Scottish Parliament Region: South of Scotland

Case 200500976: Ayrshire and Arran NHS Board

Summary of Investigation

Category

Health: Hospital; NHS funded Continuing Care

Overview

The complainant (Mr C) raised a number of concerns that, following his father (Mr A)'s stroke in November 2004, his father became eligible for NHS funding of all his care in a Nursing Home rather than the limited funding he received from his local authority. Ayrshire and Arran NHS Board (the Board) had not agreed to fund this care and Mr C raised a complaint that the matter had not been properly considered.

Specific complaints and conclusions

The complaints which have been investigated are that the Board failed to:

(a) properly assess Mr A's eligibility for NHS funded Continuing Care *(upheld)*; and

(b) properly review Mr C's application for NHS funded Continuing Care *(partially upheld)*.

Redress and recommendations

The Ombudsman recommends that the Board:

(i) undertake a retrospective, evidenced assessment of Mr A's continuing care needs and;

(ii) ensure that where there is an application either for NHS Continuing Care Funding or to review a decision to refuse funding, the process for dealing with that application is explained to the applicant at the outset.

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

Main Investigation Report

Introduction

1. On 6 July 2005 the Ombudsman received a complaint from Mr C about the assessment of the eligibility of his father (referred to as Mr A) for NHS funded Continuing Care by Ayrshire & Arran NHS Board (referred to as the Board). The events referred to in this complaint occurred between November 2004 and May 2005. Mr C first raised the matter with the Board on 11 February 2005 and received a final response on 23 June 2005. Mr C remained unhappy with the response and asked the Ombudsman's office to investigate the matter.

2. The complaints from Mr C which I have investigated are that the Board failed to:

(a) properly assess Mr A's eligibility for NHS funded Continuing Care; and

(b) properly review Mr C's application for NHS funded Continuing Care.

3. As the investigation progressed, I identified issues concerning the clarity, accessibility and transparency of the process for assessing eligibility for NHS funded Continuing Care. The Ombudsman will, therefore, be forwarding a copy of this report to the Scottish Executive Health Department (SEHD) to consider the implications of specific cases on two reviews currently being undertaken by SEHD (see paragraphs 38 to 40).

Background Legislation, Case Law and Guidance

Scottish Guidance, Legislation and Case Law

4. Each NHS Board in Scotland has a duty to arrange and fund the health care needs of people in their geographical area who require continuing health care; this care is commonly referred to as NHS funded Continuing Care. This care can be provided in a number of settings but is paid for entirely by the NHS Board.

5. Each NHS Board also has a duty to ensure any necessary arrangements are in place for in-patients prior to discharge. Responsibility for making these arrangements will vary according to the particular needs of each patient. The decision to discharge is made by the doctor responsible for the patient's care and is a clinical decision. In some cases it will also involve joint working between hospital staff, the GP and social services staff. Where there are costs involved in meeting the particular needs identified these can be met in a number of ways including self-funding by the patient (or the patient's family), local

authority funding (which will vary according to need and circumstance) or NHS funded Continuing Care as appropriate.

6. The general responsibilities of the NHS to arrange discharge are set out in guidance issued in 1996 by the then Scottish Office Department of Health (now SEHD). This guidance note is referred to as MEL 1996(22) (the MEL). This guidance is supplemented by later guidance (Circular Nos SWSG10/1998 & CCD 8/2—3). Details of all policies referred to in this report can be found in Annex 3.

7. The criteria used by the NHS to determine eligibility for NHS arranged and funded Continuing Care are also set out in the MEL and (as applicable to Mr A's situation) can be summarised as applying in 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; or, a patient requires routine use of specialist health care 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.

8. 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 and reports issued by the Health Services 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 the funding of Continuing Care. The SEHD 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.

9. However, the same issue has not been tested in the Scottish courts. As a general point, decisions in the Court of Appeal in England can be persuasive but are not binding on Scottish courts. Similarly, the development of the guidance and practice in England which has followed from the English legal case and subsequent decisions of the English Health Service Ombudsman cannot be considered binding on Scottish health authorities.

10. There has been no revision of NHS Continuing Care funding guidance in

Scotland since the publication of the MEL and Scottish policy has developed differently to that of England. The routes for care funding in England and Scotland have further diverged since 2002 when the policy of providing for Free Personal and Nursing Care established by the Community Care and Health (Scotland) Act 2002 was introduced in Scotland. In summary the current position with regard to NHS funded Continuing Care in Scotland remains limited to that set out by the MEL.

Investigation

11. Investigation of this complaint involved reviewing Mr A's relevant hospital and nursing home records, obtaining the opinion of a medical and a nursing adviser (referred to in this report as the advisers), reading the documentation provided by Mr C, identifying relevant legislation, reviewing policies and procedures. A first draft report was issued in July 2006 but withdrawn while the Ombudsman's office sought legal advice on certain matters and raised a number of the concerns identified in that draft report (and a number of other cases being considered by the Ombudsman's office) with the SEHD. A subsequent revised draft was issued to Mr C and the Board for comment in December 2006. A summary of terms used is contained in Annex 1. A glossary of medical terms is contained in Annex 2. A list of legislation, policies and reports considered is at Annex 3. A summary of the problems identified by the Ombudsman's office with the procedure for operating MEL (1996) is contained in Annex 4. I have not included in this report every detail investigated but I am satisfied that no matter of significance has been overlooked.

12. In his complaint to the Ombudsman's office Mr C raised issues about the relevant SEHD guidelines. These guidelines are the responsibility of the SEHD and cannot be addressed within this investigation which concerns the Board. However, this and other complaints currently with the Ombudsman's office raise broader policy issues which the Ombudsman has drawn to the attention of SEHD (see paragraphs 38 to 40).

(a) The Board failed to properly assess Mr A's eligibility for NHS funded Continuing Care

13. Mr A, then aged 84, became resident in a private nursing home (referred to as the Nursing Home) in October 2001 under a self-funding arrangement. Mr C stated that at that time Mr A received some funding for this care from Social Work. Mr C stated that Mr A generally enjoyed good health although he was subject to bouts of dementia and had controlled diabetes.

14. On 23 November 2004, Mr A suffered a cardiovascular accident (CVA) and was admitted to Crosshouse Hospital in Kilmarnock (the Hospital). Mr C stated that at this point there was a distinct and continuing change to Mr A's physical and mental state. In particular Mr C noted that Mr A now required to be PEG-fed, he could not swallow or speak, he had brain degeneration and cognitive impairment, right side paralysis and right eyesight failure and was bedridden with double incontinence.

15. Mr C stated that Mr A had continued to pay for his place at the Nursing Home while he was in hospital to ensure that this would be held open for him and in the hope he would be able to return there. Mr A was discharged from the Hospital back to the Nursing Home on 10 January 2005. Mr C stated that the family were happy with this move although there was no consultation with them about this beforehand. Mr C said that it was the family's understanding that there was a continuing health need for his father but that this could be met by the Nursing Home which had highly competent nursing staff. His belief was that this was arranged and provided under the supervision and auspices of the NHS.

16. On 11 February 2005, Mr C wrote to the Board to apply for NHS funding for his father's care. In this letter Mr C referred to the recent changes in Mr A's condition and stated that he believed Mr A's mental and physical state meant that he was eligible for continuing in-patient care.

17. Mr C received an acknowledgement on 15 February 2005. The process for reviewing Mr C's request is detailed in complaint (b) but the Medical Director sent Mr C a substantive letter of response on 1 April 2005. In this letter Mr C was advised that Mr A was not considered to be eligible for NHS funded Continuing Care as there had been no change to his functioning abilities prior to his hospital admission and no change in his level of dependency. It was suggested that as Mr A was now PEG-fed his nursing care was in some respects easier. The letter concluded that there did not appear to be any

clinical problems which required continual medical intervention or supervision nor any excessive or unpredictable nursing needs.

18. Mr C wrote to the Board on 10 April 2005 disputing their analysis and some of the facts on which it was based. He asked for an independent review and details of the criteria used in making the decision. Mr C received a further response on 23 June 2005 from the Director of Nursing at the Board. The Director advised that it was the view of the Consultant Physician who had treated Mr A that 'the decision to discharge is always a matter for judgement and the criteria for making a decision are not and can not be completely explicit'. Mr C was advised that one factor taken into account was the ability of the Nursing Home to manage the changes in Mr A's health, in particular the PEG-feeding and that the Board were of the view that, as the Nursing Home were able to manage this, the decision was taken by the clinical team that Mr A could be discharged back to the home.

19. Mr C was not satisfied by this response as he felt it did not address the central question of his father's eligibility for NHS funded care. Mr C noted that the situation in England had progressed since 1996 and that a number of legal judgements and decisions by the English Health Service Ombudsman had resulted in more specific guidance from the Department of Health in England. Mr C complained that all these developments had led to changes in practice in England such that Scottish regulation could no longer be considered to be in-line with good practice.

20. The nursing adviser commented that the medical notes and Nursing Home notes indicated that Mr A was incontinent prior to his hospital admission, was 'chairfast' but could stand with a zimmer frame, was hoisted to transfer, and had been known to take the occasional step unaided. On his return to the Nursing Home he was unable to speak, unable to swallow, unable to walk, and was fed via a PEG feeding tube. The Hospital had confirmed that the Nursing Home had expertise in managing PEG feeding, and indeed it was noted that the Nursing Home had a number of other residents with PEG tubes that were successfully managed. The discharge nursing note states that 'nursing home state he is the same as before, only he could speak'. The medical adviser questioned how the Nursing Home staff were able to state this when there is no evidence of any reassessment of Mr A by the Nursing Home or of any communication with Hospital staff with regard to his other care needs.

21. The medical adviser noted that there is no record in the clinical record of an assessment being requested from a therapist on the ward and no overall nursing plan or evaluation (although he noted that the day-to-day records were good). There is also no evidence of a nursing assessment prior to discharge with details being passed on by staff to the Nursing Home informally over the telephone. The medical adviser concluded that based on the clinical records available, he inferred that Mr A's condition was different with respect to his care needs before and after admission as he could no longer communicate, was completely immobile, required specialist feeding and was more frequently noted to be resistant to care offered and aggressive. Of particular significance to the MEL, the medical adviser considered that these changes indicated his care needs had become more 'intense, complex and unpredictable'. This mirrors one of the eligibility criteria of the MEL.

22. The Advisers noted that patients being considered for discharge from hospital may need assessment for NHS Continuing Care funding but will only receive funding if they meet the criteria of the MEL. In Mr A's case clinicians considered he did not meet those criteria and, therefore, did not perform any assessment under the MEL criteria. The medical adviser was critical of staff at the Hospital for not recording any nursing or pre-discharge assessment which in his view meant that the reason given by the Board for not undertaking an assessment for NHS funded Continuing Care, because Mr A would not have been eligible anyway, was a hollow one. The medical adviser concluded that the lack of evidence of any informal assessment makes it, in his view, impossible for the Board to prove Mr A did not need an NHS Continuing Care assessment.

Other evidence from the medical record and other sources

23. NHS Quality Improvement Scotland (NHS QIS), the organisation within NHS Scotland responsible for producing national standards and guidelines, developed four standards for Care of Stroke Patients in the Acute Setting, one of which relates to discharge (see Annex 3 for details of the report). In March 2005 the project group from QIS visited the Stroke Unit at the Hospital where Mr A was treated to review the performance of the Board against all four standards. With respect to discharge the group found that the standard was being met in the Hospital. The report noted that there was a comprehensive discharge policy and that staff reported discharge planning was conducted in consultation with patients and carers. The report also referred to ongoing reviews of discharge needs at a weekly multi-disciplinary meeting.

24. The medical and nursing records for Mr A's admission do make reference to discussions with Mr A's family about aspects of his health care but these entries are largely made early in Mr A's admission. There is no reference to either a multi-disciplinary team discussion of Mr A's discharge or to involvement of his family in discharge planning. The records contain a copy of a 'Multi-disciplinary Discharge Summary' which has space for details of patient and family communication but none is indicated on the form. The nursing record for 10 January 2005, the day Mr A was discharged, simply notes 'To go today due to bed crisis in hospital'.

25. The medical adviser noted that the final discharge process was not carried out in accordance with the Board's guidance for Stroke patients and noted that the information on PEG feeding on discharge was not well handled as a specialist nurse needed to visit the Nursing Home to explain the programmed pump to the Nursing Home staff.

(a) Conclusion

26. Mr C raised a number of issues with respect to the development of NHS Continuing Care practice in England and the impact of these changes in Scotland. The application of the English legal cases has not been established by a court in Scotland and it is not the role of the Ombudsman's office to interpret and define the law or to make policy. In reaching my conclusions on this complaint I am concerned solely with the question of whether the Board correctly considered and applied the MEL and any other relevant discharge procedures.

27. The clinical advice I have received is that the view of the Board that Mr A would not qualify for NHS funded Continuing Care and was, therefore, appropriately never considered eligible to be assessed under the MEL is incorrect. The Advisers have told me that the Board's view of Mr A's needs on discharge was not consistent with the change in his health and in particular cannot be substantiated by any contemporaneous assessments since none were carried out. I conclude there was a failure to properly consider Mr A's eligibility for assessment for NHS funded Continuing Care under the MEL and to follow the appropriate discharge procedures for Stroke patients.

28. In reaching this conclusion I must emphasise that it is not the role of the Ombudsman's office to determine whether or not any individual patient is

clinically eligible for NHS funded Continuing Care and I am not reaching such a conclusion in this case. However, there is insufficient evidence to substantiate the decision of the Board not to fund Mr A's care and a degree of clinical doubt has been expressed by the Advisers. For these reasons I uphold the complaint that the Board failed to properly assess Mr A's eligibility for NHS funded Continuing Care.

(a) Recommendation

29. In light of this conclusion the Ombudsman recommends that the Board undertake a retrospective assessment of Mr A's eligibility for NHS Continuing Care funding from 10 January 2005 to include the necessary multi-disciplinary and family inputs. In particular the Board should ensure that the assessment process is transparent and clearly evidences its conclusions.

(b) The Board failed to properly review Mr C's application for NHS funded Continuing Care

30. Mr C wrote to the Board on 11 February 2005 to apply for NHS funding for his father's care to be backdated to the date of his discharge from the Hospital, 10 January 2005. Mr C received an acknowledgement of this letter on 15 February 2005 advising him that he would receive a response from the Medical Director. The Medical Director sought information from the Consultant Physician about his decision to discharge without NHS funding for Continuing Care and responded to Mr C on 1 April 2005. The Director stated that he agreed with the decision that Mr A did not require long-term continuing NHS care.

31. Mr C disagreed with this view and wrote again on 10 April 2005. In response the Medical Director informed Mr C that there was an appeals procedure where there was a dispute about NHS funded Continuing Care. This procedure was managed by the Director of Public Health and Mr C's letter was forwarded to her. Mr C was notified on 25 April 2005 that the Director of Public Health was considering his appeal. On 3 June 2005, Mr C received a letter from the Director of Nursing advising him that the matters he had raised were subject to an investigation in line with the NHS Complaints Procedure. On 23 June 2005 the Director of Nursing provided Mr C with a response to his letter of 10 April 2005, advising him that this was being sent in accordance with the NHS Complaints Procedure and that he could now refer the matter to the Ombudsman's office. The letter explained that the matter had originally been inappropriately considered with regard to the MEL not the NHS Complaints

Procedure and apologised for this error. The letter also stated that, because of the error, the Director of Nursing had reviewed the information to ensure the correct process had originally been followed and that she was satisfied that it had been.

32. Mr C wrote to the Director of Nursing on 6 July 2005 stating that he had never made a complaint but had only sought to make an application for NHS funding for his father's care.

33. Advice to Health Boards regarding the process for review of decisions regarding NHS funding of Continuing Care is set out in a letter issued by SEHD Directorate of Service Policy and Planning (DKQ/1/44) to all NHS Chief Executives on 13 June 2003. The letter states that where a patient is still receiving in-patient care the decision should be reviewed in accordance with the guidance in the MEL. If a patient has been discharged the decision should be reviewed in accordance with the NHS Complaints Procedure.

34. In Mr C's case, his letter of 11 February 2005 was processed, in error, under the MEL guidance. The error was noted by a Consultant in the office of the Director of Public Health and the matter was transferred to the Director of Nursing as the person responsible for the, correct, NHS Complaints process.

(b) Conclusion

35. The problem highlighted in Complaint (a) stems from the lack of a clear process for assessment within the MEL. This lack of process permits clinicians to take decisions that a patient is not eligible for assessment under the MEL and, therefore, no formal assessment is ever undertaken. This precludes any family involvement in the process and gives rise to understandable confusion about what assessments have actually occurred and the meaning of decisions that have been reached. I note this confusion extends to those involved in administering the process as well as the families. In this case Mr C's application was eventually considered in accordance with the correct policy but it was never made clear to Mr C that his father had never been assessed for NHS funded Continuing Care. An apology for the original error was given but the explanation given was not helpful to Mr C's understanding of the error. I conclude that Mr C's application was properly reviewed following the initial error but that this error was not properly explained to Mr C. I, therefore, partially uphold this complaint.

(b) Recommendation

36. The Ombudsman has considered this conclusion and recommends that the Board ensure that, where there is an application for NHS Continuing Care Funding or to review a decision to refuse funding, the process for dealing with that application and its possible conclusion is explained to the applicant at the outset.

Wider Policy Issues

37. This and a number of other cases currently with the Ombudsman's office raise issues about whether recent decisions by English courts might be expected to have had a bearing on policy and practice in Scotland. The Ombudsman has raised this issue with SEHD who have indicated that they will be considering the implications of these judgements carefully as part of the review of free personal and nursing care currently being undertaken by them.

38. These cases have also illustrated the need for a clearer, more accessible and a more transparent process for assessing eligibility for NHS Continuing Care funding. The Ombudsman's office has also raised these concerns with SEHD who have advised us that they acknowledge the procedural gaps identified in the current guidance and are seeking to address this issue in draft revised guidance which they are in the process of developing.

39. In light of both the review of the guidance and the implications of the English developments the Ombudsman will be sending a copy of this report to the SEHD for consideration of the impact of the current guidance in individual cases.

27 March 2007

Annex 1

Explanation of abbreviations used

Mr A	The Complainant's father
Mr C	The Complainant
The Board	Ayrshire and Arran NHS Board
The Advisers	Medical and nursing advisers to the Ombudsman
SEHD	Scottish Executive Health Department
NHS QIS	NHS Quality Improvement Scotland
The Nursing Home	The nursing home where Mr A was resident before and after his hospital admission
The Hospital	Crosshouse Hospital, Kilmarnock
The Medical Director	The person responsible for reviewing Mr C's application for NHS Continuing Care Funding

Annex 2

Glossary of terms

CVA	Cardiovascular Accident commonly known as a stroke
PEG Feeding	Percutaneous Endoscopic Gastronomy - Liquid nutrition through a tube inserted directly into the stomach

Annex 3

List of legislation, policies and reports considered

MEL 1996(22)
Sets out the responsibilities of the NHS to arrange discharge and the criteria for eligibility for NHS funded Continuing Care. Issued by the, then, Scottish Office Department of Health (now SEHD).

SEHD Circular, No. SWSG10/1998
Scottish Office : Community Care Needs of Frail and Older People (Integrating Professional Assessments and Care Arrangements

SEHD Circular, No. CCD 8/2—3
SEHD Circular: Choice of Accommodation – Discharge from Hospital

SEHD Letter, DKQ/Q44
Directorate of Service Policy and Planning letter to all NHS Chief Executives on 13 June 2003, outlining the process for handling Continuing Care funding complaints.

The Health Service Ombudsman for England
HC399 (2002 – 2003) & HC144 (2003 - 2004)
NHS funding for long term care

NHS Quality Improvement Scotland
Local Report – November 2005 (NHS Ayrshire and Arran)
Stroke Services: Care of the Patient in Acute Setting

Annex 4

Procedural difficulties and confusion arising from MEL 1996 (22)

1. The complaints received in the Ombudsman's office on the subject of NHS funded Continuing Care and the MEL 1996 (22) show common themes of dissatisfaction among complainants associated with the process of being assessed for and obtaining NHS funded Continuing Care.

2. The lack of a formalised process for Continuing Care assessment means the public are often unable to obtain clear information about the qualification criteria for NHS funded Continuing Care. There is a lack of clarity about when a patient should be the subject of a multi-disciplinary assessment under the MEL 1996 (22). This assessment generally occurs at the time of a patient's discharge from hospital. Not every patient discharged will require to be assessed under the MEL 1996 (22) but there is no clear guidance on how the decision on whether or not to assess is made. Consultants can make discretionary and undocumented decisions that patients are not eligible to be assessed under the MEL and this results in a lack of transparency and inconsistency in the decisions made.

3. The lack of a formalised process for NHS funded Continuing Care assessment also results in a lack of clarity about how somebody who is not being discharged from hospital can access the Continuing Care assessment process under the MEL 1996 (22). The NHS has moved to work more closely with Local Authorities on assessment of care needs. The MEL does not reflect any role for such activities in assessing the potential eligibility of those currently living in the community (rather than this being carried out by hospitals as part of their discharge procedures).

The fact that certain patients are not considered eligible to be assessed without being given any formal assessment results in confusion about the reasons for refusal of funding. The way in which the MEL 1996 (22) functions is not always clearly communicated to families and they are often not provided with details on how to appeal and request a review of the decision to refuse funding. Furthermore, if somebody has not been considered as eligible to be assessed under the MEL 1996 (22), there is no automatic right of appeal and no formal way in which the family or the patient can request an official assessment.