

Planning for future care needs: the legal position



Law Centre (NI)

At a glance

This briefing examines the legal position governing a Health and Social Care Trust's (HSC Trust) duty to identify an adult service user's future care needs and to make timely and appropriate preparation and provision for longer term care planning to address social care needs which may arise at a later stage in a service user's life.

It is aimed at health and social care staff, service users, carers and their advisers.

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Introduction

This briefing examines the legal position governing a Health and Social Care Trust's (HSC Trust) duty to identify an adult service user's future care needs and to make timely and appropriate preparation and provision for longer term care planning to address social care needs which may arise at a later stage in a service user's life.

This is of particular relevance in situations where the service user and/or their carer is/are getting older and require guidance and assistance from the HSC Trust to plan for an anticipated change in their circumstances which may arise due to advancing age and/or declining health.

The community care legal advisers at Law Centre (NI) have noted an increase in the number of queries to the advice line service concerning the obligations of HSC Trusts to assist service users and their carers in planning for their future care needs and provision. Given this increase, it is useful to review and analyse the law and guidance on this issue.

1. Introduction: the legal framework

The law relating to social care is not contained in any one piece of legislation but rather is comprised of a number of different statutes. These statutes create rights for individual service users and their carers and confer both duties and powers on HSC Trusts to assess social care needs and provide services.

1.1 Key pieces of social care legislation

Key pieces of social care legislation include¹:

- Health and Personal Social Services (NI) Order 1972;
- Chronically Sick and Disabled Persons (NI) Act 1978;
- Disabled Persons (NI) Act 1989;
- Carers and Direct Payments Act (NI) 2002;
- Mental Health (NI) Order 1986

¹ For more information on key pieces of social care legislation applicable in Northern Ireland, please see Law Centre (NI) Encyclopaedia of Rights: Introduction to Community Care available at: <http://www.lawcentreni.org/EoR/community-care/introduction-to-community-care.html>

1.2 Guidance

In addition to the legislative provisions, various statutory bodies including the Department of Health, Social Services and Public Safety (DHSSPSNI); the HSC Trusts and the Health and Social Care Board (HSC Board) issue various forms of guidance for use by HSC staff.

There are several types of guidance including policy guidance, practice guidance, codes of practice, circulars and advice notes.

Generally, guidance does not impose legally binding obligations on HSC Trusts although it may carry significant weight in the event of dispute concerning the assessment of need and the provision of services. Certain types of guidance may impose a legal obligation, eg guidance made explicitly under legislation which specifically requires HSC Trust staff to act under it². Otherwise, a HSC Trust will not automatically be acting unlawfully if a decision is reached without following relevant guidance.

1.3 Key pieces of social care guidance

Key pieces of social care guidance include:

- People First: Community Care in Northern Ireland for the 1990s (DHSSPSNI);³
- People First Care Management: Guidance on Assessment and the Provision of Community Care (DHSSPSNI);⁴ (the People First Guidance)
- Care Management, Provision of Services and Charging Guidance 2010 (DHSSPSNI);⁵
- Regional Access Criteria for Domiciliary Care 2008 (DHSSPSNI);⁶
- Carers Assessment and Information Guidance 2005 (DHSSPSNI);⁷

² This is referred to as 'statutory guidance'. An example would be the Charging for Residential Accommodation Guide (CRAG) which is issued under the Health and Personal Social Services (NI) Order 1972. It sets out the charging rules applied by a HSC Trust when assessing a residential/nursing home resident's liability to contribute towards or pay for their care.

³ Available at https://www.health-ni.gov.uk/sites/default/files/publications/dhssps/people-first_0.pdf

⁴ Available at https://www.health-ni.gov.uk/sites/default/files/publications/dhssps/people_first-care-management.pdf

⁵ Available at <https://www.whatdotheyknow.com/request/72125/response/177406/attach/html/4/HSC%20ECCU%201%202010%20Care%20Management%20Provision%20of%20Care%20and%20Charging%20Guidance%20March%202010.pdf.html>

⁶ Available at https://www.health-ni.gov.uk/sites/default/files/publications/dhssps/circular-eccu-2-2008-domicilliary-care-access-criteria_0_1.pdf

⁷ Available at <https://www.health-ni.gov.uk/sites/default/files/publications/dhssps/ec-carers-assessment-information-guidance.pdf>

2. Planning for future care needs

In the main, the provisions of the above legislation and Guidance are largely focussed on a HSC Trust's duty to provide social care services to meet an individual's assessed eligible **current** needs. Equally, legal challenges taken against decisions made by HSC Trusts have in general centred on alleged failures to meet **existing** social care needs.

2.1 Future care planning and guidance

However, there are a number of key provisions within social care guidance which emphasise the importance to HSC Trust staff of considering an individual's longer term care needs when conducting an assessment of need, when planning care provision in each case and when reviewing existing care arrangements.

- **The People First Guidance**

This guidance highlights the importance of looking beyond an individual's current needs and circumstances by requiring that HSC Trusts have *'an alert and dynamic approach to review arrangements to avoid any threat to continued community living'*.⁸

Chapter 8, paragraph 8.6 requires that *'Care Planning should be sufficiently flexible to respond to short term **and** changing needs'*.

- **Care Management, Provision of Services and Charging Guidance 2010**

This Guidance confirms that one of the underpinning principles governing the provision of community care is that HSC Trusts *'respond flexibly and sensitively to the needs of individual service users and their carers'*⁹;

Paragraph 27 of this Guidance requires that case managers ensure that *'changing needs or circumstances are recognised and re-assessment of need is undertaken, when necessary'*.

Regarding arrangements for review of assessments of need, paragraph 24 emphasises that the case manager should *'make sure that reviews take place (the frequency of which will be dictated by the circumstances and complexity of the individual's care or care package but no less than annually); and ensure that reviews are person-centred and inclusive, take into account the experience/views of service users and carers, and service providers, and that they inform changes in care or service provision'*.

⁸ The People First Guidance, paragraph 6.5

⁹ Care Management, Provision of Services and Charging Guidance, page 3

Taken together, the above provisions of DHSSPSNI Guidance highlight that both the review mechanism and the care planning process are intended to be used by HSC Trust staff to ensure that future needs are met via timely, effective and efficient service provision when these needs arise. It is also clear that the wishes and views of service users and their carers should inform the assessment of need, care planning and review processes to ensure that their wishes both in the immediate and long-term are fully considered by the HSC Trust.

2.2 Future care planning and case law decisions

The issue of planning for future care needs has not explicitly arisen in cases concerning social care provision which (as stated) more often centre on a HSC Trust's duties to assess and address contemporary social care needs.

However, the importance of reviewing assessments and care plans in a timely manner so as to avoid breach of statutory duties by HSC Trusts has been highlighted in a number of cases.

- **In the matter of an Application by Kathleen McClean for Judicial Review [2011]' (McClean's Application)¹⁰**

McClean's Application concerned the alleged failure of the Western HSC Trust to provide adequate domiciliary care services to a service user with physical health issues¹¹.

McClean's Application required the Northern Ireland High Court to analyse the correct legal process to be followed by health and/or social care professionals across Northern Ireland when applying the eligibility criteria contained within the 2008 DHSSPSNI Circular entitled 'Regional Access Criteria for Domiciliary Care' (the Circular).

The importance of reviewing an individual's person-centred assessment (so as to ensure that a HSC Trust is able to provide adequate and suitable services to individual service users as soon as they require the services) is confirmed in the Circular. It concludes by stating that *'Review is essential in ensuring that appropriate domiciliary care is available to those most in need of it. All individuals should be advised at their assessment that this will be reviewed on a regular basis and that any services provided may be changed (including reduction or withdrawal) if their needs and risks have changed'*¹².

¹⁰ [2011] NIQB 19, available at http://www.courtsni.gov.uk/en-gb/judicial%20decisions/publishedbyyear/documents/2011/2011%20niqb%2019/j_j_mcc18085final.htm

¹¹ For more information on this case see Law Centre (NI) Information Briefing (31) entitled 'Assessing eligibility for domiciliary care services: McClean's Application' available at <http://www.lawcentreni.org/Publications/Law-Centre-Information-Briefings/Community%20care%20briefings/Briefing-31-Domiciliary-Care-Eligibility.pdf>

¹² Regional Access Criteria for Domiciliary Care, 2008 at paragraph 15

Such was the importance placed on ensuring reviews of assessments were carried out by the Circular, the HSC Trust's failure to carry out a timely review when the service user's circumstances changed was one of the reasons why the NI Court held that the Trust had acted unlawfully in the McClean case.

- **In the matter of an application by JR47 for judicial review' (JR47)¹³**

JR47 concerned the delay by the Belfast HSC Trust in discharging an individual with a mild learning disability from a long stay hospital into the community¹⁴.

One aspect of the case required the Northern Ireland High Court to assess the legal weight which should be attributed to Chapters 7 and 8 of the People First Guidance.

The Court held that Chapters 7 and 8 of the People First Guidance generate a substantive legitimate expectation that assessments of social care needs and any resulting care plan will normally accord with the frameworks specified therein.

As noted above, Chapter 8, paragraph 8.6 requires that '*Care Planning should be sufficiently flexible to respond to short term and changing needs*'.

Following the judgments of the Northern Ireland High Court in the McClean case and in JR47 it is clear that there is an expectation that HSC Trusts provide a care planning process which anticipates any reasonably foreseeable changes to care provision which may be required. It is also clear that whilst the Trust's primary focus should be on meeting existing social care needs, it is not unreasonable for carers and service users to request consideration be given to provision for longer term care needs which may arise as circumstances change.

3. Conclusion

With an aging population in Northern Ireland, carers and service users are becoming more conscious of the need to look beyond their immediate social care needs and consider future care arrangements.

There is no explicit requirement in law or guidance requiring a HSC Trust to address future needs within the assessment and care planning processes. However, the importance placed by both the provisions of DHSSPSNI guidance and case law decisions on having in place

¹³ [2013] NIQB 7, available at http://www.courtsni.gov.uk/en-GB/Judicial%20Decisions/PublishedByYear/Documents/2013/%5B2013%5D%20NIQB%207/j_j_McCL8735Final.htm

¹⁴ For more information on this case see Law Centre (NI) Information Briefing entitled 'The implications of JR47' available at <http://www.lawcentreni.org/Publications/Law-Centre-Information-Briefings/Implications-of-JR47-Judgement-May-2013.pdf>

effective review mechanisms means that in practice HSC Trusts should consider longer-term social care needs and provision to avoid breaching their statutory duties should a crisis situation arise.

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The Law Centre's Independent Advice, Support and Mediation Service (Community Care) runs a specialist advice line and representation service.

How we can help you

We provide advice and assistance to:

- adults who have needs due to physical or mental disability, ill health or age,
- adults with sensory disabilities, and
- adults whose needs arise because of their role as carer.

We can help in cases which raise issues concerning the legal responsibilities of health and social care trusts and other public bodies in the provision of health and social care.

We also welcome calls from health and social care staff, other healthcare providers and advisers.

Our advice line: 028 9024 4401, Monday to Friday, 9am to 1pm and 2pm to 5pm, out of hours voicemail service available

We also run a regional advice clinic service, please contact us for further information.

We advise in all areas of community care, including:

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Where necessary, we initiate judicial review proceedings in the High Court to clarify interpretation of health and social services law and/ or to challenge decisions made by public bodies or HSC Trusts. We can pursue appeals to the Court of Appeal and beyond where necessary.

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More information

Consult our website for more information on the service and on health and social care legal issues: www.lawcentreni.org

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