

London Borough of Brent
Executive - 29th March 2004
Report from the Director of Social Services

North West London Continuing Care Criteria

For Action	Name of Wards Affected
	None

FP REF: SS-03/04-13

1.0 Summary

1.1 This report provides an update on developments and amendments to the Continuing Care Criteria following an internal review of a trial period implemented from the 1st April 2003. A previous report to Executive in April 2003 described the common approach agreed across Primary Care Trusts and Local Authorities in North West London on the implementation of new requirements for criteria on eligibility for NHS Continuing Care, (free NHS care). This was a Department of Health (DoH) requirement contained in the joint Health Service and Local Authority Circular entitled 'Continuing Care: NHS and Local Council's Responsibilities'. The new North West London continuing care criteria and guidelines was produced following a high profile legal case (Coughlan Judgment) about eligibility for continuing care funded by the NHS. Originally the criteria only covered younger adults with a physical disability and older people. During the trial period this was amended to include all younger and older adults with – physical disabilities, learning disabilities, mental health problems including mental illness associated with old age). It was agreed to review implementation during 2003/04 to monitor any cost shifts and issues arising and to report back to Executive.

2.0 Recommendations

2.1 Members are asked to approve the amended North West London PCT and Local Authorities Continuing Care Criteria, Guidelines and Assessment Tool (**Appendix 1**) from 1st April 2004.

2.2 Members are asked to note that so far application of the new criteria has not led to significant shifts in funding between the PCT and the Council in 2003 and that this will continue to be monitored.

3.0 Financial Implications

3.1 The financial implications highlighted in April 2003 were based on some pilot reviews of existing joint funded cases in older people and physical disability. It was anticipated overall the impact on community care would be minimal with possible cost shifts being higher for older people and lower for physical disability.

3.2 It has been difficult to track the funding shifts partly, because of the difficulty in obtaining accurate information when there are reviews still outstanding, but also because of other changes happening in parallel to the new criteria, most notably the introduction of the NHS funded free nursing care and the requirement to assess every resident of a care home.

Eligibility

- 3.3 On the basis of the information that is available, concerns that there would be a shift in funding responsibility towards the local authority appear not to have been fulfilled. Within Brent to date the shift has not been significant and in the main has been toward the NHS/PCT funded. The community care purchasing budgets have so far contained costs overall, although there are still more cases to be reviewed, particularly within learning disability. More detail is provided in paras 6.10 – 6.13.
- 3.4 The PCT and Social Services will continue to monitor the impact of implementation and refine information available in order to track trends in need and activity and to consider in more detail the impact of the implementation of the criteria within Brent.
- 3.5 Continuing Care Criteria for Children and Young People are now being developed across the NW London sector to complement the criteria for Adults and these may well have an impact on future budgets. The proposed criteria will be reported to Chief Executives of the PCT and Directors of Social Services later in the year for consideration.

3.6 Use of Health Act flexibilities for pooled budgets

Some authorities have already set up pooled budgets for continuing care cases. Brent PCT and SSD are having discussions on the principles of pooled budgets and in which areas this would require each authority to 'ring fence' its current commitments. However, this does not bring any more money into the system, although, for individuals, it could provide more flexible care. Given pressures on the PCT and Social Services budgets officers will need to assess the impact on budgets and the demand prior to seeking approval for a pooled budget from Executive.

4.0 Staffing Implications

- 4.1 There are no staffing implications.

5.0 Legal Implications

- 5.1 The joint Health Service and Local Authority Circular entitled "Continuing Care: NHS and Local Council's Responsibilities" [HSC 2001/015: LAC (2001) 18] was issued by the Department of Health on the 28th June 2001 under section 7(1) of the Local Authority Social Services Act 1970 and it must be followed in all but the most exceptional of circumstances. The guidance seeks to ensure that the NHS and local authorities agree together how they will meet continuing health and social care needs. However, the responsibility for setting eligibility criteria for continuing NHS health care remains with health authorities.
- 5.2 Following the Delayed Discharges Act last year for the first time the NHS Trusts have a legal requirement to assess for continuing care before patients leave hospital and cannot be discharged before the assessment for fully funded NHS continuing care has taken place.
- 5.3 The guidance also addresses the respective duties of local authorities and health in the light of the judgment of the Court of Appeal in the case of North and East Devon Health Authority ex parte Coughlan in 1999. In that case, the Court of Appeal decided, inter alia, that the NHS does not have sole responsibility for all nursing care and that such care, for a chronically sick patient, may, in appropriate cases be provided by a local authority as a social service. However, this is subject to section 49 of the Health and Social Care Act

2001, which prevents local authorities providing or arranging for care to be provided by a registered nurse.

- 5.4 Following the trial and review described in this report the amended criteria were submitted to the legal firm of Capsticks who have advised that in their view the revised criteria are lawful.
- 5.5 Residential accommodation is provided under Part III of the National Assistance Act 1948. The local authority is under a duty to recover from the client a payment in respect of the service subject to a means test which takes into account the client's resources, including any social security benefits, when assessing the contribution to be made by them towards the cost of their care.
- 5.6 It should be borne in mind that where clients are liable to be charged for services that they consider should be provided free of charge by the NHS, this may lead to dissatisfied clients seeking to challenge the decision making by seeking a Judicial Review of both health and the local authority. No such claims have been received since the existing criteria were adopted from April 2003.
- 5.7 If the Ombudsman were to receive a complaint and adverse findings were made the Council would probably be required to review its criteria and the way the criteria are applied and to make efforts to remedy any consequential financial injustice to service users. No such complaints have been received since the existing criteria were adopted from April 2003.

6.0 DETAIL

- 6.1 The previous report to Executive outlined the purpose of having Continuing Care Criteria to enable Health and Social Services assessment staff to determine whether people have health/medical needs which should be funded, free, by the Health Service. If their needs require health care support but their personal care needs have been assessed as the predominant need then funding is through Social Services, and some services can be charged for. If their needs are a mix of health and social care then a package will be joint funded via the Free Nursing Care determination.

Department of Health Guidance

- 6.2 In June 2001 the Department of Health issued new Guidance: *Continuing Care: NHS and Local Councils' Responsibilities HSC 2001/015: LAC (2001) 18*. This consolidated previous guidance and set out a range of actions for Health Authorities (and subsequently Primary Care Trusts) to take with local councils, to ensure that local policies comply with the guidance. It also advised that there should, in time, be one set of criteria in place across a whole Strategic Health Authority area.

North West London (NWL) Health authorities and Local Authorities were required to work together to develop revised Continuing Care Criteria to meet the requirements following the Coughlan Appeal Judgment. The criteria have been developed since April 2003 to cover all younger adults and older people with a physical disability, learning disability or a mental health problem, including a mental illness associated with old age.

- 6.3 The responsibility for establishing and implementing NHS Continuing Care Criteria lies with the NHS. The Strategic Health Authority has taken on the responsibility of seeking legal advice regarding the new criteria, both when first prepared and with the amendments now proposed, on behalf of the 8 PCT's and LA's. The advice received is that the criteria are lawful.

Trial of Criteria

- 6.4 It was agreed that although the new criteria would be implemented in April 2003 that the criteria would be trialed and evaluated with a view to a final criteria to be implemented in April 2004. During 2003 the NW London Continuing Care Group (involving 8 Social Services departments) monitored the implementation of the criteria and the impact which they had on the provision of care to individuals and in the shifting of costs for continuing care between local authorities and the NHS. The trials showed where the criteria and background policy needed to be amended.
- 6.5 The implementation of standard criteria across the area also resulted in the identification of areas for improvement in assessment, multi-disciplinary working, record keeping and communication with users and carers. Training and improved procedures have been introduced to improve those areas.

Consultation

- 6.6 Staff have welcomed the criteria and were involved in identifying areas where greater clarity was needed to ensure consistency of implementation and these were addressed in the amended criteria. These included amendments to the domains relating to mental illness, cognitive impairment, challenging behaviour, tissue viability and palliative care. An additional domain relating to breathing was added. There were working groups across all client groups evaluating the criteria and full consultation days which included clients and carers as well as professionals from all agencies. A Report was also presented to Trust Chief Executives and Directors of Social Services for endorsement and implementation for the amended criteria from April 2004.
- 6.7 Clients meeting the full NHS continuing health care criteria will be eligible for NHS care within a care facility approved by the Primary Care Trust. The relevant Primary Care Trust will fund this care in full.
- 6.8 Clients who do not meet these criteria will not be eligible for continuing care fully funded by the NHS but may be entitled to funding of the nursing element of their care or require additional specialist health care services. These will be purchased through the responsible Primary Care Trust's service level agreement at no charge to the client and will normally be provided by NHS trusts or other designated providers e.g. a registered care home where the client is placed.
- 6.9 All clients, whether they are fully NHS funded or not, are entitled to a Social Services assessment in order to ascertain their need for both residential and non-residential community care services. Where the Local Authority provides services (residential or non-residential) there will be appropriate oversight of such services from a Local Authority Care Manager in order that an individual's social needs are met.

Outcome of Reviews 2003/04

- 6.10 For Physical Disabilities, of the new and reviewed cases dealt with there has been an even cost shift, however there are still 14 more reviews of previously joint funded packages to be carried out. Of the 6 that have been reviewed there has been an even split with no great cost difference to each authority.
- 6.11 Within Mental Health the process of agreeing continuing care funding does include people discharged under Section 117 of the 1983 Mental Health Act which places a legal joint responsibility upon health and social services for aftercare. Overall there has been a cost shift from the Social Services Mental Health purchasing budget to the PCT. The reasons for this do not just relate to reviews of cases but new clients with high health needs, although the funding should now follow the assessment of need in relation to health and social care.
- 6.12 For Older People, of new cases since April 2003, there has been a slight cost shift to the PCT. However there are 18 previously joint funded cases to be reviewed (9 in home care and 9 in nursing home care) and these are to be completed by 1st April. Any cost shifts will be monitored.
- 6.13 Within Learning Disability, of the new and reviewed cases dealt with since April 2003, 43% were funded by health and 57% by social services. Of these 9 were review cases, 3 of which were rebanded to health and 6 rebanded to social services. (a 33% cost shift). Of these rebanded cases Social Services tend to pick up the less expensive packages of care and Health the more expensive. There are still 21 more reviews of previously jointly funded cases and the cost shifts will continue to be monitored.
- 6.14 The significance of any change is not simply to the authority responsible for funding but also to the clients concerned, since if the NHS is not considered responsible the client is liable to be charged for the services provided.

Future Reviews

- 6.15 It is expected that the regular review procedure will be the method by which decisions relating to existing clients are reviewed. All clients are entitled to a review assessment under the new criteria and to a change in funding arrangements if that is indicated by the assessment. However, the change will only apply from the review assessment date, it will not be applied retrospectively.
- 6.16 Disputes between Health and Social Services will be dealt with through an agreed mediation process.
- 6.17 A booklet explaining the new agreement and assessment process has been prepared by NWLSHA that allows for each locality to add their own local process and contract details. It identifies that individuals who had previously been given a commitment to NHS funded care for the remainder of their lives would continue to receive it. However in future it will be made clear in writing to all individuals that as their needs change so they would be reassessed and the funding position may change.

7.0 BACKGROUND

The Coughlan appeal Judgment (R v North and East Devon Health Authority ex parte Coughlan) 1999.

Health and Social Care Act 2001

Continuing Care: NHS and Local Councils' Responsibilities HSC 2001/015: LAC (2001) 18

Guidance on Free Nursing Care in Nursing Homes: HSC 2001/17: LAC (2001) 26

North West London, PCT and LA Agreement on Continuing Care. (February 2004)

The Community Care(Delayed Discharges) Act 2003

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