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Practice
Guidance

Section 117 aftercare services and the *Mental Health Act 1983*

Dartington

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Introduction

The purpose of this practice guidance is to provide an overview of English law concerning the provision of 'aftercare services' under section 117 (s117) of the *Mental Health Act 1983* (MHA). It aims to support good quality decision-making about s117 aftercare by explaining:

- the duty to provide s117 aftercare - what it is and why it is important
- who is entitled to receive s117 aftercare
- who is responsible for the provision of s117 aftercare (including the process for handling disputes)
- aftercare planning
- discharge from s117 aftercare.

This guidance explains how s117 of the MHA applies to adults in England. It should be noted that there are differences in the way in which this provision operates in Wales. Similarly, while under 18s, as well as adults, are covered by s117 some of the rules governing how s117 applies differ between the two age groups.

For accuracy, the terminology in relation to mental health adopted in this guidance reflects the language of the relevant legislation (the MHA and the *Mental Capacity Act 2005* (MCA)).

Chapter 33 of the *Mental Health Act 1983*: *Code of Practice* (the MHA Code) published in 2015 provides guidance on aftercare.

Please note that the contents of this resource do not constitute legal advice and are provided for general information purposes only.

The section 117 aftercare duty: What it is and why it is important

Section 117 of the MHA sets out the circumstances in which 'aftercare services' must be provided to people who are discharged from hospital after having been detained in hospital for treatment for a 'mental disorder'. It places a joint duty on NHS bodies (usually clinical commissioning groups (CCGs)) and local authorities to ensure that people falling within the scope of s117 are provided with aftercare services for as long as they need such services.

Accordingly, s117 aftercare will be of huge importance to people who have been receiving treatment for a 'mental disorder' in hospital as a detained patient and are in need of care and support when they leave hospital.

The s117 aftercare duty

Section 117(2) states:

> It shall be the duty of the clinical commissioning group or Local Health Board and of the local social services authority to provide or arrange for the provision of, in cooperation with relevant voluntary agencies, aftercare services for any person to whom this section applies until such time as the clinical commissioning group or Local Health Board and the local social services authority are satisfied that the person concerned is no longer in need of such services; but they shall not be so satisfied in the case of a community patient while he remains such a patient.

The duty to provide s117 aftercare is 'free-standing' (R v Manchester City Council ex p Stennett and others ([2002] UKHL 34)). This means that the basis on which it operates, such as who the duty applies to, when and for how long, is governed by s117 rather than other legislation, such as the *Care Act 2014*.

Meaning of s117 'aftercare services'

Section 117(6) defines 'aftercare services' as:

> '...services which have both of the following purposes –
>
> **a)** meeting a need arising from or related to the person's 'mental disorder'; and
>
> **b)** reducing the risk of a deterioration of the person's mental condition (and, accordingly, reducing the risk of the person requiring the admission to a hospital again for treatment for 'mental disorder'.)'

Rather than specifying the services that can be provided to people eligible for s117 aftercare, this definition focuses on the purpose of the aftercare services. The MHA Code states that the 'ultimate aim' of s117 aftercare services is to maintain people in the community (para 33.3). In practice, it may not always be clear whether the person's needs arise from, or are related to, their 'mental disorder'. However, those making this decision should bear in mind the MHA Code's advice that the definition of aftercare should be interpreted broadly (para 33.4).

Services under s117 might include:

> ...healthcare, social care and employment services, supported accommodation and services to meet the person's wider social, cultural and spiritual needs, if these services meet a need that arises directly from or is related to the particular patient's mental disorder, and help to reduce the risk of a deterioration of the patient's mental condition.
> (MHA Code para 33.4)

In addition to meeting people's 'immediate needs for health and social care' on their discharge from hospital, s117 aftercare should aim to support people 'in regaining or enhancing their skills, or learning new skills, in order to cope with life outside hospital' (MHA Code para 33.5).

The scope of the duty to provide s117 aftercare is not limited to the 'mental disorder' that gave rise to the person's detention in hospital. For example, if a person receiving services under s117 then develops dementia, the person's mental health needs arising from the dementia can also be covered under s117.

Aftercare services and accommodation

While s117 aftercare is unlikely to cover a person's basic housing needs, accommodation, such as residential care and supported accommodation, can be provided under s117 if this falls within the purpose of aftercare services under s117(6) (i.e. to meet the person's mental health needs and to reduce risk of a deterioration of the person's mental health condition and hospital readmission).

In some cases, people may have been receiving services, such as residential care, prior to their detention under the MHA. If they are assessed as needing residential care as part of their s117 aftercare, this must be provided free of charge (subject to the 'top-up' arrangements noted below).

People who qualify for accommodation under s117 have the right to choose their accommodation provided certain conditions are met, such as the preferred accommodation must be suitable and available. If their choice of accommodation is more expensive than the accommodation the local authority would arrange as part of the person's aftercare services, either the person receiving the s117 aftercare or someone acting on their behalf can agree to make a 'top-up' payment. (See s117A of the MHA; *Care and Support and Aftercare (Choice of Accommodation) Regulations 2014* and Department of Health and Social Care, *Care and Support Statutory Guidance* (Annex A paras 44 – 50)).

Direct payments for aftercare services

Individuals can receive direct payments to enable them to pay for their aftercare services (s117(2)C) from local authorities and NHS bodies, provided certain conditions are met. The MHA Code provides guidance on when such payments may be made (paras 33.17-33.19).

Aftercare services must be provided free of charge

Section 117 aftercare services are provided free of charge, whatever the person's financial means (R v Manchester City Council ex p Stennett and others ([2002] UKHL 34)).

Who is entitled to receive s117 aftercare?

The right to receive s117 aftercare applies to people who have been detained in hospital for treatment, who then cease to be detained and leave hospital, provided they were detained under one of the following provisions of the MHA:

- Section 3 (admission for treatment).
- Section 37 (hospital order) and section 45A (hospital direction) (where the court has ordered the person's admission to hospital following a criminal conviction).
- Sections 47 and 48 (the transfer of prisoners to hospital).

People who have been granted leave of absence from hospital (see s17 of the MHA) may fall within s117 if they have been discharged from hospital, even if only temporarily. However, s117 will not apply where the person is not discharged from hospital, for example the person is given leave for a couple of hours to go to the local shops (R(CXF) v Central Bedfordshire Council ([2018] EWCA Civ 2852).

The MHA Code notes that when people are discharged from hospital they 'should be given an explanation of what happens next, including any s117 aftercare or other services which they are to be provided' (para 4.30).

Section 117 aftercare services must be provided to people (referred to as 'community patients in s117(2)) who are placed on a 'community treatment order' (CTO) on their discharge from hospital (see sections 17A-G of the MHA) for throughout the CTO. Aftercare services must continue after they are discharged from a CTO if they still have needs for s117 aftercare (MHA Code 33.6). Chapter 29 of the MHA Code provides guidance on CTOs.

Entitlement to s117 aftercare

People entitled to s117 aftercare are not obliged to accept the aftercare services they are offered (although community patients subject to a CTO may be required to comply with certain conditions, such as attending a particular place to receive treatment).

The MHA Code emphasises that where people decline aftercare services their decision should be fully informed. An unwillingness to accept services does not mean that people no longer need s117 services, nor should it stop them from receiving such services if they later change their minds (MHA Code 33.24). It is also suggested that, where a person declines such services, this decision should be reviewed on a regular basis.

Care planning for those falling outside scope of s117 aftercare duty

Section 117 aftercare does not apply to everyone who has received treatment in hospital, for example those admitted under s2 of the MHA (admission for assessment) or those treated in hospital on an informal basis (i.e. not detained under the MHA). However, whether or not they are detained, the discharge arrangements for all those who have been admitted to hospital for treatment for mental disorder should be planned in accordance with the care programme approach (CPA) - see below (MHA Code para 34.9).

People discharged from hospital may well have needs that fall outside the scope of s117 and such needs should be assessed under alternative legislation, such as the *Care Act 2014*.

Who is responsible for the provision of s117 aftercare?

Section 117 places a joint duty on the relevant NHS health body (usually a Clinical Commissioning Group (CCG)) and local authority to provide the aftercare services the person has been assessed to need. This means that both will be responsible for ensuring the provision of aftercare. As the MHA does not state how these responsibilities are to be allocated between them, CCGs and local authorities should have locally agreed policies on how they will meet their joint responsibilities in place.

Local authorities will either provide aftercare services themselves or arrange for the care to be provided by others, for example local voluntary organisations. CCGs will commission such services, for example from an NHS Trust.

The basis on which the s117 responsible bodies are determined is set out in s117(3) of the MHA, which is a separate and distinct process from the one for determining the local authority responsible for provision of services under the *Care Act 2014*.

Usually, the responsible CCG and local authority will be the one in which the person was ordinarily resident immediately before being detained under the MHA (s117(3)(a) and (b)). However, as explained below, this is not always the case. The rules governing how to identify the responsible local authority and the responsible NHS body are set out first, followed by an explanation of ordinary residence.

Identifying the responsible local authority

When identifying which local authority will be responsible for a person's s117 aftercare, the first point to consider is whether the person was 'ordinarily resident' immediately before being detained.

It is important to note that the rules concerning ordinary residence differ between s117 of the MHA and the *Care Act 2014*. In particular:

- The person's ordinary residence will be determined by applying the relevant test for ordinary resident discussed below. If it can be established where the person was ordinarily resident before being detained under the MHA, the responsible local authority is the local authority in which the person was ordinarily resident in England (s117(3)(a)) or in Wales (s117(3)(b)). If the person was not ordinarily resident in either England or Wales, s117(3)(c) will apply (discussed below).

  As noted by the Department of Health and Social Care's guidance *Care and Support Statutory Guidance* (19.67), the provisions under s39 of the *Care Act 2014* which deem a person to be resident in a particular local authority's area do not apply when seeking to determine the local authority responsible for s117 aftercare services.

- If the person is discharged from hospital and subsequently moves so that they are ordinarily resident in another area, there is no change to the local authority responsible for the s117 aftercare services.

  This means that, whereas under the *Care Act 2014* a change in the person's ordinary residence after discharge from hospital will affect the local authority responsible for their social care services, it will *not* affect the local authority responsible for the person's s117 aftercare.

The *Care and Support Statutory Guidance* (*Care Act 2014* (19.64)) explains that under s117 of the MHA:

> ...if a person is ordinarily resident in local authority area (A) immediately before detention under the 1983 Act, and moves on discharge to local authority area (B) and moves again to local authority area (C), local authority (A) will remain responsible for providing or commissioning their aftercare. However, if the patient, having become ordinarily resident after discharge in local authority area (B) or (C), is subsequently detained in hospital for treatment again, the local authority in whose area the person was ordinarily resident immediately before their subsequent admission (local authority (B) or (C)) will be responsible for their aftercare when they are discharged from hospital.

Identifying the responsible NHS body

In most cases the NHS body responsible for a person's s117 aftercare is the CCG in which the person was ordinarily resident immediately before being detained under the MHA (applying the relevant test for ordinary residence discussed below).

In relation to identifying the relevant CCG for the purpose of s117, it should be noted that guidance issued by NHS England, *Who Pays? Determining responsibility for payments to providers*, is out of date. The position is that, like local authorities, the relevant CCG is determined by ascertaining where the person was ordinarily resident, not where the person was registered with a GP.

However, some cases will fall within regulations issued under s117(2E) of the MHA (NHS Commissioning Board and Clinical Commissioning Groups (*Responsibilities and Standing Rules Regulations 2012*, as amended (2016)) which make provision for when the NHS Commissioning Board (known as NHS England) (reg 15) and a CCG other than the one in which the person is ordinarily resident will be responsible for arranging the aftercare (reg 14; for example, where the person is not resident in England). As noted below, in some cases s117(3)(c) will also be relevant.

Ordinarily resident and s117

The term 'ordinarily resident' is not defined under the MHA so this is determined by case law. The *Care and Support Statutory Guidance* notes that, while in most cases a person's ordinary residence will be clear, other cases will be less straightforward, requiring consideration of the specific circumstances and taking into account factors such as **time, intention and continuity**.

The *Care and Support Statutory Guidance* highlights the relevant factors in identifying a person's ordinary residence in the light of case law, including the need to take into account the person's capacity to make decisions about where to live (paras 19.12 – 19.36). Such guidance will be relevant to practitioners seeking to establish individuals' ordinary residence for the purpose of s117.

- **Adults with capacity to make decisions about where to live**
  The leading case on ordinary residence emphasises the principle that ordinary residence is the place the person has voluntarily adopted for a settled purpose, whether for a short or long duration (Shah v London Borough of Barnet ('Shah') ([1983] 2 A.C. 309)).

It is suggested, therefore, that factors to consider when seeking to establish the person's ordinary residence immediately before being detained under the MHA should include:

- where the person was actually living before being detained
- whether they were living there voluntarily
- whether they were living there for a settled purpose.

It does not matter how long the person was living in a particular place – whether the person is considered to be ordinarily resident there will depend on the nature and quality of the person's connection with the new place.

> **Adults who lack capacity to make decisions about where to live**

All adults are assumed to have capacity to make decisions for themselves, including where they wish to live, unless evidence shows otherwise (s s1(2) of the *Mental Capacity Act* (MCA) 2005). In cases where people who lack the capacity to decide where they want to live, local authorities should adopt the above approach set out in Shah 'but place no regard to the fact that the adult, by reason of their lack of capacity, cannot be expected to be living there voluntarily'.

In establishing whether the person's residence can be regarded as having a settled purpose local authorities should consider:

- where the person is physically present
- their purpose for living there
- their connection with the area
- how long they have been living there
- their views, wishes and feelings.

(See *Care and Support Statutory Guidance* paras 19.26-19.32 and R (on the application of Cornwall Council) v Secretary of State [2015] UKSC 46).

People not ordinarily resident in England or Wales

Under s117(3)(c) if a person was not ordinarily resident in England or Wales immediately before being detained, the NHS body and local authority responsible for the provision of the person's aftercare will be the one in which the patient is 'resident'.

The extent to which there is a difference between 'ordinarily resident' and 'resident' is unclear. However, key factors in deciding a person's residence under s117(3)(c) are where they eat and sleep as well as the extent to which their presence is voluntary. It is possible for a person to be resident in a hospital if they are a voluntary patient (but not if they are detained under the MHA) and they have no other place of residence, for example if their tenancy was terminated or their accommodation arrangements otherwise came to an end after they were admitted to hospital (R (Sunderland City Council) v South Tyneside Council ([2012] EWCA Civ 1232)).

If the person's residence cannot be established (likely to be rare), the responsible NHS body and local authority will be those responsible for the area in which the person is sent on discharge.

Disputes

Section 117(4) of the MHA makes provision for disputes between local authorities about where the person was ordinarily resident immediately before being detained.

Disputes between local authorities in England are determined in accordance with the process set out in s40 of the *Care Act 2014*. If the dispute cannot be resolved locally, the local authorities can request that this is determined by the Secretary of State or the person appointed by the Secretary of State (see the *Care and Support (Disputes Between Local Authorities) Regulations 2014* and *Ordinary Residence: Practice Guidance, 2019*). The *Care and Support Statutory Guidance* emphasises that the person concerned should not go without the care they need because the authorities are in dispute over which one is responsible for the person's aftercare (para 19.77).

- As required by s117(5) the Secretary of State for Health and the Welsh Ministers have published arrangements for determining disputes between local authorities in England and local authorities in Wales (see further reading on page 14).

- Disputes between NHS bodies over the responsibility for a person's aftercare needs are not covered by the MHA. However, the *Who Pays? Determining responsibility for payments to providers* guidance states that disputes are expected to be resolved locally, 'ideally at CCG level' but where this is not possible NHS England should be consulted and arbitrate where necessary.

Aftercare planning

Although the duty to provide aftercare services is only triggered on a person's discharge from hospital, CCGs and local authorities are expected to work together beforehand to plan what aftercare services people will need on their discharge from hospital. For example, the MHA Code (33.10) states:

> *Although the duty to provide aftercare 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 care programme approach 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 or prison.*

Planning for discharge

The MHA Code highlights the importance of proper discharge planning, stating that before deciding to discharge, grant a person more than very short-term leave of absence, or to place a person under a CTO, the clinician responsible for the person's care ('the responsible clinician') should ensure that 'the patient's needs for aftercare have been fully assessed, discussed with the patient (and their carers, where appropriate) and addressed in their care plan' (MHA Code 33.13).

People who are entitled to s117 aftercare services should be identified and the details of the services provided to them recorded (MHA Code 33.14).

Under the MHA, people whose aftercare needs are being assessed while they are detained in hospital will be entitled to help and support from an Independent Mental Health Advocate (IMHA). Those who have been discharged from hospital under a CTO will continue to be entitled to an IMHA throughout the CTO. In addition, the *Care and Support Statutory Guidance* advises that an advocate under the *Care Act 2014* should be considered for those people who do not retain a right to an IMHA and whose care and support needs are being assessed, planned or reviewed, if they have substantial difficulty in being involved and if there is no appropriate person to support their involvement (para 7.23).

Assessment of needs for aftercare services

Prior to their discharge, people's needs for s117 aftercare services should be fully assessed and planned in accordance with the guidance on the care programme approach (CPA). The CPA sets out a system for the assessment, care planning and review of the care of people who have complex mental health needs. Chapter 34 of the MHA Code sets out guidance on who the CPA applies to, how the assessment and care planning should be undertaken and who should be involved.

It is important to note that the assessment of a person's needs for s117 aftercare is not subject to the eligibility criteria provisions that apply to assessments under the *Care Act 2014*, nor the requirement for a care and support plan under that Act.

The MHA Code emphasises that the care planning 'requires a thorough assessment of the patient's needs and wishes' that reflects the person's needs and that the care plan 'should be prepared in close partnership with the patient from the outset' and involve any carer as well as relevant professionals. The considerations set out under the MHA Code (para 34.19) are wide ranging. In addition to the person's continuing mental healthcare, psychological needs and physical healthcare, it includes:

- daytime activities or employment
- appropriate accommodation
- identified risks and safety concerns
- specific needs (for example arising from co-existing disabilities or drug, alcohol or substance dependency)
- parenting or caring needs
- assistance in welfare rights and managing finances
- contingency plans (should the patient's mental health deteriorate)
- crisis contact details.

When considering the duty to provide aftercare services, the courts have noted that the bodies responsible for the provision of a person's s117 aftercare services must use their best endeavours to ensure that such services are in place (R(IH) v Secretary of State for the Home Department and others [2003] UKHL 59; (R(K) v Camden & Islington HA [2001] EWCA Civ 240).

Discharge from aftercare services

As the duty to provide aftercare services is joint, it will continue unless and until both the CCG and the local authority are 'satisfied that the person concerned is no longer in need of such services' (s117(2)). This means that some people will be entitled to s117 aftercare services for a considerable amount of time.

As noted above, s117 aftercare planning is expected to be undertaken in accordance with the CPA. The MHA Code states that an individual's CPA care plans should be regularly reviewed - with the care coordinator arranging 'reviews of the plan until it is agreed between all parties, including the patient, that it is no longer necessary' (34.15)). However, whether the person is to receive care under the CPA arrangements is a separate issue to that of the person's entitlement to s117 aftercare. This means that, even if a person is discharged from the CPA, they will continue to be entitled to receive s117 services until such time as the relevant local authority and CCG agree that the person no longer needs to receive aftercare services under s117.

The person receiving s117 aftercare services and, if they so wish, their carer and/or advocate should be fully involved in the discussions on whether to end the aftercare (MHA Code 33.20).

The MHA Code (33.21-33.3) highlights that:

- Aftercare services under s117 should not be withdrawn solely on the grounds that:
  - the person has been discharged from the care of specialist mental health services
  - an arbitrary period has passed since the care was first provided
  - the person is deprived of their liberty under the MCA
  - the person has returned to hospital informally or under section 2
  - the person is no longer on a CTO or section 17 leave.
- Aftercare services may be reinstated if it becomes obvious they have been withdrawn prematurely, for example where a person's mental health begins to deteriorate immediately after services are withdrawn.
- Even when the provision of aftercare has been successful in that the person is now well-settled in the community, the person may still continue to need aftercare services, for example to prevent a relapse or further deterioration in their condition.

Key learning points

- Section 117 provides for the provision of aftercare to people who were detained in hospital for treatment for a 'mental disorder'.
- Aftercare services under s117 are broadly defined as their purpose is to meet the needs arising from, or related to, the person's mental disorder and seek to prevent a deterioration of the person's mental condition, thereby avoiding their readmission to hospital.
- All aftercare services under s117 are provided free of charge (but 'top up' arrangements can be put in place for accommodation).
- The planning of a person's aftercare is undertaken in accordance with the Care Programme Approach.
- People are entitled to receive aftercare services until such time as both the CCG and the local authority responsible for their aftercare agree that the person no longer needs such services.

Further reading

Legislation

Care Act 2014
www.legislation.gov.uk/ukpga/2014/23/contents/enacted

Mental Health Act 1983
www.legislation.gov.uk/ukpga/1983/20/contents

Regulations

Care and Support and Aftercare (Choice of Accommodation) Regulations 2014
www.legislation.gov.uk/uksi/2014/2670/contents/made

Care and Support (Direct Payments) Regulations 2014 (SI 2014/2871)
www.legislation.gov.uk/uksi/2014/2871/contents/made

NHS Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules Regulations 2012 (SI 2012/2996)
www.legislation.gov.uk/uksi/2012/2996/contents/made
(as amended by SI 2016/293): *The National Health Service Commissioning Board and Clinical Commissioning Groups (Responsibilities and Clinical Commissioning Groups (Responsibilities and Standing Rules) (Amendment) Regulations 2016)*

(Please note that these websites do not always include the most up-to-date versions of legislation.)

Guidance

Department of Health - *Mental Health Act: Code of Practice* (chapters 33 and 34)
www.gov.uk/government/publications/code-of-practice-mental-health-act-1983

Department of Health and Social Care - *Care and Support Statutory Guidance*
www.gov.uk/government/publications/care-act-statutory-guidance/care-and-support-statutory-guidance#moving-between-areas-inter-local-authority-and-cross-border-issues

Additional information

Local Government Association (LGA) and Association of Directors of Adult Social Care (ADASS) *Ordinary residence guide: Determining local authority responsibilities under the Care Act and the Mental Health Act* (August 2018)
www.local.gov.uk/sites/default/files/documents/CHIP%20Ordinary%20Resident_FINAL%20COPY.pdf

Association of Directors of Adult Social Services (ADASS) - *Guidance and Principles for Aftercare Services under Section 117*
www.londonadass.org.uk/wp-content/uploads/2018/01/Section-117-Protocol-reviewed-Dec-2018.pdf

Notes

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