



*National Framework for NHS
Continuing Healthcare and
NHS-funded Nursing Care in England*

Consultation Document

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Consultation document

Setting the Scene

This Government remains committed to improving health and social care services and extending choice and independence for people with a long-term condition.

The Department of Health's guidance on funding the long-term care of those outside hospital was first presented in 1995. This guidance asked the 100 health authorities that existed at that time to develop local eligibility policies. These policies set out the criteria which would, in individual cases, be used as the basis for decisions about the need for NHS funded care.

In October 2001, the Government introduced 'NHS-funded Nursing Care', so that the NHS would meet the costs of registered nurse time spent on providing, delegating or supervising care in any setting.

However, there was still inconsistency across the 28 English Strategic Health Authorities. In December 2004, we announced our intention to develop a National Framework to improve the clarity and consistency of provision, and simplify the interaction with NHS-funded Nursing Care. The White Paper *Our Health, Our Care, Our Say: A New Direction for Community Services* reaffirmed this formal commitment to develop a National Framework.

The National Framework also reinforces the Government's key policy commitments on dignity in care, healthy ageing and joined-up care, set out in the recent report *A New Ambition for Old Age*, which details the next steps in implementing the National Service Framework for Older People.

Executive Summary

The Government is determined to establish a simpler, fairer and more coherent system of assessment to determine eligibility for full NHS funding of long-term care ('NHS Continuing Healthcare') which can be applied consistently across England.

The National Framework for NHS Continuing Healthcare and NHS-funded Nursing Care in England has two main purposes. Firstly, it sets out a single policy on who should receive NHS funding, be that fully funded NHS Continuing Healthcare (where the NHS funds the whole care package) or NHS-funded Nursing Care (where the NHS is responsible for the nursing required from a registered nurse in a care home). Secondly, it proposes a standard process for assessing eligibility for these services, including national tools to help support decision-making.

The National Framework builds on previous guidance and aims to amalgamate best practice from across England. It does not change the underlying legal framework on which current eligibility policies should be based.

The key elements of the proposed National Framework are summarised below:

- Eligibility for fully funded NHS Continuing Healthcare will depend on an individual's overall care needs, not their disease, diagnosis or condition. It is not dependent upon the person who provides the care required to manage those needs, nor the location in which the care is provided.
- The national assessment model places the individual at the centre of the process and ensures that all important decisions on NHS Continuing Healthcare are made by NHS multi-disciplinary teams in collaboration with the Local Authority, where appropriate.
- The framework for NHS Continuing Healthcare provides a consistent, structured approach to co-ordinate the assessment and decision-making process. This will involve a comprehensive assessment of physical, mental, psychological and emotional needs, including additional specialist assessments to build up an overall picture. Decisions should be fair and consistent, regardless of age, care group, type of needs or reason for those needs.
- If an individual's primary need is a health need, they should qualify for NHS Continuing Healthcare, in which case the NHS would be responsible for providing or commissioning all of their care (including accommodation, if the individual is in a care home). See paragraphs 13-16 of this document.
- Assessment of whether there is a 'primary health need' will make reference to four key indicators – nature, complexity, intensity and unpredictability of need – and look for these indicators when assessing the individual's care needs.
- The NHS has a legal responsibility for providing care required from a registered nurse. Where this is not provided through NHS Continuing Healthcare, the NHS is responsible for the provision of registered nursing for those in care homes or in their own homes.

- NHS-funded Nursing Care may be provided via contractual arrangements between the Primary Care Trust (PCT) and the care home itself. In this case, the PCT will make a payment which takes account of the assessed nursing needs of the individual.
- At present, provision of NHS-funded Nursing Care is via payment 'bands' which relate to an indicative level of registered nursing care tied to a level of funding. The National Framework will remove this banding system and the requirement for a separate 'determination' to decide the band. In its place, the NHS will continue to fund registered nursing care, via a weekly rate which takes account of a national average. PCTs will continue to be responsible for assessing a person's nursing needs and for deciding what nursing should be provided, using the national average rate as a guide.
- To promote proportionate and appropriate assessments and target resources, the first stage of the assessment process will be a screening stage, in which potential eligibility for NHS Continuing Healthcare is considered. This will also be the opportunity to fast track the provision of NHS Continuing Healthcare for those whose health is deteriorating rapidly.
- For most individuals, the care planning process will decide on the best location for their needs to be met, depending on their personal circumstances. If this location is a care home providing nursing care because they have an assessed need for care from a registered nurse (but they do not qualify for NHS Continuing Healthcare), then they may be eligible for NHS-funded Nursing Care.
- Review is a key element of the assessment framework, to ensure that changing needs are appropriately identified and supported. All individuals who go through the assessment process for NHS Continuing Healthcare should undergo a review three months after the initial assessment, irrespective of the outcome of that assessment, and then at least annually.

We are developing an assessment tool which can be used to support the screening process and the full assessment for NHS Continuing Healthcare (see below and the 'Core Values' document for more background information on these tools). A draft assessment tool is published separately.

Please refer to this document for further information and details on how to comment on this specific part of the assessment framework.

In summary, the principle reforms proposed by the National Framework are:

Old System	National Framework
<ul style="list-style-type: none"> • Each of the 28 SHAs in England operates their own rules on eligibility for NHS Continuing Healthcare. 	<ul style="list-style-type: none"> • One national policy on eligibility for the NHS in England.
<ul style="list-style-type: none"> • Various ‘criteria’ which can confuse the overarching test on eligibility for full NHS funding. 	<ul style="list-style-type: none"> • A clear policy on eligibility, based on four key indicators and linked directly to the assessment process.
<ul style="list-style-type: none"> • Each SHA uses its own assessment process and tools to support local decision-making. 	<ul style="list-style-type: none"> • An integrated national assessment process supported by national tools to promote consistency.
<ul style="list-style-type: none"> • PCT assesses individual’s need for services from a registered nurse, and places the individual into one of three bands (high, medium or low) on the basis of the relative level of those needs. 	<ul style="list-style-type: none"> • NHS still assesses registered nursing need and decides what services to provide, but there is no ‘banding’ system and funding takes account of a national weekly average cost of providing the services.
<ul style="list-style-type: none"> • PCT undertakes a separate ‘determination’ to decide on the most appropriate band (and attached funding level). 	<ul style="list-style-type: none"> • No requirement for a separate freestanding assessment to decide the band, saving time and resources.
<ul style="list-style-type: none"> • Funding of registered nursing services linked to ‘band’. 	<ul style="list-style-type: none"> • Funding of registered nursing services takes closer account of actual nursing needs.

In addition to this core document, we have published a ‘Core Values and Principles’ document which sets out some of the overarching values, best practice and background detail to the proposals, and should be read in conjunction with this document. You may also wish to refer to the Consultation Toolkit, which includes a simplified public information leaflet and presentation.

Introduction

1. This Consultation document sets out proposals for the new integrated National Framework for NHS Continuing Healthcare and NHS-funded Nursing Care in England. This Framework has been developed in response to widespread calls for the Government to act to promote fairness and consistency in the provision of these services, and to remove the potential for a ‘postcode lottery’ under current arrangements, in which each one of the 28 regional Strategic Health Authorities has its own policies and processes.
2. The National Framework has been developed in consultation with representatives from health and social care and voluntary organisations as well as users and carers. It sets out a practical framework for practitioners, and a coherent system of eligibility and assessment for NHS Continuing Healthcare and NHS-funded Nursing Care to ensure that access to these NHS services is interpreted and applied fairly and consistently.
3. The National Framework is based on the provisions and responsibilities of the current legal framework for NHS Continuing Healthcare. When the National Framework is operational, Primary Care Trusts (PCTs) will be required to determine a person’s need for NHS Continuing Healthcare by reference to the assessment process set out in the framework. The PCT must go on to provide, or arrange for the provision of, such services (including accommodation) as it considers appropriate in light of that assessment. The assessment process stipulated in Directions will be underpinned by Departmental guidance. This guidance will provide further detail on the national policy on when a person’s care should be funded by the NHS (i.e. the eligibility criteria), and what services should normally be provided.
4. Policy reforms relating to the provision of NHS-funded Nursing Care are intended to be implemented nationally through Directions later in 2006.

Remit of the Consultation

5. The National Framework will not change the extent of services that can be provided free of charge, nor will it alter the underlying policy on continuing care.
6. The National Framework does not deal with individual budgets or direct payments – the recent White Paper *Our Health, Our Care, Our Say: A New Direction for Community Services* makes it clear that these will not be extended to NHS healthcare.
7. The Consultation does not explicitly cover under 18s (children). Whilst similar principles and values should apply, there are different legislative drivers for younger people’s services, including their need for education. However, acknowledging the important links with children’s services, we are publishing a separate paper on children’s Continuing Care alongside this consultation and ask for your separate contributions on the specific issues which relate to this group.

8. While always welcoming feedback based on personal experiences, the Consultation will not be able to respond to or comment on individual cases.
9. This Framework does not apply to individuals who are detained under the Mental Health Act 1983, and who are the responsibility of the NHS under the provisions of this Act.

Key Definitions

10. **'NHS Continuing Healthcare'** is the name given to a complete package of ongoing care arranged and funded solely by the NHS, where it has been assessed that the individual's primary need is a health need. It can be provided in any setting. In a person's own home, it means that the NHS funds all the care that has been assessed as required. In care homes, it means that the NHS also makes a contract with the care home and pays the full fees for the person's accommodation as well as all their care.
11. **'Health and Social Care Joint Packages'** are care packages which include services funded and provided by both the NHS and the Local Authority. These are provided to people whose needs are not primarily health needs but who require increased levels of support at home or in a care home. Local Authorities are responsible for social care services including accommodation where appropriate, and the NHS is responsible for healthcare services, including the care required from a registered nurse. The healthcare element of the joint package, for which the NHS is responsible, incorporates registered nursing services, the provision of which is arranged by the Primary Care Trust with the care home, and is known as **NHS-funded Nursing Care**. Other healthcare services, for example access to a General Practitioner or other NHS specialist, are free at the point of delivery. The social care elements of a joint package of care are means-tested and this means that there may be a charge for some or all of these services.
12. **'Social Care'** is provided by a Local Authority's Social Services Department and can be provided on a means-tested basis, in a variety of settings. Where it is provided in a care home, Social Services also have responsibility for arranging the accommodation, generally through contracting with the care home.

Eligibility for NHS Continuing Healthcare

13. NHS Continuing Healthcare should be awarded when it is determined that an individual's overall care needs are such that their **primary need is a health need**.
14. The question of whether the 'primary need is a health need' looks at the totality of the relevant needs and addresses the following questions (see also the *Coughlan* judgment at Annex A):
 - i. taken as a whole, are the nursing or other health services required by the individual more than incidental or ancillary to the provision of accommodation which Local Authority Social Services are under a duty to provide; and

- ii. are they of a nature beyond which a Local Authority whose primary responsibility is to provide Social Services could be expected to provide?

These questions should be answered by leaving aside Section 49 of the Health and Social Care Act 2001 (“the 2001 Act”), the effect of which is to prohibit Local Authorities from providing or arranging registered nursing services (see Annex A for more information). In other words, the questions should be addressed from a perspective as if Local Authorities were still legally permitted to provide registered nursing care.

This involves considering **both** the quantity and the quality (i.e. the character/type) of the services in question.

If the answer to both questions is ‘yes’, then the level of the person’s health needs is such that they have a primary health need, so should qualify for NHS Continuing Healthcare, and all of their care should be provided as part of the NHS.

15. Assessment of whether an individual meets the qualitative and quantitative requirements of a primary health need is to be made by reference to four key indicators, namely the **nature, complexity, intensity and unpredictability** (alone or in any combination) of an individual’s physical, mental, psychological or end-of-life care needs.
16. Figure 1 below describes these key indicators. It is important to recognise that some individuals may have a primary health need on the basis of one indicator alone, while others may have a number of interrelated needs that combine into a primary health need, and which should be considered in a holistic way rather than separately.

Figure 1: Key indicators of a primary health need

Nature and/or	<ul style="list-style-type: none"> • 'Nature' can describe either the characteristics of a particular condition (e.g. symptoms which are unstable, episodic, intractable, chronic, persistent, involuntary etc.), or the type of interventions required to manage that condition (e.g. invasive treatment, palliative care, responsive medication etc.). • In both cases, the 'nature' of condition or intervention can be described in terms of; <ul style="list-style-type: none"> (i) the quality of care provided – i.e. the type (ii) the quantity of care provided – i.e. the level
Complexity and/or	<ul style="list-style-type: none"> • A person's needs may be described as complex due to the interaction of multiple symptoms or factors (including the secondary effects), or the necessary interventions resulting from a single condition. Those needs may require the involvement of more than one type of healthcare professional. • The combination of multiple conditions, treatments and/or symptoms requires informed and timely management and/or urgent intervention without which the individual's needs would continue to escalate, placing them at significant risk.
Intensity and/or	<ul style="list-style-type: none"> • Intensity relates to the quality and quantity of care required to manage or maintain health-related needs, with the implication that without this care a person's health needs would increase. For example, a chronic health condition may require a high degree of intervention to minimise health risks. • There may be one or more symptoms that are so severe, persistent or intractable that they require a timely response to minimise or ameliorate them. • In relation to some conditions, intensity will present a significant risk of aggressive, resistive or disinhibited behaviour which is likely to cause physical injury or significant risk to self, others or the wider community and requires regular risk assessment, possibly by a NHS multi-disciplinary team. • A number of apparently low-level needs can result in the combination of those needs bringing the overall intensity to the level of a primary health need.
Unpredictability	<ul style="list-style-type: none"> • An individual with unpredictable needs will have a fluctuating, unstable or rapidly deteriorating condition which cannot be reliably anticipated. Unexpected or irregular fluctuations in physical or mental or psychological health of the individual and/or their behaviour will require prompt intervention by a health professional or an appropriately informed carer to manage risk to themselves or others. • Severe and continuously deteriorating physical condition resulting in rapidly increasing dependency or a short-term life expectancy. • The individual has a rapidly deteriorating or unstable physical or mental condition that requires timely intervention to manage symptoms, avoid deterioration or distress, and minimise risk.

17. If an individual is eligible for NHS Continuing Healthcare because his primary need is a health need, then the NHS should provide or commission those services required to meet all the assessed care needs, including the accommodation, where that is part of the overall need.

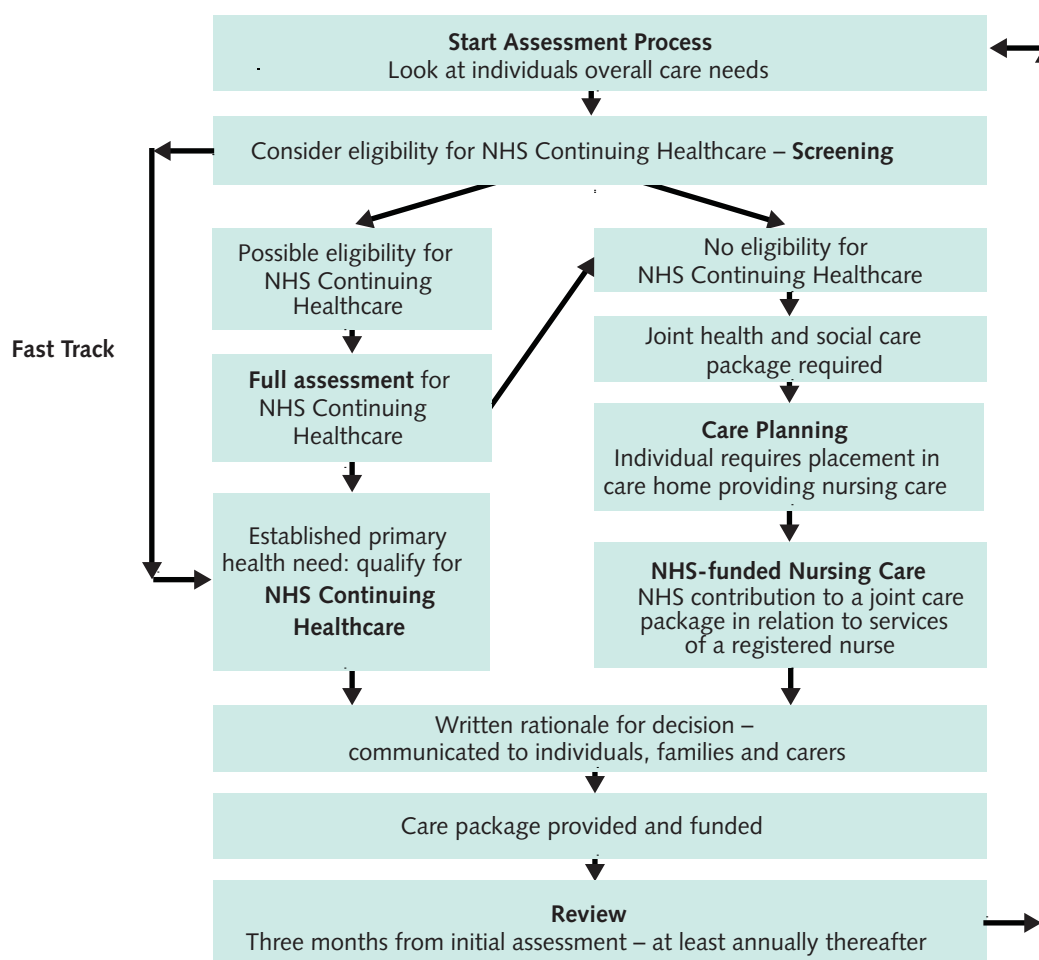
Provision of NHS-funded Nursing Care

18. Following assessment for NHS Continuing Healthcare and the decision that the person does not qualify for full NHS funding, care planning should identify how the assessed care needs of that person will be met. If care planning indicates the requirement for a placement in a care home providing nursing care, then the NHS will have identified the individual's need for nursing care as part of that planning. The NHS may provide for those needs via NHS-funded Nursing Care.
19. NHS-funded Nursing Care applies only to the provision of the services by a registered nurse required for individuals who are resident in care homes. In other settings, registered nursing will usually be provided directly by the Primary Care Trust, free at the point of delivery. The NHS-funded Nursing Care arrangements do not affect an individual's ability to receive other healthcare services free from the NHS, for example from a physiotherapist, psychologist or community dentist, where a need for those services has been assessed.
20. If an individual's care needs (including, but not limited to, registered nursing) do not indicate a primary health need, then the individual may be eligible for NHS-funded Nursing Care.
21. Following the primary health need approach described in paragraphs 13-14, the needs of an individual receiving NHS-funded Nursing Care must reflect the principle that;
 - i. The totality of the individual's nursing care needs (including registered nursing), in combination with any other relevant assessed needs, could lawfully be provided by a Local Authority whose responsibility it is to provide social services, leaving aside the enactment of section 49 of the 2001 Act.
22. The commissioning arrangements represented by NHS-funded Nursing Care only apply when the NHS body responsible for the care is not providing the registered nursing care directly. Fully funded NHS Continuing Healthcare includes, by definition, any requirement for care from a registered nurse. Any joint care package should make clear how the NHS is meeting the requirement for registered nursing care, since there should not be duplicate arrangements for care from a registered nurse.
23. Typically, recipients of NHS-funded nursing care will have a requirement for one or more of the following services provided by a registered nurse:
 - i. Supervision of the patient, monitoring nursing needs and identifying early changes,
 - ii. planning, reviewing and amending the care plan,

- iii. early identification of, and action to tackle, potential health problems,
 - iv. identifying other health needs and referring to other healthcare professionals as necessary – to a General Practitioner, specialist nurse etc.,
 - v. monitoring and supporting self-medication by the patient, and
 - vi. prescription of drug therapies and treatments as necessary.
24. The NHS's responsibility for registered nursing care may be discharged via contractual arrangements between the Primary Care Trust and the care home. PCTs themselves (or via a partnership with a Local Authority) will contract with the care home where the individual is resident to pay a weekly rate in relation to the assessed provision of registered nursing care.
25. PCTs will receive an allocation of funds to cover the costs of registered nursing. The level of funding provided will be calculated on the basis of the average weekly cost, per individual, of providing registered nursing services, and the Department will publish this in guidance.
26. The average weekly rate for NHS-funded Nursing Care for 2006/07 has been calculated as £97. This rate will be subject to review on an annual basis. The PCT will be responsible for satisfying itself that the nursing care and level of funding provided takes proper account of the individual's assessed nursing needs.
27. The National Framework removes the current banding system for NHS-funded Nursing Care, in which the individual's need for services from a registered nurse is determined as being in one of three 'bands' corresponding to 'high', 'medium' or 'low' requirement for registered nursing care. It also removes the necessity for a freestanding 'determination' of registered nursing need for the purposes of deciding this banding.
28. Transition issues should be considered carefully when moving individuals from the previous banding system to the new NHS-funded Nursing Care arrangements. Particularly for those individuals previously in the 'high band' of NHS-funded Nursing Care, the PCT should take into account the registered nursing that the individual currently receives. Any change in funding which results from a review of the registered nursing requirement should be based on an actual change in assessed registered nursing care needs, and should be clearly communicated to the individual and their family, where appropriate, with full reasoning provided for the change.
29. NHS-funded Nursing Care is not available to individuals who have decided for personal reasons (for example to be with a spouse or partner) to reside in a care home providing nursing care, but who are not assessed as having any need for care from a registered nurse.

The Assessment Framework

30. Figure 2 below sets out the assessment process for establishing eligibility to NHS funding:



31. The first step in the process is to identify an individual's care needs and to consider if he is eligible for NHS Continuing Healthcare. Only then, if it is decided that the individual is not so eligible, will that individual become eligible for NHS-funded Nursing Care if placed in a care home providing nursing care. This placement is part of the planning and provision of care, after it has been decided that the individual does not qualify for NHS Continuing Healthcare, applying the primary health need approach. The individual may require placement in a care home providing nursing care to manage their various needs, but their primary need is not a health need.
32. NHS bodies should ensure that clear protocols for assessment and decision-making are in place. These should lead to a record of a rationale for decisions, which demonstrate the comparison of the nature, intensity, complexity or unpredictability (or any combination of these) of the person's care needs to the primary health need approach, so that a consistent approach can be demonstrated.
33. The NHS should make the decision on responsibility for NHS Continuing Healthcare working in collaboration with Social Services. The process can be initiated wherever the individual is living. It is important that the process does not delay treatment or appropriate care being put in place.

Screening

34. At the first stage of the assessment or review process, the potential eligibility for NHS Continuing Healthcare should be explicitly considered. This must take place when discharge planning commences in hospital or, for someone living in the community, when a healthcare episode occurs or routinely through the involvement of nurses in regular assessments of nursing needs in a care home or their own home.
35. Screening has two purposes:
 - i. to encourage proportionate assessments by targeting resources for full assessments at those for whom NHS Continuing Healthcare may be appropriate, and;
 - ii. to identify those individuals who require fast-tracking to immediate care, for example because they have a short-term life expectancy.
36. The screening process is not a full assessment of needs in line with the primary health need approach. It is a preliminary indication of potential eligibility for NHS Continuing Healthcare which triggers the requirement for a full assessment, and identifies those for whom the full assessment is not applicable, for example someone whose condition will respond to treatment, is expected to make a full recovery and does not have long-term care needs. Operation of the screening process should be inclusive, not exclusive, and PCTs should ensure that individuals are not 'screened out' inappropriately.
37. It should also identify individuals who, due to the nature of their health needs, require fast tracking to ensure they receive an appropriate assessment and the right care quickly. An example would be someone who has a rapidly deteriorating condition and is likely to die in the near future, as indicated by a prognosis from a member of the NHS multi-disciplinary team.
38. A national Screening Tool is under development to support this stage of the process, and will be based upon the national Decision-Support Tool used in the full assessment for NHS Continuing Healthcare (see paragraphs 42-43 below). Further background on this tool can be found in the 'Core Values' document in paragraphs 12-17.

Full Assessment for NHS Continuing Healthcare

39. If possible eligibility for NHS Continuing Healthcare is indicated by screening, a full assessment of the person's care needs should be undertaken to establish whether those needs indicate a person's primary need is a health need, upon which eligibility for NHS Continuing Healthcare should be based. This assessment must incorporate consideration of the individual's physical, mental, psychological and emotional needs.

40. The individual should have undergone an assessment which is appropriate and proportionate to their presenting needs. This must include an assessment of their overall nursing and general care needs and in some cases additional specialist assessment(s) will be needed. The assessment must be relevant to the needs of the individual, involve appropriately trained practitioners and be undertaken in consultation with the individual and their representative and the Local Authority, if appropriate.
41. Where an individual is not eligible for NHS Continuing Healthcare and Social Services have not been involved in the assessment process, the NHS should advise that individual of their right to a full assessment from Social Services.
42. To support the comprehensive assessment and promote consistency in decision-making, assessors may refer to the national Decision-Support Tool when determining eligibility for NHS Continuing Healthcare.
43. The Decision-Support Tool provides practitioners with a needs-led approach by describing how the key indicators of a primary health need (see paragraphs 13-14) manifest themselves in relation to the care needs of a person. This is done by describing the different aspects of a person's care needs in 'care domains' which relate to particular areas of need, for example behaviour and cognitive impairment. These 'care domains' represent generic areas of need into which the various needs of an individual can be placed. The domains are sub-divided into statements of need representing low, moderate, high, severe or priority levels of need, depending on the domain. The relative needs in the 'care domains' are then assessed and referred to the Decision-Support Tool, so building up a picture of the care needs in order to determine whether the primary need is a health need. More information on the tool is included in the supporting 'Core Values and Principles' document (paragraphs 18-28).
44. It is recommended that standardised assessment tools be used where appropriate to support the Decision-Support Tool. For example, assessors may choose to refer to the Waterlow Risk Assessment Tool in relation to tissue viability.

Care Planning

45. The full assessment for NHS Continuing Healthcare by health and social care professionals identifies a person's overall care needs, while the care planning process decides how those needs can be met.
46. Following a decision that a person's primary need is not a health need, they may receive a package of health and social care (rather than being fully funded by the NHS). As part of this planning process, the NHS determines its responsibility for the services that are required to be provided by a registered nurse, since this cannot be provided by the Local Authority following the 2001 Act.
47. If care planning indicates that the individual requires placement in a care home providing nursing care to manage their needs, the individual may receive a joint care package. As part of the joint care package, the NHS makes arrangements to fund the element which relates to care provided by a

registered nurse, to discharge its responsibility following from the 2001 Act. This is the NHS-funded Nursing Care payment. Additional therapeutic services may also be funded by the NHS if these are agreed as part of an assessment.

48. The Local Authority will be responsible for providing social care, including such nursing care as can lawfully be provided following the *Coughlan* limits set out in paragraph 14 (see also Annex A). It is the legal duty of the Local Authority to ensure that the services which it provides comply with these legal limits and that it is not acting beyond its powers.

Registered Nursing Assessment

49. For the majority of individuals discharged from an acute hospital or placed in a care home providing nursing care, assessment of that individual's need for care from a registered nurse will have taken place as part of the NHS Continuing Healthcare assessment and care planning processes described above.
50. There will be some individuals who, due to their personal circumstances, have not undergone assessment or care planning by health and/or social care professionals, for example because they have chosen to reside in a care home independently. In these cases, after considering the potential eligibility for full funded NHS Continuing Healthcare, it is the PCT's responsibility to assess whether the individual has a need for registered nursing care, and make appropriate arrangements to provide for that need through NHS-funded Nursing Care.
51. Any such assessment should satisfy the PCT that the individual has a need for the services of a registered nurse, and should provide the PCT with sufficient information to establish a contract with the care home in respect of those services.

Review

52. A case review should be undertaken to reassess the care needs and eligibility for NHS Continuing Healthcare and to ensure those needs are being met at a minimum three months following the initial assessment and then as a minimum standard on an annual basis. Some cases will require a more frequent case review in line with clinical judgment and changing needs.
53. The outcome of the case review will determine whether the individual's needs have changed, which will then determine whether the package of care may need to be revised or the funding responsibilities altered.
54. Neither the NHS nor Local Authorities should unilaterally withdraw from an existing funding arrangement without a joint reassessment of the patient and without first consulting one another about the proposed change of arrangement. Any proposed change should be put in writing to the patient by the organisation that is proposing to make such a change. If joint agreement cannot be

reached upon the proposed change, the local disputes procedures should be invoked and current funding arrangements should remain in place until the dispute has been resolved.

Interim Arrangements

55. As a result of NHS structural reorganisation taking place from mid-2006, the 28 existing Strategic Health Authorities will be replaced by ten regional Strategic Health Authorities. This will have implications for existing local Continuing Care policies in the interim period until the National Framework is implemented across England.
56. The Department of Health will publish interim guidance for SHAs and PCTs on their responsibilities and the operation of Continuing Care policy in this interim period.

Consultation Questions and Contributions

57. A full list of the specific questions which relate to this Consultation, and details of how your contributions can be submitted, is attached at Annex B to this document.

Annex A: The Main Legal Provisions

1. The *Coughlan* Judgment

The judgment of the Court of Appeal in the *Coughlan* case in 1999 had far-reaching effects for Continuing Care policy, and features prominently in the legal framework within which the draft National Framework has been developed.

The Court of Appeal's judgment in *Coughlan* also made important points on the limits of a Local Authority's power to provide nursing care. In short, the Court decided that Local Authorities could provide some nursing services, but only if those services could be described as 'merely incidental or ancillary to the provision of the accommodation' by the Local Authority, and of a nature which a Local Authority could be expected to provide. If an individual's 'primary need is a health need', then nursing must be the sole funding responsibility of the NHS. The Court went on to further describe this limit by relating it to the 'quality and quantity' of the nursing care required (i.e. the type of nursing and the amount of nursing). This is what has become known as the '*Coughlan* Test'.

Fuller details on the circumstances surrounding the judgment are available in Health Service Circulars 1999/180 and 2001/015, both of which can be accessed via the Department of Health website at:

<http://www.dh.gov.uk/PolicyAndGuidance/OrganisationPolicy/IntegratedCare/ContinuingCarePolicy/fs/en>

2. Section 49, Health and Social Care Act 2001

"Exclusion of nursing care from community care services

- (1) Nothing in the enactments relating to the provision of community care services shall authorise or require a local authority, in or in connection with the provision of any such services, to
 - (a) provide for any person, or
 - (b) arrange for any person to be provided with, nursing care by a registered nurse.

- (2) In this section “nursing care by a registered nurse” means any services provided by a registered nurse and involving-
- (a) the provision of care, or
 - (b) the planning, supervision or delegation of the provision of care,
- other than any services which, having regard to their nature and the circumstances in which they are provided, do not need to be provided by a registered nurse.”

The effect of the above section is to prohibit Local Authorities from providing or arranging the provision of nursing required by a registered nurse in connection with social care services, meaning that this becomes an NHS responsibility.

This legal provision was made to enable the introduction of NHS-funded Nursing Care (also formerly known as Registered Nurse’s Contribution to Care or RNCC), by which process registered nursing care is funded free of charge. It was also intended to promote effective rehabilitation following acute illness or injury by reducing the perverse incentive to discharge patients too early into the care of Social Services.

3. The *Grogan* Judgment

The *Grogan* case at the High Court in January 2006 considered the application of the *Coughlan* judgment in local Continuing Care eligibility criteria and processes.

The Court concluded that in assessing whether Mrs Grogan was entitled to NHS Continuing Healthcare, the defendant Care Trust did not have in place or apply criteria which properly identified the test or approach to be followed in deciding whether her primary need was a health need. There was no finding, that Mrs Grogan in fact met the criteria for NHS Continuing Healthcare, but the Care Trust was ordered to re-assess her case against revised eligibility criteria.

Further information on the *Grogan* judgment is available in Departmental Guidance ‘NHS Continuing Healthcare: Action Following the *Grogan* Judgment’, which is available on the Department of Health website at:

http://www.dh.gov.uk/PublicationsAndStatistics/Publications/PublicationsPolicyAndGuidance/PublicationsPolicyAndGuidanceArticle/fs/en?CONTENT_ID=4131162&chk=2u2FYp

Annex B:

The Consultation Questions

1. We recognise that terminology can be complex in this area, and the names given to particular packages of care (for instance, ‘NHS Continuing Healthcare’) can cause confusion. We are keen to receive any suggestions for how these core concepts could be re-named to better describe the services they provide.
2. Currently, Strategic Health Authorities hold policy responsibility for local Continuing Care policies. Following the introduction of the National Framework, we are considering moving this overall responsibility to Primary Care Trusts as the local commissioning bodies for NHS services. We would welcome your contributions on this proposal, and any particular benefits or potential obstacles to achieving this.
3. The National Framework sets out to assess individuals on the basis of their need for care, rather than their diagnosis, condition or where the care is provided, as the fairest way to determine eligibility for NHS funding. Does it achieve this or are there other factors which should be considered?
4. We assess whether an individual’s primary need is a health need with reference to four key indicators – nature, complexity, intensity and unpredictability. Do you think these are the correct indicators, or are there any omissions?
5. Do you have any views on the statements used to describe the key indicators?
6. Assessors will determine whether a primary health need is established by looking at the key indicators in terms of eleven generic ‘care domains’:
 - a. Behaviour
 - b. Cognitive Impairment
 - c. Communication
 - d. Mobility
 - e. Nutrition
 - f. Continence
 - g. Skin (including tissue viability)
 - h. Breathing
 - i. Drug Therapies and Medication

- j. Psychological/Emotional Needs
- k. Seizures/Altered States of Consciousness

Bearing in mind that professional judgment is paramount and assessors can add to/overrule these on a case-by-case basis, are these the right core areas of need to assess?

- 7. What are your views on the process shown in the Assessment Framework? What are the potential implementation issues?
- 8. Do you agree with the concept of a national screening tool to help promote proportionate and appropriate assessments and to direct resources where they are most needed?
- 9. We would welcome views on the concept of the national Decision-Support Tool to promote greater clarity and consistency in decision-making nationally.
- 10. Do you think that the care planning process is the best place to establish whether an individual requires care from a registered nurse? What are the alternative processes for determining eligibility for NHS-funded Nursing Care?
- 11. What are your views on the principle of removing the banding system for payments of NHS-funded Nursing Care?
- 12. We would also welcome your views on the following supporting documents:
 - a. 'Core Values and Principles'
 - b. Public Information Leaflet
 - c. Consultation Presentation
 - d. Partial Regulatory Impact Assessment
- 13. If you would like to say anything else about the issues raised by the National Framework for NHS Continuing Healthcare and NHS-funded Nursing Care, please do so.

Contributions

Please send your contributions by the deadline of 22 September 2006 to:

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Annex C: Consultation Code of Practice

This Consultation complies with the Cabinet Office's code of practice for written consultations. The six main criteria of this code are as stated below:

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
2. Be clear about what your proposals are, who may be affected, what questions are being asked and the time-scale for responses.
3. Ensure that your consultation is clear, concise and widely accessible.
4. Give feedback regarding the responses received and how the consultation process influenced the policy.
5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.
6. Ensure your consultation follows better regulation best practice, including carrying out a regulatory Impact Assessment if appropriate.

As part of the Consultation process, respondents are invited to comment on the extent to which this Consultation follows the core criteria above. Should you have any comments or complaints to this end, please contact the Department of Health's Consultation Co-ordinator:

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