

Mental Health Act Section 117 Policy

Version number :	2.3
Consultation Groups	Mental Health Law Monitoring Group
Approved by (Sponsor Group)	Mental Health Law Monitoring Group
Ratified by:	Quality Committee
Date ratified:	28 th July 2021
Name of originator/author:	Guy Davis - Associate Director of Mental Health Law
Executive Director lead :	Paul Gilluley – Chief Medical Officer
Implementation Date :	June 2021
Last Review Date	June 2021
Next Review date:	June 2024

Services	Applicable
Trustwide	Yes
Mental Health and LD	
Community Health Services	

Version Control Summary

Version	Date	Author	Status	Comment
1.0		Guy Davis	Draft	Originally developed in partnership with Tower Hamlets Clinical Commissioning Group, London Borough of Tower Hamlets, Newham Clinical Commissioning Group, London Borough of N Newham, City of London
1.1		Guy Davis	Final	added paragraph 2.6 on 'NHS Continuing Healthcare'.
1.2		Guy Davis	Final	Table re CCG responsibility added. Para 7.7. added re informing CCG about discharge from Trust mental health services. Sent to CCG leads for comments.
2.1	19/08/15	Guy Davis	Final	Add references to Care Act Section 75. Sections 3 and 8 added. Included references to Tower Hamlets CCG, amended 6.4, added references to adult social care national eligibility threshold. No recourse to public funds section expanded by LB Newham.
2.2	22/01/18	Guy Davis	Final	Changes to rules re responsible CCGs in para 5.0.
2.3	14/06/21	Guy Davis		Clarified the rules around CCG responsibilities in connection with arranging provision of and paying for after-care. Deleted some unnecessary text in relation to LA responsibilities. Updated responsibility re section 117 register.

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Executive Summary

This policy sets out the law and statutory guidance in relation to the duty to provide after-care to certain patients who have been detained for treatment under the Mental Health Act 1983. It also sets out what the Trust and its partner organisations should consider when implementing and following law and guidance.

1.0 Introduction

- 1.1 The policy should be read in accordance with the Mental Health Act 1983 ('the Act'), the Care Act 2014, the Mental Health Act Code of Practice 2015, the Care and Support Statutory Guidance 2014, associated legislation, case-law and relevant Trust policies and guidance; notably the Care Programme Approach Policy.
- 1.2 Local Social Services Authorities (LSSAs) and clinical commissioning groups (CCGs) may have localised processes to direct and assist their legal responsibilities under section 117, so Trust practitioners should have regard to these where relevant, in carrying out related clinical and social care functions.

2.0 The Legal Framework

- 2.1 Section 117 states that it shall be the duty of the CCG and LSSA (in cooperation with relevant voluntary agencies) to arrange for the provision of (or in the case of the local social services authority, provide) after-care services for any person to whom section 117 applies, until such time as both of those organisations are satisfied that the patient concerned is no longer in need of any such services (the duty can never end for as long as the patient remains subject to a Community Treatment Order under section 17A).
- 2.2 The duty under section 117 applies to people of all ages, including children and young people who are detained under sections 3, 37, 45A, 47 and 48, and who are subsequently released from hospital.
- 2.3 The effect of this is that the duty under section 117 applies to the above qualifying patients if they are:
- a) discharged from detention and remain in hospital as an informal patient for a period after that;
 - b) discharged from detention and leave hospital;
 - c) authorised to leave hospital by virtue of section 17 (for a material period of time; i.e. overnight);
 - d) released from prison having spent some time of their sentence detained in hospital under a qualifying section listed above;
 - e) readmitted to hospital informally or detained under a section of the Act for which the duty under section 117 does not apply; for example sections 2, 4, 5(2), 5(4), 35, 36, 38, 44, 135(1) and 136, and the need for after-care services continues.

- 2.4 The duty under section 117 does not automatically apply to patients who are subject to Guardianship under section 7 unless they were also previously detained under one of the qualifying sections above.
- 2.5 Section 117 does not appear in the list of provisions set out in Schedule 3 of the Nationality, Immigration and Asylum Act 2002, which means that LSSAs are not released from the duty under section 117 to provide relevant support to patients who are refugees or asylum seekers (nor are CCGs). Please see para 12.0 below for more details.
- 2.6 Where a patient requires a service as part of their after-care under section 117, this should be provided under section 117 and not under NHS continuing healthcare. It is possible however, for a patient in receipt of after-care services under section 117 to have on-going care or support needs that are not related to their mental disorder. These needs would fall outside of the scope of section 117 and they would be assessed for NHS continuing care eligibility, or joint funding, in the usual way. A patient receiving services under section 117 could also develop physical health needs which are distinct from their section 117 needs. Again, this may trigger NHS continuing healthcare considerations in relation to these separate needs.
- 2.7 Section 117 is a 'stand-alone' duty; it is not a 'gateway' for providing services under other legal mechanisms, and because there is no explicit power to charge patients for services provided under it, those services must be provided free of charge as per the *Stennett* case.¹ This also means that patients cannot be charged indirectly via any state benefits that they might be entitled to; for instance if supported accommodation is part of their after-care service, housing benefit may not be able to be used to fund that service unless it was already in place prior to admission and is deemed to continue.
- 2.8 Section 117 responsibility is restricted to those services necessary to meet a need arising from a person's mental disorder as per the statutory definition (see below). In respect of accommodation, this means that 'ordinary housing' will not usually be provided under section 117. That is bare housing which does not meet a need which results from a person's mental disorder at all.²
- 2.9 It should be noted that this right to free services does not extend to carers of patients receiving section 117 after-care.

3.0 Changes brought about by the Care Act 2014

- 3.1 The Care Act 2014 (the 2014 Act) updated and amended the law in relation to adult social care. The 2014 Act places a number of general duties on LSSAs which must be taken account of when it is exercising its duties and powers under Part 1 of the Act. Those general duties are set out in sections 1 to 7 of the 2014 Act.
- 3.2 Of particular relevance to section 117 cases it is worth noting the following:
- s.1 promoting individual well-being
 - s.2 preventing needs for care and support
 - s.3 promoting the integration of care and support with health services etc.
- 3.3 Section 117 was amended by section 75 of the 2014 Act in 3 significant ways:

¹ *R. v Manchester City Council Ex p. Stennett* [2002] UKHL 34

² *R v LB Greenwich and LB Bromley Ex p. Mwanza* [2010] EWHC 1462 (Admin)

- Inserted a statutory definition of 'after-care';
- Amended the position so that the LSSA whose area a person is 'ordinary resident' is responsible for the after care;
- Makes provision for regulations to be made to allow a choice of accommodation.

4.0 What are After-Care Services?

4.1 After-care is defined 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 admission to a hospital again for treatment for mental disorder)."

4.2 Whilst the case of *Clunis v Camden and Islington Health Authority* (1998) 1 CCLR, is pre- Care Act 2014, it is still useful guidance in that it confirms that after-care "would normally include social work, support in helping with problems of employment, accommodation or family relationships, the provision of domiciliary services and the use of day centre and residential facilities." *Stennett* (mentioned above) also established that "psychiatric treatment" is after-care.

4.3 A patient's need for such services will potentially change over time and the fact that the services currently being provided differ from those which were provided at the time of the service-user's discharge, does not have the effect of extinguishing the duty to provide after-care under section 117.

4.4 In *Stennett* it was agreed that "caring residential accommodation" that meets a patient's mental health needs is within the scope of after-care services under section 117. It should be noted that the high court³ has established that the provision of 'ordinary' accommodation that meets a basic human need does not fall within the scope of section 117, but assistance in obtaining such accommodation may well fall within its scope.

5.0 Who does the duty under section 117 fall upon? - Clinical Commissioning Groups

5.1 Section 117(3) empowers the secretary of state to publish regulations to establish CCG responsibility (mainly relating to payments) and these have been amended a number of times over the years. It is beyond the scope of this policy to set out all of those changes.

5.2 The duty to arrange for provision of after-care services falls to the CCG where the patient was resident immediately prior to being detained under one of the qualifying detention sections. This is the case upon each new episode of detention under a qualifying section.

5.3 The legal responsibility to pay for after-care services now falls to the CCG covering the geographical area where the GP is located, with whom the patient was registered at the time they were first detained under a qualifying

³ *R (on the application of Mwanza) v 1) Greenwich LBC 2) Bromley LBC* [2010] EWHC 1462 and *R (Afework) v LB Camden* [2013] EWHC 1367 (Admin)

section. This CCG continues to be legally responsible for paying for the after-care even if the patient relocates.

5.4 It is not for the Trust to determine the above responsibilities, but in cases where disputes have arisen that result in practical challenges to patients getting the required care, advice may be sought from the Mental Health Law department.

6.0 Who does the duty under section 117 fall upon? – Local Social Services Authorities

6.1 Since the Care Act 2014 came into effect on 1 April 2015, for LSSAs the responsibility lies with the area in which the patient concerned is ordinarily resident or that which the patient is sent on discharge by the hospital in which the patient was detained. It is therefore necessary to identify the area in which the discharged patient was ordinarily resident immediately before they were detained in hospital, even if that patient is not going to return to that area on discharge. Responsibility will only fall to the Social Services Authority in the area where the patient is to reside on discharge if no previous residence can be established.⁴

6.2 See also 7.3 below.

7.0 Ordinary Residence

7.1 The courts have confirmed that the term ordinary residence should be given its ordinary and natural meaning⁵. The concept of ordinary residence involves questions of fact and degree. Factors such as time, intention and continuity (each of which may be given different weight according to the context) have to be taken into account. The leading case on this matter is that of *Shah v London Borough of Barnet* (1983) 1 All ER 226 where Lord Scarman stated that:

‘unless ... it can be shown that the statutory framework or the legal context in which the words are used requires a different meaning I unhesitatingly subscribe to the view that “ordinarily resident” refers to a man’s abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or long duration.’

7.2 CCGs and LAs should always have regard to this case when determining the ordinary residence of people who have capacity to make their own decisions about where they wish to live. Ordinary residence can be acquired as soon as a person moves to an area if their move is voluntary and for settled purposes. There is no minimum period in which a person has to be living in a particular place for them to be considered ordinarily resident there, because it depends on the nature and quality of the connection with the new place.

7.3 However, in relation to LAs, the definition of ordinary residence where the person’s physical whereabouts changes, has recently been the subject of much legal debate following judgments made by the secretary of state in 2020 and practitioners are advised to refer to the legal department of the relevant LA where there is doubt and/or dispute.

⁴ *R (on the application of M) v Hammersmith and Fulham LBC and Sutton LBC* [2010] EWHC 562 (Admin)

⁵ As above

7.4 If responsibility changes, practitioners should ensure that appropriate transfer arrangements are made, including in accordance with the Care Programme Approach Policy and that the receiving organisation is aware of the duty under section 117 towards that patient. The needs assessment should clearly specify which part of the package relates to the provision of section 117 after-care to enable this to occur.

8.0 Planning of Section 117 After-care

8.1 The planning of after-care needs to start when the patient is admitted to hospital. The Code of Practice states that after-care for all patients admitted to hospital for treatment for mental disorder should be planned within the framework of the Care Programme Approach in accordance with policy. A written care plan, based on a full assessment of the patient's needs, and which specifies after-care arrangements in respect of the patient's mental disorder, must be in place before:

- a) Discharge from hospital;
- b) A period of Section 17 leave - except for short periods of leave, when "a less comprehensive review may suffice, but the arrangements for the patient's care should still be properly recorded" (Code of Practice 27.10). Any period of leave which includes an overnight stay necessitates a full after-care plan;
- c) A Mental Health Tribunal or Managers Hearing - after-care arrangements should be considered in all cases.

8.2 Practitioners will need to be mindful of and utilise both section 117 criteria and the national eligibility threshold for adult social care. Assessments will need to clearly set out which needs relate to section 117 duties and which needs (if any) relate to the adult social care national eligibility threshold.

8.3 The section 117 after-care plan should normally be formulated at a multi-disciplinary meeting; this meeting will also identify the care co-ordinator. The Code of Practice contains detailed guidance about the practitioners who should be involved in this process and the considerations to be taken into account (Code of Practice chapter 27.12). The care plan should clearly identify the interventions that are related to after-care under section 117 and those that are not (including those that meet the adult social care national eligibility thresholds), and the patient should be given a copy. It should be regularly reviewed in accordance with the Care Programme Approach.

9.0 Choice of Accommodation and Direct Payments

9.1 Section 117A, inserted by the 2014 Act, empowers the Secretary of State to make Regulations requiring a Local Authority to comply with a preference by a person eligible for after care for particular accommodation. This may require the person paying a top-up fee if the preferred accommodation is more- than the Local Authority's usual cost.

9.2 In meeting the duty under section 117 the person⁶ is permitted to receive the support through a direct payment.

⁶ Including parents if the person is a child

- 9.3 The position aligns after-care provision with other aspects of social care which may be available to the person. The Local Authority is able to delegate responsibility for providing direct payments to a person.
- 9.4 When the local authority is providing or arranging for the provision of accommodation for the person concerned and the person concerned expresses a preference for particular accommodation⁷, and any prescribed conditions as set out in The Care and Support and After-care (Choice of Accommodation) Regulations 2014 are met - provision of the person's preferred accommodation must be provided (if there is a difference in cost, the person can then pay for the difference of the additional cost in prescribed cases unless no other suitable accommodation is available at the amount stated in the personal budget in which case the local authority will need to consider adjusting their budget).

10.0 Register of Patients and Review of Section 117 After-care

- 10.1 A register is maintained by the Mental Health Law department on the Trust's electronic patient record system (RiO), and it is reviewed/updated whenever a patient is detained by the Trust under a qualifying section. However, given that the legal responsibilities in connection with section 117 fall to CCGs and LAs, this register is not to be seen as definitively recording every duty that exists for those organisations.

11.0 Determining that the duty under section 117 has ended

- 11.1 There is no mechanism in the Act to 'discharge' from section 117; it is a duty that ends when both the responsible CCG and LSSA are satisfied that the patient concerned is no longer in need of any after-care services. The Code of Practice at 33.20 states that "the most clear-cut circumstance in which after-care will end, is where the patient's mental health has improved to a point where they no longer need services because of their mental disorder."
- 11.2 The Code confirms at 33.20 – 33.23 that after-care services under section 117 should not be withdrawn solely on the grounds that the patient has been discharged from the care of specialist mental health services, or an arbitrary period has passed since the care was first provided, or the patient is deprived of their liberty under the Mental Capacity Act 2005, or the patient has returned to hospital informally or under section 2, or the patient is no longer on CTO or section 17 leave.
- 11.3 The Code goes on to state that even where the provision of after-care services has been successful in that the patient is now settled in the community, he/she may still continue to need after-care services to prevent a relapse or further deterioration in their condition.
- 11.4 The effect of the above is that if for instance the patient was discharged from the care of the Trust's specialist mental health services but continued to reside in accommodation provided as part of after-care, the duty under section 117 remains for both the CCG and the LSSA albeit that the duty on the CCG may become 'dormant'. So for as long as the patient resides in that accommodation, if he/she were to require specialist mental health services in the future, the responsible CCG would have a duty to provide those services. Similarly, the duty would potentially continue if the patient was discharged

⁷ Section 30, Care Act 2014

from Trust specialist services but was prescribed medication for their mental disorder by their General Practitioner.

- 11.5 Some patients will have other community care needs not associated with treatment of a mental disorder (for example in respect of their physical illness or disability). Such patients should be assessed under the Care Act 2014 to determine if they have any eligible needs for services provided under other legislation. If the patient does appear to have other needs, the treating team should identify that those needs are distinct from after-care services that might form part of the duty under section 117.
- 11.6 In order to minimise the risk of legal challenges, if the Trust stops providing after-care covered by section 117 to a patient, confirmation of this and details of their other care arrangements should be forwarded to the responsible CCG/GP and social services authority.

12.0 No Recourse to Public Funds

12.1 Unlike the provision of many community care services, the duty to provide after-care services under section 117 applies to patients irrespective of their country of origin or immigration status. A patient with no recourse to public funds (NRPF) in the United Kingdom must be provided with after-care services when they leave hospital after detention under one of the qualifying sections.

12.2 In the event that an individual is:

- a) to be discharged from s117 after-care; and
- b) likely to require services pursuant to a Care Act 2014 compliant needs assessment,

consideration will need to be given to the individual's immigration status and entitlement to support in the UK. A Human Rights assessment must be undertaken together with a needs assessment under section 9 of the Care Act, when the individual is subject to immigration control and has no recourse to public funds pursuant to s115 of the Immigration and Asylum Act 1999, and where the individual falls within the restricted categories in Schedule 3 of the Nationality, Immigration and Asylum Act 2002 (NIAA).

12.3 The Children and Families Act 2014 (Consequential Amendments) Order 2015 states that the prohibitions on people with NRPF extends as far as it is not a breach of their human rights - the Order clarifies that Part 1 of the Care Act 2014 is included in the list in Schedule 3 of the NIAA. This means that those specified groups will not be able to access assistance under Part 1 of the Care Act, unless the exercise of a power or performance of a duty is necessary for the purpose of avoiding a breach of a person's rights under the European Convention on Human Rights or European Community Treaties.

12.4 The human rights assessment must ensure that decisions are made within the context of a human rights approach, considering people's needs not just in terms of physical functionality but in terms of a universal right to dignity and respect. As a minimum, the assessment should seek to consider the following:

- Whether the prohibition of services to the individual is likely to breach their human rights (the relevant articles of Schedule 1 of the Human Rights Act 1998 are likely to be:

Article 3 (prohibition on torture or inhuman or degrading treatment or punishment);

Article 8 (respect for private and family life); and

Article 6 (right to a fair and public hearing) in cases where the person is involved in criminal or civil proceedings in the UK, this extends to immigration proceedings.

It is important to note that some articles are absolute and so must not be breached and others are qualified and so can be breached when certain conditions are met.

- Whether the individual could return to his/her country of origin or whether there is either any legal, medical or practical reason why this is not an option.

12.6 For further information see the No Recourse to Public Funds Network guidance at <http://www.nrpfnetwork.org.uk/Documents/Practice-Guidance-Adults-England.pdf>

13.0 Refusal of Section 117 After-care

13.1 Section 117 only places a duty on the CCG and local social services authority to arrange/provide after-care services and gives the patient an entitlement to such services to meet their assessed needs; there is no power to require a service user to accept the after-care offered.

13.2 However, an unwillingness to accept services does not mean that the service-user has no need of them, nor does it make them ineligible to receive after-care services under section 117 should they subsequently change their mind.