance with a statement of special educational needs, (2) immediately before the child was so accommodated, the child was either provided with primary medical services by a person who is now a member of the 'placing' CCG or usually resident in the area of the 'placing' CCG and not provided with GP services by a person who is now a member of the 'placing' CCG and (3) the 'placing' CCG would not otherwise be responsible under s3(1A)(a) of the 2006 Act (because the child has now been registered with a GP practice in the area of the 'receiving CCG').
- Any child who is:
 - a. a "looked after child" within the meaning of s22 Children Act 1989 (but excluding a child accommodated in a secure children's home for whom the Commissioning Board has commissioning responsibilities); or
 - b. a "relevant child" within the meaning of s23A Children Act 1989; or
 - c. a child qualifying for advice and assistance under s24(1A) or (1B) Children Act 1989; or
 - d. a child provided with accommodation at a school to which (s)he is admitted with a statement of educational needs made under s324 Education Act 1996; or
 - e. a child who requires accommodation in a care home, a children's home or an independent hospital to meet his or her continuing care needs;

who is provided with either services which consist of or include the provision of accommodation situated in the area of another CCG under arrangements made by the "placing" CCG in the exercise of its commissioning functions (by itself or jointly with a local authority) or services which consist of or include the provision of accommodation situated in the area of another CCG under arrangements made by the local authority alone and, immediately before those arrangements were made, the CCG allied to the "placing" local authority was responsible for the child under s3(1A)

and the child is both resident in that accommodation and would not be a person for whom the CCG in the area of the "placing" local authority is responsible because of the child's subsequent (ie, in the new area) GP registration.

The logic behind the designation of responsible commissioner in these cases appears to be a combination of the idea that the "placing CCG" should not be able to divest itself of responsibility by making an out of area placement with the principal concern that commissioning responsibilities for secondary care services should not be divided between more than one commissioning body.

Final guidance

As far as *Who Pays?* is concerned, whereas (in the draft version) the commissioning of the detention provision itself was dealt with in paragraph 28 and the s117 aftercare at some length, and with example scenarios, at paragraphs 53 to 57, each now gets a solitary paragraph at 33 and 34 respectively. While the draft guidance was more consistent with the traditional interpretation of section 117(3), in terms of how the responsible CCG should be identified in various situations, the finalised guidance is woefully laconic:

34. It is the duty of the CCG and local social services authority to commission after-care for those persons discharged from hospital following detention under section 117 of the Mental Health Act. The responsible CCG should be established by the usual means (see paragraph 1). If a patient who is resident in one area (CCG A) is discharged to another area (CCG B), it is then the responsibility of the CCG in the area where the patient moves (CCG B) to pay for their aftercare under section 117 of the Act as agreed with the appropriate local social services authority.

In the absence of more comprehensive guidance on this difficult area, our advice is to face the challenge head on: embrace the regulations and get to grips with them sooner rather than later! If, having battled unsuccessfully with cold towels and complex drafting, you require our support with their interpretation, we should be delighted to assist.

Useful links

[Who pays? Determining responsibility for payments to providers](#)

[The NHS Commissioning Board and Clinical Commissioning Groups \(Responsibilities and Standing Rules\) Regulations 2012](#)

[Mental Health Act 1983](#)

[Health and Social Care Act 2012](#)

[Briefing: Responsible commissioner: making sense of the new rules and guidance \(April 2013\)](#)



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