After-care options

Tony Harrop-Griffiths offers guidance on the after-care options available to patients discharged from hospital under the Mental Health Act 1983

It is well known that free social care is available under the NHS if a person is eligible for Continuing Healthcare (CHC), but not so well known is that it's also available from the NHS in combination with a local authority, under section 117 of the Mental Health Act 1983 (MHA), as an 'after-care service'.

Also of interest to those advising mental health patients and/or their relatives, section 117 is about to undergo substantial change in the near future when amendments made to it by the Care Act 2014 come into force, effective from 1 April 2015.

Section 117 applies to persons who leave hospital having been compulsorily detained for treatment for a mental disorder, under (in particular) section 3 of the MHA.

It is important to note that it does not apply to someone who has only been detained for assessment under section 2 or section 4 of the same Act, even though they may then remain in hospital for treatment as a voluntary patient, after the period for detention under those sections has expired.

Section 117 can also apply to those who have been detained in hospital for treatment under:

- section 37, hospital order made by a criminal court;
- section 45A, hospital direction made by the Crown Court;
- section 47, transfer direction from prison for a convicted person; and
- section 48, transfer direction from prison for a person who has not been convicted, all under the MHA.

On leaving hospital (including on leave under section 17 of the same Act) such a person is owed an after-care duty, more precisely, a duty to provide him with after-care services, in the community. These services can include specialist accommodation such as in a care home or in supported living, domiciliary care, day centre use and general social work, such as help in obtaining ordinary accommodation and with family relationships, as well as psychiatric treatment. Indeed they can be anything that meets a need arising from or related to their mental disorder,

which reduces the risk of a deterioration of their mental condition and, therefore, the risk of being readmitted to hospital for further treatment.

Plan in advance

Planning for after-care should begin well before the person concerned leaves hospital, making use of the Care Programme Approach (CPA) which is the framework for assessment, care planning and review, in the case of those with severe mental health problems. Details of who should be involved in the planning and the needs to be assessed and met are set out in the statutory code of practice, made under the MHA.

Many local authorities had thought that section 117 simply acted as a gateway to the provision of other community care services, for example, accommodation under section 21 of the National Assistance Act 1948 (the route by which local authority placements are made in care and nursing homes) and that they could therefore charge for anything provided under section 117. In a case in 2002, however, the House of Lords decided otherwise, since when it has been certain that no charge can be made, a position preserved by the Care Act.

The duty is owed jointly by an NHS body and a social services (i.e. local) authority and it continues for as long as they are both satisfied that the person concerned remains in need of such services – unless it is a community patient, i.e. subject to a community treatment order made under section 17A of the MHA. Also, the duty ceases if the patient is again detained in hospital for treatment, at which point application and planning for the required services the patient will need should begin again as soon as they are detained.

Section 117 currently provides that the responsible body and authority are those "for the area in which the person concerned is resident or to which he is sent on discharge by the hospital in which he was detained." The position with regards to which NHS body is responsible is relatively simple, unlike the position as regards the local authority.

Responsible authority

In England, if the person concerned is registered with a GP, the esponsible NHS body is the Clinical Commissioning Group (CCG) of which the GP is a member. If the GP is not registered with one, it is the CCG for the area in which the GP considers they are usually resident.

In Wales, the responsible NHS body is the Local Health Board for the area in which the person concerned considers he is usually resident.

The identity of the NHS body involved can change, for example if the patient registers with a GP who belongs to a different CGG, but the identity of the responsible social services authority cannot – unless, exceptionally, another authority agrees to take over funding.

The courts have determined that the responsible local authority is the one in whose area the person concerned was resident immediately before he was detained for treatment, or if he was not resident anywhere at the time (for example, because he was an itinerant) the authority to which he is sent on discharge from the hospital concerned.

The application of this test in practice is not, however, straightforward and quite often local authorities become embroiled in disputes that can result in litigation. However this should not disrupt the provision of services to the detriment of the person concerned – one of the authorities (sometimes more than two are involved) should accept provisional responsibility and can, if necessary, be required to do so by means of a letter before a claim for judicial review brought by, or on behalf of the patient.

"Plain residence" is currently a crucial part of the test, but this will change on 1 April 2015, when section 75 (together with other sections) of the Care Act 2014 comes into force, whereupon it will change to "ordinary residence". Also, unlike the situation as it is today, any local authorities in dispute with each other about responsibility will be able to have their dispute resolved by the Secretary of State for Health (or the Welsh Ministers) rather than have to go to court (or to arbitration), which is a very welcome development. They will also come under a specific duty to decide between themselves which authority is to provide after-care services on a provisional basis.

There are two other important changes to be made to section 117 by the Care Act on 1 April.

The first is that if accommodation is to be provided as an after-care service, the person concerned will, to a great extent, be able to choose it for themselves, as they could do today if they were being provided with accommodation by a local authority under the National Assistance Act 1948.

Where the patient expresses a preference for a particular accommodation of the same type as the authority has decided to provide under section 117, and it is suitable and available and the provider agrees to the local authority's terms, the authority must provide that accommodation. If it will cost more than the authority usually pays, then it must still be provided if another person, typically a relative, is willing and able to 'top-up' the fees, and to enter into a written agreement with the authority to this effect.

The other important change is that direct payments can be made, instead of 'direct services' being provided. Subject to some exceptions, the payments must be made to the person concerned (or a 'nominated person' acting on their behalf) if the patient asks for them, provided they have the mental capacity to ask, and if they do not have the capacity to do so, an 'authorised person' can ask on their behalf, and use the payments to pay for the services which are needed. ■

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