Procedure

Joint Commissioning for Mental Health Act Section 117 Aftercare and the Interface with the National Framework for Continuing Healthcare 2012 (revised)

November 2017

NHS Eastern Cheshire Clinical Commissioning Group
NHS South Cheshire Clinical Commissioning Group
NHS Vale Royal Clinical Commissioning Group
NHS West Cheshire Clinical Commissioning Group
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11 Related Documents	Department of Health, (2015). *Mental Health Act 1983 Code of Practice*. London: Department of Health. Department of Health, (2015). *Reference Guide to the Mental Health Act 1983*. London: Department of Health. Department of Health, (2012). *The national framework for NHS continuing healthcare and NHS-funded nursing care - (revised).* London: Department of Health. Department of Health (2014) The Care Act and Care and Support Statutory Guidance under the Care Act 2014 (Oct 2014) *Mental Health Act Manual 17th Edition due 300914.* London: Sweet and Maxwell. Who Pays? Determining responsibility for payments to providers April 2016 NHS England Cheshire & Wirral CCGs Continuing Healthcare and Complex Care Interagency Working Dispute Resolution Procedure June 2017

1.0 Introduction and Background

The aim of this policy is to:

- Ensure staff understand the legal requirements relating to After-care duties and planning
- Encourage participation and respect of patient`s rights particularly relating to Section 117 After-care services
- Ensure a clear escalation process for issues relating to After-care to avoid unreasonable delays for patients and to maintain an efficient service for all those subject to Section 117 After-care (as per Continuing Healthcare and Complex Care Interagency Working and Dispute Resolution Procedure June 2017)

Section 117 will only apply to the following individuals;

- Patients detained under Section 3, 37,45A, 47 or 48 who are discharged from detention and leave the hospital. This includes people with a learning disability, who have been detained under a Section 3/37, where their learning disability is associated with "abnormally aggressive or seriously irresponsible behaviour".
- Patients subject to Guardianship if they were previously detained on Section 3 or 37
- Patients under Section 3, 37, 47 and 48 who are given leave of absence under Section 17
- Patients under Section3,37,47 and 48 who are made subject to Section 17A –Community Treatment Order. Eligibility continues after discharge from Section 17A in the same way it would for a Section 3 patient
- This is not age specific and Section 117 applies to children and older people.

1.1 Clinical Commissioning Groups and Local Authorities should be familiar with the relevant sections of the Mental Health Act 1983 (as amended). Under section 117 of the Mental Health Act 1983, Local Authorities and Clinical Commissioning Groups have a statutory joint duty to provide; in cooperation with the relevant voluntary agencies, aftercare services for any person to whom section 117 of the MHA applies until such time as they are satisfied that the person is no longer in need of such services.

1.2 Individuals entitled to statutory aftercare under section 117 should have their needs assessed and clarified as part of the Care Programme approach (CPA). After-care services must have both the purposes of "meeting a need arising from or related to the person's mental disorder" and reducing the risk of a deterioration of the person's mental condition. The range of services which can be provided is broad.

1.3 Services for needs that are to be met as after-care services under section 117 of the Mental Health Act 1983 should be provided under that legislation rather than as NHS Continuing Healthcare.

1.4 There are no powers to charge for services provided under section 117, regardless of whether they are provided by the NHS or LAs. Therefore no charges will be made to service users receiving aftercare services to support people with mental health condition under Section 117.This includes both health and social care services.

1.5 S117 was not a “gateway” section to services provided under previous community care legislation such as the National Assistance Act 1948 or the National Health Service Act 2006, or from April 2015, the Care Act 2014. As a consequence, the normal rules about commissioning responsibilities in the NHS or Ordinary Residence for Social Services do not apply to S117 services.

1.6 Cheshire East, Cheshire West and Chester and Wirral Councils and their respective CCG’s: West Cheshire, Vale Royal, South Cheshire, Eastern Cheshire and Wirral have a joint responsibility for commissioning and reviewing aftercare services under Section 117.

1.7 The National Framework for Continuing Health Care (paragraph 121 of the 2012 edition) advises that it is not necessary to assess eligibility for NHS Continuing Healthcare if all the services in question are to be provided as aftercare under S117. It is not, therefore, necessary to assess eligibility for NHS Continuing Healthcare. However, there may be circumstances where a person's mental health aftercare needs are met under S117 and, where they may also have at the same time, physical health needs which are eligible for NHS CHC funding or social care needs, not related to their mental health that are funded by the Local Authority

1.8 The Mental Health Act is clear that the provision of section 117 is the joint responsibility of the Local Authorities and their partner CCGs but gives no specific guidance on apportionment funding, this falls within the discretion of the two public bodies. In agreeing locally what those respective responsibilities are, the three Local Authorities and their partner CCG’s must abide by the limits of what they can lawfully provide. Where a patient is entitled to s117 aftercare services the CCG shall be responsible for the provision and funding of those areas identified to meet their mental health aftercare needs. Para 15.45 of the Care Act Guidance states that mental health care means psychiatric services, or other services provided for the purpose of preventing, diagnosing or treating illness, the arrangements for which are the primary responsibility of a consultant psychiatrist. Councils can provide nursing or other health provision which are required by an individual which are no more than “incidental or ancillary” to the provision of the accommodation and are not of a “nature” beyond which a local authority , whose prime responsibility it is to provide social services, could be expected to provide. Section 22 of the Care Act makes it clear that in meeting an adult’s needs for care and support, a local authority may not provide healthcare services which are the responsibility of the NHS.

2.0 Policy Context

2.1 The cost of providing S117 services will be subject to appropriate and proportionate division in line with our statutory duties.

2.2 The Local Authority cannot provide services that fall outside its statutory duties, and will therefore only commission those services relating to accommodation and community care and support needs. The Local Authority would endeavour to ensure best value by securing services at the Local Authority’s contract rates for care home and domiciliary agency providers where such services meet the needs of service users.

2.3 Guidance provided by the Department of Health in February and May 2016 states that “Where an individual indicates a desire to pay for higher cost accommodation or services,

the relevant CCG should liaise with them to identify the reason for this preference. It is not possible for a person to be simultaneously an NHS patient and a private patient without clear differentiation. Therefore unless the CCG is willing to fund the cost of the higher specification room, then it is not possible for an individual to pay the marginal cost of a higher priced room". The existing CHC commissioning policy will be revised to reflect this new guidance and the responsibility of the CCG to both reflect and take account of individual preferences and choice versus the responsibilities to provide value for tax payer money. Section 75 of the Care Act 2014 allows for people subject to s117 to choose accommodation that is more expensive than the Local Authority can fund and pay a top-up. Careful consideration will then need to be made as to who should lead on the contractual arrangements in the event of a joint package of care and support but where the individual wishes to contribute a top up from their own resources to secure their preferred choice.

2.4 The role of the CCG is to address Health Needs, including mental health aftercare, and in its functions will consider such needs. However, the CCG will not consider the procurement of care and support services beyond its statutory responsibilities.

2.5 The Council and CCG will not pay for services not normally funded by them e.g. food, clothing, household bills, rent. Other services attached to rent (which may include support services) are not normally classed as Section 117 services and charges may therefore apply. Other sources of funding may be available for certain services (for example housing related support). Service users should also be helped to access Social Security benefits to which they are entitled.

2.6 The Council and CCG will only pay for services which are identified in the agreed Care Co-ordination care and support plan as Section 117 aftercare services. S117 aftercare plans must be reviewed under the Care Programme Approach process.

2.7 Where a person's physical health needs outweigh those of mental health, then Section 117 does not preclude screening for Continuing Health Care, and an application for consideration if necessary. Any such cases should be processed under the usual protocols of the National Framework for NHS Continuing Healthcare and NHS- Funded Nursing Care, to include the completion of a Decision Support Tool. Section 117 rules apply only to the provision of services to support mental health needs arising from or related to the person's mental disorder and, to reduce the risk of a deterioration of the person's mental condition. Care and support needs arising out of physical illness or impairment can be liable to a financial assessment separate to and distinct from Section 117

2.8 Section 117 funding will cover agreed increases in services for a service user already receiving s117 aftercare, when it is assessed that these services are necessary to support mental health needs in the community and to reduce the likelihood of a deterioration in the person's mental disorder and the risk of future hospital admission, when agreed through the CPA review process or by CCG commissioners in an urgent situation. Additionally, the review process may identify changes in needs that lead to reducing support and or discharge from S117.The duty to provide after-care services exists until both the CCG and the local authority are satisfied that the patient no longer requires them.

3.0 Services arranged as section 117 will be:

- Fully funded by the Local Authority; or
- Fully funded by the CCG; or
- Jointly funded by the Local Authority and the CCG

3.1 Independent Hospitals – all clients subject to care within Independent Hospitals will be subject to full funding from the CCG. They are not subject to S117 but subject to hospital transfer arrangements under the Mental Health Act.

3.2 Section 17 Leave (prior to Sec 117 arrangements) – the CCG will be responsible for fully funding any such leave in a care home/community support package. This will be time limited as supported by the Mental Health Act (and Sec 17 leave documentation) and it`s Code of Practice. This arrangement will normally be for a **period of 2 weeks** unless otherwise negotiated with the clinical team.

3.3 Community care support packages which are required to meet purely social care needs will be fully funded by the Local Authority.

3.4 There is no single statutory definition that adequately distinguishes between a health and a social care need; instead, we are guided by definitions that give an indication of what may be considered a health or a social care need. It is the intensity, complexity, nature and the purpose of the intervention that helps us to make decisions about the correct apportionment of funding of care for an individual. For care packages which are funded both by the Local Authority and the CCG, each will fund the elements of aftercare which falls within their respective statutory duties. CCGs should work in partnership with their LA colleagues to agree the respective responsibilities in any joint package of care. Where the package of after care is demonstrably beyond the statutory remit of the Local Authority, due to the nature, complexity, intensity and unpredictability of the health need, the CCG will fully fund the total package of aftercare support under Section 117.

3.5 Medical treatment is defined fully in para 1.17 of the Reference Guide to the Mental Health Act, and includes nursing, psychological intervention, specialist mental health habilitation, rehabilitation and care, as well as medication and other forms of treatment which might more normally be regarded as medical.

3.6 Accordingly, the above definition covers medical treatment in its normal sense as well as the other forms of treatment mentioned. Practical examples of psychological interventions include cognitive therapy, behavior therapy and counselling. Habilitation and rehabilitation are used in practice to describe the use of specialized services provided by professional staff including nurses, psychologists, therapists and social workers, which are designed to improve or modify patient's physical and mental abilities and social functioning. The distinction between habilitation and rehabilitation depends in practice on the extent of the patients existing abilities-rehabilitation is appropriate only where the patients are relearning skills or abilities they had before.

3.7 Medical treatment for a mental disorder means medical treatment the purpose of which is to alleviate, or prevent a worsening of, the disorder or one or more of its symptoms or manifestations.

3.8 Clinical Commissioning Groups (CCG's) are clinically led statutory NHS bodies and are responsible for the commissioning of health care services for their local population. The

CCG would therefore be responsible for the commissioning of specialist mental health provision under S117 in the community.

3.9 The Local Authority will be responsible for commissioning domiciliary care, residential care within its current contractual framework and low level supported living.

3.10 People subject to Community Treatment Orders (CTOs) will be subject to the same assessment regime as described above in paragraphs 3.3 to 3.5. No assumptions shall be made based on their legal status under CTO as to which commissioner should fund the after care package. In other words, the assessment may indicate that the aftercare package is fully funded by the Local Authority, or, jointly funded by health and social care commissioners, or, fully funded by health commissioners.

3.11 Although the duty to provide after-care begins when the patient leaves hospital, the planning of aftercare needs to start as soon as the patient is admitted to hospital. CCGs and local authorities should take reasonable steps, in consultation with the allocated Care Coordinator and other members of the multi- disciplinary team to identify appropriate aftercare services for patients in good time for their eventual discharge from hospital. Therefore in order that decisions over long term care are made as locally and efficiently as possible, a CCG representative, as well as Local Authority, wherever possible should be fully engaged in the discussion of any S117 pre-discharge meeting prior to a multidisciplinary plan being finalised.

3.12 Referrals to the Local Authority will be made via agreed procedures outlined in detailed operational guidance

3.13 Referrals to the Complex Care Team will need to be submitted electronically to: cheshireandwirral.chc-cc@nhs.net

3.14 Patients should be the focal point of planning care services provision and should be involved in so far as possible. The MDT will complete and agree the discharge plan and will ensure that they distinguish on the discharge plan between those items of care and support that specifically relate to the mental health need. The Commissioner`s (CCG) duty is to provide a care package to meet the reasonable needs of patients as assessed by the relevant professionals. Furthermore, the Commissioner will have delegated authority to agree financial contribution up to the usual total package cost of the CCG, under the usual SFI (Standing Financial Instructions). Similarly, the Local Authority will ensure that the appropriate level of delegated authority confirms the financial contribution from the Local Authority to any agreed integrated package of care.

3.15 Lead providers that make arrangements for aftercare without the appropriate authority from the CCG and Local Authority commissioners will have to bear the cost of that package until such time as it is properly agreed by the commissioners.

4.0 When does S117 Apply

What are After-Care Services?

4.1 The MHA Code of Practice provides:

"... After-care is a vital component in patients' overall treatment and care. As well as meeting their immediate needs for health and social care, after-care should aim to support them in regaining or enhancing their skills, or learning new skills, in order to cope with life outside hospital..."

4.2 The Care Act 2014 inserts a new subsection 6 to section 117 enshrining the principles set out in the Mwanza case in legislation. From April 2015 onwards section 117(6) will read as follows:

"(6) In this section, "after-care services", in relation to a person, mean`s services which have both of the following purposes—

(a) Meet a need arising from or related to the person's mental disorder and

(b) Reduce the risk of a deterioration of the person's mental condition (and, accordingly, reducing the risk of the person requiring admission to a hospital again for treatment for mental disorder)."

4.3 Specific aftercare services, that may be required specifically to meet mental health aftercare needs are not listed in the Mental Health Act 1983 and can potentially include any services provided directly by the CCG or the local authority as well as services commissioned from other providers, these may include:

- Assistance from community psychiatric nurses
- Medical supervision through out- patient appointments
- Psychiatric Treatment
- Social care
- The provision of domiciliary care
- Support in helping the ex-patient with employment
- The care and support element within supported living (not the accommodation itself and associated housing support)
- Residential care and residential nursing care

As aftercare services are not defined, the Local Authority and the relevant CCG has considerable discretion in relation to the services that can be provided.

4.4 Services providing care or support for a physical disability, illness, substance misuse problems, and common needs not arising from the patient's mental health disorder cannot be provided under S117. These must be met under separate health and community care legislation.

4.5 Although accommodation can be provided under s117, the need for accommodation must be a direct result of the reason that the patient was detained for in the first place. As a

matter of law ordinary accommodation can never be a free after-care service under s117 Mental Health Act.

5.0 Monitoring of Section 117 Aftercare Arrangements

5.1 The principles of monitoring all after care services to service users under Section 117 are embodied in the Care Programme Approach and the supporting guidance within the MHA Code of Practice.

5.2 From a person-centred perspective, the agreement of a combined CCG and LA funding approach to S117 allows for a seamless and coordinated approach to Aftercare. Maintaining the commissioning process at the clinical level (within a specified risk assessment) significantly reduces bureaucracy around the process.

Those concerned must consider the following issues:

a. The patient's own wishes and needs, and those of any dependents;
b. The views of any relevant relative, friend or supporter (including advocate/IMCA) of the patient;
c. The need for agreement with authorities and agencies in the area where the patient is to live;
d. In the case of offender patients, the circumstances of any victim and their families should be taken into account when deciding where the patient should live;
e. The possible involvement of other agencies, e.g. probation, voluntary organisations
f. The establishing of a care plan, based on full and detailed assessment and clearly identified needs, including a contingency plan should the patient relapse
g. The appointment of a key worker from either of the statutory agencies to monitor the care plans implementation, liaise and co-ordinate where necessary and report to the senior officer in their agency any problems that arise which cannot be resolved through discussion
h. Any safeguarding considerations
i. Cost effectiveness of proposed service
j. Any assessment under the Mental Capacity Act
k. The identification of any unmet need.

6.0 Ordinary Residence

For CCG's

6.1 S.117 aftercare responsibility comes into effect at the point of discharge. It is therefore essential as part of the discharge planning process to identify the relevant funding bodies prior to discharge.

6.2 The responsibility of CCG's has been changed with regard to residency and is determined in the new regulations.

6.3 The responsible commissioner prior to 1st April 2013 should be determined according to their GP practice registration or their usual residence prior to detention.

6.4 The Responsible commissioner on/after 1st April 2013 and 31st March 2016 should be determined according to the GP practice registration in the area to which they are to be discharged to.

6.5 The Responsible commissioner from 1st April 2016 should be determined according to their GP practice registration or their usual address prior to detention.

6.6 Decisions about "Residence/Ordinary Residence" may in some cases be difficult to determine and as such legal guidance should be sought from the appropriate authority Legal Advisors.

6.7 Guidance on previous legislation was provided in the case of *R v Mental Health Review Tribunal Ex p. Hall (1999) 4 All ER 883*. This case made clear that responsibility for the provision of after-care services fell to the local authority and CCG for the area in which the person was resident when they were detained in hospital, even if the person did not return to that area on discharge.

6.8 The position is now different in respect of the responsible CCG and following the publication of recent DoH guidance Who Pays? It is now only if no residence can be established does the duty fall on the authority where the person is to go on discharge from hospital.

6.9 If a service user moves to or is placed in another area and is subsequently detained under a treatment section in the new area the responsibility for S117 after-care services would then change to the authorities of the new area.

6.10 'Who Pays? Determining Commissioning Responsibility August 2013' and subsequent amendment, sets out the responsibilities for CCGs with regard to patients who move between CCGs during the course of their care. The amendment to Who Pays can be found at Appendix 3 for further clarity.

6.11 If, after placing a patient in area outside of the borough, there is a dispute between CCGs as to who is responsible, the relevant CCG shall continue to fund services for the patient on a without prejudice basis until the dispute is resolved.

6.12 NHS England may commission placements for patients not known to the above-mentioned Foundation Trusts. For example, a person with brain injury may be detained in an independent hospital or a person is transferred from prison to a secure hospital. Where it is established that the responsible CCG is, it will be necessary for the relevant CCG to ensure patient details are updated on the Register accordingly when "Ordinary Residence" status has been established. The CCG or the LA acting on their behalf will also be required to access the register.
Who Pays? Determining responsibility for payments to providers, August 2013 , NHS England, Section C page 17

For the LA

6.13 For the Local Authority, ordinary residence is determined by where the person was living prior to admission. The Care Act 2014 replaced the term "residence" to "ordinary residence"

in order to align Care Act responsibilities with s117 responsibilities. Placements made before April 2015 when the Care Act came into force will be subject to the rules of Ordinary Residence as they applied under the NAA 1948 and associated guidance.

6.14 If the LA places someone out of area into supported living, shared lives, or residential care it retains responsibility for them under the Care Act and S117. If the person relapses and is admitted again under Section 3, then the placing LA retains responsibility (prior to the Care Act the responsibility for 117 would fall to the host LA). This is because the person did not acquire ordinary residence in the host LA area. If the person acquires ordinary residence i.e. is supported in accommodation that is not deemed under the Care Act, then the responsibility for 117 would fall to the host LA, in the event of a readmission under S3. The host LA would already have acquired duties towards the person for their non-mental health eligible social care needs under the Care Act.

6.15 In circumstances where there is a dispute between following local authorities following a patient being placed, it shall be the responsibility of the placing authority to continue providing support pending the resolution of the dispute.

7.0 Transfer or placement to another Local Authority area

7.1 The duty to provide after-care services remains with the placing local authority even if the service user becomes resident in another area (subject to the rules in paras 7.12 – 714). The Care Coordinator should ensure that the necessary arrangements are in place to continue provision of services as indicated in the Care Plan.

7.2 Authorities can agree to a transfer of responsibility for providing S117 services. In this scenario the Care Coordinator should ensure that transfer of all after-care documents are completed and, in consultation with the Responsible Clinician, ensure appropriate transfer of care between the authorities

8.0 Direct Payments (Personal Budgets)

8.1 Direct payments can be made to people who are assessed as requiring services under S117.In determining whether a direct payment should be made, a CCG and/or Local Authority is required to have regard to whether it is appropriate for a person`s condition, the impact of that condition on the person`s life and whether a direct payment represents value for money.

8.2 Local Authorities and CCGs have a power (not a duty) to make direct payments to those requiring services under S117. The provision of a discretionary power is intended to give greater flexibility in cases where they are concerned that there may be risks in making direct payments in respect of services which the person concerned may prefer not to receive.

9.0 Discharge from S117 Procedure

9.1 Aftercare services under s117 should not be withdrawn solely on the grounds that:

9.1.1 The patient has been discharged from the care of specialist mental health services.

9.1.2 An arbitrary period of time has passed since the care was first provided.

9.1.3 The provision of care is successful in that the service user is well settled in the community or residential care.

9.1.4 The patients is no longer subject to Supervised Community Treatment or S17 leave.

9.1.5 They have returned to hospital as informal patients or under Section 2 of the Mental Health Act.

9.1.6 The patient is deprived of their liberty under the MCA (DoLs)

9.2 It is essential that a client`s s117 status and aftercare plan, is regularly reviewed and accurately recorded by the allocated Care Co-ordinator. Decisions to discontinue the provision of elements of a care package under s117 must be made with reference to the client, carer, and the multi- disciplinary team.

9.3 If S117 after-care ends, it cannot be re-started if the service user becomes mentally ill once again. They can only receive S117 services if they are re-admitted to hospital under a treatment section of the MHA as in 2.2 above.

9.4 S117 services cannot be terminated for service users subject to after-care under supervision (S37 with a S41 MHA Restriction Order) until the respective orders have been discharged.

9.5 S117 services may not be terminated for a patient still subject to Section 17A Community Treatment Order.

9.6 Discharges from Secondary Care with Continuing Section 117 Aftercare.

9.7 In exceptional circumstances, individuals may remain on Section 117 and require after care services that are available from primary care for example medication where prescription charges are may be funded under section 117.

10.0 Disputes Resolution

10.1 Any disputes about responsibility for funding Section 117 will be dealt with through the Continuing Healthcare & Complex Care Interagency Dispute Resolution Procedure.

11.0 References

1. Department of Health, (2015). *Mental Health Act 1983 Code of Practice*. London: Department of Health.
2. Department of Health, (2015). *Reference Guide to the Mental Health Act 1983*. London: Department of Health.
3. Department of Health, (2012). *The national framework for NHS continuing healthcare and NHS-funded nursing care - (revised).* London: Department of Health.

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5. *Mental Health Act Manual 17th Edition due 300914.* London: Sweet and Maxwell.
6. Who Pays? Determining responsibility for payments to providers April 2016 NHS England
7. Continuing Healthcare and Complex Care Interagency Working Dispute Resolution Procedure June 2017
8. R(Mwanza)v LB of Greenwich(2010) EWHC 1462