Northern Ireland
Public Services
Ombudsman

Investigation Report

Investigation of a complaint against

Northern Health & Social Care Trust

NIPSO Reference: 18433

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The Role of the Ombudsman

The Northern Ireland Public Services Ombudsman (NIPSO) provides a free, independent and impartial service for investigating complaints about public service providers in Northern Ireland.

The role of the Ombudsman is set out in the Public Services Ombudsman Act (Northern Ireland) 2016 (the 2016 Act). The Ombudsman can normally only accept a complaint after the complaints process of the public service provider has been exhausted.

The Ombudsman may investigate complaints about maladministration on the part of listed authorities, and on the merits of a decision taken by health and social care bodies, general health care providers and independent providers of health and social care. The purpose of an investigation is to ascertain if the matters alleged in the complaint properly warrant investigation and are in substance true.

Maladministration is not defined in the legislation, but is generally taken to include decisions made following improper consideration, action or inaction; delay; failure to follow procedures or the law; misleading or inaccurate statements; bias; or inadequate record keeping.

The Ombudsman must also consider whether maladministration has resulted in an injustice. Injustice is also not defined in legislation but can include upset, inconvenience, or frustration. A remedy may be recommended where injustice is found as a consequence of the failings identified in a report.

Reporting in the Public Interest

This report is published pursuant to section 44 of the 2016 Act which allows the Ombudsman to publish an investigation report when it is in the public interest to do so.

The Ombudsman has taken into account the interests of the person aggrieved and other persons prior to publishing this report.

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SUMMARY

I received a complaint about the actions of the Northern Health and Social Care Trust (the Trust). The complaint concerned the eligibility of the complainant's father (the patient) for Continuing Healthcare funding while resident of Larne Care Centre. The complainant said that the Trust, in its assessment and monitoring process, failed to follow guidance issued by the Department of Health in relation to CHC. As a result, the complainant said that the Trust failed to determine the patient's primary need as health care and as such the Trust denied the patient of his entitlement to funding for CHC.

The investigation of the complaint established that the Trust failed to respond appropriately to the complainant's requests for an assessment of primary need for the patient, to determine if he would qualify for funding in accordance with the Department of Health, Social Services and Public Safety, Circular HSC ECCU 1/2010 - Care Management, Provision of Services and Charging Guidance, 11 March 2010 (the 2010 Circular). Specifically, the Trust, in its responses to the complainant's requests, failed to undertake the appropriate CHC assessment for the patient in a timely manner. I considered this failing to constitute maladministration by the Trust.

The investigation also established maladministration by the Trust in relation to its failure to implement a local procedure for the assessment of CHC applications that is fully in accordance with the 2010 Circular. In addition, the investigation established maladministration in respect of the Trust's failure to implement a CHC procedure that is consistent with the regional report 'Transforming Your Care: A Review of Health and Social Care in Northern Ireland (December 2011)'.

The investigation did not establish maladministration in relation to the Trust's CHC assessment of the patient carried out in April 2018, which concluded he was not eligible for CHC funding.

I recommended that the Trust ought to apologise to the complainant for the failures identified. I also made recommendations in relation to improving the service provided by the Trust. In the absence of updated guidance from the Department on a regional approach to CHC, I recommended the Trust, either individually or collectively with other HSC Trusts and organisations, takes action to put in place administrative arrangements that are necessary to enable it to consider all future requests for a determination of CHC eligibility in a timely, consistent and transparent manner and in accordance with the Department's policy direction, as set out in the 2010 Circular.

THE COMPLAINT

1. The complaint was about the actions of the Northern Health and Social Care Trust (the Trust) in relation to how it determined eligibility for Continuing Healthcare (CHC) funding for a placement in a care home. The complainant was concerned about the eligibility of his father (the patient) for Continuing Healthcare (CHC) funding while he was a resident of Larne Care Centre. The patient had been a self-funding resident since his admission to Larne Care Centre on 8 July 2014. The complainant said that in January 2016 the patient's health *'rapidly deteriorated to the point where his needs [became] mainly medical and not social'.* The complainant said that from that point on, the cost of the patient's care ought to have been fully met by the Trust. The complainant said that the Trust did not consider appropriately his request for an *'updated care and financial assessment'* of the patient which he believed would have made him (the patient) eligible for CHC funding. The complainant stated that, by not providing a CHC assessment of the patient, the Trust failed to fulfil its obligations. The complainant described this failure as *'tantamount to maladministration'*. The patient sadly passed away in March 2019.

Background

2. On 8 November 2015, the patient was admitted to Antrim Area Hospital (AAH) and treated for urosepsis[1]. He was discharged back to Larne Care Centre on 13 November 2015. On 12 January 2016 the patient was admitted again to AAH with

[1] Urosepsis is a type of sepsis that is limited to the urinary tract.

a primary diagnosis of aspiration pneumonia[2], urosepsis and acute kidney injury[3]. He was discharged on 29 January 2016.

3. On 12 January 2016 the complainant wrote a letter addressed to the Trust's 'Chief Executive's Office' to '*request an updated care and financial assessment'* for the patient whose condition, as the complainant described, '*has rapidly deteriorated, to the point where his needs are now mainly medical not social'*. The complainant stated, that while the patient had been assessed previously as a self-funding resident, *'I now believe [the patient's] care costs should be fully met by the Trust'.* The complainant stated *'my family insist that the Trust meets its obligations by undertaking updated assessments'*.

4. In its response to the complainant dated 10 February 2016, the Trust advised that the concept of CHC differed from other parts of the UK, *'and is not directly transferable to Northern Ireland due to differences in legislation and also because of the integrated health and social care system we have here'*.

5. The Trust's response advised that the patient's needs were assessed prior to his placement at Larne Care Centre and that this assessment indicated his *'needs could appropriately be met in nursing home care without one to one interventions or supervision from a specifically trained health care professional'.* The letter confirmed the patient's '*needs continue to be met with nursing care and therefore do not meet the criteria for eligibility for Continuing Health Care needs'*.

6. 'The Trust's response advised further, *'for a small number of individuals who have highly complex medical needs requiring frequent, intensive health care inputs, a 'case by case' approach is adopted by Trusts which could result in the provision of free care. Such a decision would be informed by the clinical judgment and assessment of the multidisciplinary team'.*

[2] Aspiration pneumonia is a type of lung infection that is due to a relatively large amount of material from the stomach or mouth entering the lungs. Symptoms often include fever and cough of relatively rapid onset.
[3] Acute kidney injury is where the kidneys suddenly stop working properly. It can range from minor loss of kidney function to complete kidney failure. AKI normally happens as a complication of another serious illness.

7. The complainant wrote to the Trust again on 30 November 2017 in relation to the patient's '*ongoing lack of correct assessment for Continuing Healthcare'* and asked for a response under the Trust's formal complaints procedure. The complainant stated, '*it is indisputable that my father's care needs are clearly primarily for health needs, and have been for some time'*. The complainant also stated, *'the Trust's care assessment process is not fit for purpose; there is no clear method of identification from when patient's needs are primarily medical'*.

8. The complainant's letter of 30 November 2017 described the patient's needs as being approximately *'at least 70% [health] care needs and 30% social care need'*. The letter drew comparisons between the patient's needs and those of a Court of Appeal case in England pertaining to CHC[4].

9. The complainant remained aggrieved that the Trust failed to assess the patient's primary care need as health and therefore submitted his complaint to this Office on 11 December 2017.

10. The Trust's response to the complainant dated 3 January 2018 stated that, '*though [the patient's] condition will have deteriorated, his needs remain similar'* as when it had corresponded with the complainant on 10 February 2016. The Trust advised that therefore, '*the situation regarding Continuing Health Care Need (CHCN) payments remains the same'.* The Trust advised further, '*within this jurisdiction, those requiring nursing care would not normally attract payment of CHCN'*.

11. Following the Trust's response of 3 January 2018, the patient was assessed using the Northern Ireland Single Assessment Tool (NISAT)[5] on 13 April 2018. The outcome of the NISAT concluded the patient's needs *'could be met within the current nursing placement'.* The Trust wrote to the complainant on 10 May 2018 to inform him that the patient had been assessed by a '*multidisciplinary team… in*

[4] R Coughlan v North and East Devon Health Authority (2000).
[5] The Northern Ireland Single Assessment Tool (NISAT) is designed to capture information required for holistic, person-centred assessment of the older person. The NISAT is structured with 10 domains which are completed according to the level and complexity of health and social care needs experienced by the older person.

order to determine how his health and social care needs could be met…' The letter stated further, *'the outcome of this reassessment does not indicate that [the patient] requires Continuing Healthcare as his needs fall within the normal nursing care threshold and therefore his needs can continue to be met in his current environment'*.

Issue of complaint

12. The issue which was accepted for investigation is:

- **Was the assessment of the patient to determine his primary care need carried out appropriately by the Trust?**

The investigation of the complaint focused on the following elements:

(i) Whether proper assessments were undertaken by the Trust and whether these were done in an appropriate and timely manner; and
(ii) Whether the patient was eligible for funded CHC by the Trust.

INVESTIGATION METHODOLOGY

13. In order to investigate the complaint, the Investigating Officer obtained from the Trust all relevant documentation together with the Trust's comments on the issues the complainant raised. The Investigating Officer also obtained the patient's records and notes from Larne Care Centre.

Independent Professional Advice Sought

14. After further consideration of the issues, independent professional advice was obtained from the following independent professional advisor (IPA):

- Specialist Practitioner – District Nursing. 35 years' experience including 15 years' experience within NHS Continuing Healthcare, Nurse Prescriber, working as the Clinical Lead within a Palliative Care Team managing all

aspects of the application of the National Framework for NHS Continuing Healthcare and Funded Nursing Care in England.

15. Independent professional advice was originally obtained during the investigation of this complaint and was shared with the Trust for comment. However, following further detailed review of the initial advice, this Office decided to obtain further advice from the IPA. The purpose of this further advice was to seek clarification on the advice originally obtained. On review of the case, the IPA, in her further advice report, amended some of her original advice. This IPA report provided consolidated and finalised advice regarding the case.

16. The information and advice which informed the findings and conclusions are included within the body of the report. The IPA provided me with 'advice'; however how I weighed this advice, within the context of this particular complaint, is a matter for my discretion.

Relevant Standards

17. In order to investigate complaints, I must establish a clear understanding of the standards, both of general application and those which are specific to the circumstances of the case.

The general standards are the Ombudsman's Principles[6].

- The Principles of Good Administration;
- The Principles of Good Complaints Handling; and
- The Principles for Remedy.

18. The specific standards are those which applied at the time the events occurred, and which governed the exercise of the administrative functions and professional judgement of the Trust staff whose actions are the subject of this complaint.

[6] These principles were established through the collective experience of the public services ombudsmen affiliated to the Ombudsman Association.

19. The specific standards relevant to this complaint are:

- Department of Health, Social Services, and Public Safety, Circular ECCU 1/2006 – HPSS Payments for Nursing Care in Nursing Homes, 10 March 2006 (the 2006 Circular);
- Department of Health, Social Services and Public Safety, Circular HSC ECCU 1/2010 - Care Management, Provision of Services and Charging Guidance, 11 March 2010 (the 2010 Circular);
- Continuing Healthcare in Northern Ireland: Introducing a Transparent and Fair System – Consultation Document, 19 June 2017 (The Consultation Document, 2017);
- Northern Health and Social Care Trust Guidance in Relation to Continued Health Care Need, 20 July 2010 (Trust CHC Guidance);
- Northern Health and Social Care Trust Care Management Guidelines – To support the implementation of Circular HSC (ECCU) 1/2010 guidance 24 August 2016 (Trust Care Management Guidelines); and
- Department of Health, Social Services, and Public Safety, 'Transforming Your Care' – A review of Health and Social Care in Northern Ireland. December 2011 (Transforming Your Care Review).

20. I have not included all of the information obtained in the course of the investigation in this report. However, I am satisfied that everything that I consider to be relevant and important was taken into account in reaching my findings.

21. A draft copy of this report was shared with the complainant and the Trust for comment on factual accuracy and the reasonableness of the findings and recommendations.

INVESTIGATION

- **Was the assessment of the patient to determine his primary care need carried out appropriately by the Trust?**

Detail of Complaint

22. The patient was a resident of Larne Care Centre from 8 July 2014[7] until his passing in March 2019. At the time of the patient's admission to Larne Care Centre he had been assessed as a self-funding resident and had a medical history that included vascular dementia[8], Type 2 diabetes[9], hypertension[10], quadruple coronary bypass surgery[11] and myocardial infarction[12]. In submitting his complaint to this Office, the complainant stated that the patient's health deteriorated significantly in January 2016, to a point where '*his needs became mostly health related'*. The complainant stated that the Trust, in its assessment and monitoring process, failed to follow guidance issued by the Department of Health[13] (the Department) in relation to CHC assessment. As a result, the complainant said that the Trust failed to determine the patient's primary care need as health and as such the Trust continued to deny the patient's eligibility for CHC funding.

Evidence Considered

The Health and Social Services (NI) Order 1972

23. I considered the main legislation governing the provision of health and social care services in Northern Ireland - the Health and Personal Social Services (NI) Order 1972 (the 1972 Order). The 1972 Order does not provide an explicit statutory framework for the provision of CHC in Northern Ireland, nor does it require that CHC is provided to people in Northern Ireland. However, Article 78 of the 1972 Order requires that all services provided under that statute (which includes the provision of residential or nursing home care placements) and the Health Services (Primary Care) (NI) Order 1997 are provided free of charge, except

[7] The patient commenced a temporary placement at Larne Care Centre in July 2014. This temporary placement was extended several times and later became permanent in February 2015.
[8] Type 2 diabetes is a condition where the body does not make or use insulin well. As a result, this causes too much sugar in the blood.
[9] Vascular dementia is a type of dementia caused by reduced blood flow to the brain. Symptoms include confusion, slow thinking and changes mood or behaviour.
[10] Hypertension, also called high blood pressure, is when pressure in the body's blood vessels is unusually high.
[11] Quadruple bypass heart surgery is an open heart surgical procedure which is done to improve the blood flow that feeds the heart.
[12] Myocardial infarction, also known as a heart attack, is a condition where the blood supply to the heart is suddenly blocked. It requires treatment as soon as possible.
[13] Department of Health, Social Services and Public Safety at the time the 2010 Circular was issued.

where there are provisions to the contrary in either piece of legislation. Where an individual is placed in residential care by a Health and Social Care Trust (HSC Trust), the relevant HSC Trust has a statutory obligation to charge the individual for their placement if they have the financial means to pay for, or make a contribution towards, the cost of that placement.

The 2006 Circular

24. I considered the 2006 Circular which provides guidance on the responsibility of HSC Trusts to make payments for the cost of nursing care provided in nursing homes, on behalf of individuals who pay for their nursing home care. Paragraph two of the 2006 Circular explains that since the Health and Personal Social Services Act (NI) 2002 came into operation on 7 October 2002, HSC Trusts are '*responsible for paying the nursing care of residents who otherwise pay the full cost of their nursing home care'.* Paragraph 12 of the 2006 Circular advises of the availability of the Nursing Needs Assessment Tool (NNAT), which was *'developed specifically to establish nursing needs…'*

The 2010 Circular

25. I considered the 2010 Circular, issued by the Department which provides guidance on:
    - the care management process, including the assessment and case management of health and social care needs;
    - provision of services, including placement of service users in residential care homes and nursing homes; and
    - charging for personal social services provided in residential care homes and nursing homes.

26. Paragraph 12 of the 2010 Circular states, *'Proper proportionate assessment of need will continue to be the cornerstone of the care management process. Assessment of need is the systemic determination of health and social care needs in a manner which is proportionate to the individual's presenting circumstances…'*

27. Paragraph 17 of the 2010 Circular states, *'… the distinction between health and social care needs is complex and requires a careful appraisal of each*

individual's needs. In this context, it is for clinicians, together with other health and social care professional colleagues and in consultation with the service user, his/her family and carers, to determine through a comprehensive assessment of need whether an individual's primary need is for healthcare or for personal social services. In the latter case, the service user may be required to pay a means tested contribution.'

28. Paragraph 27 of the 2010 Circular states, *'…Reviews must not become a "routine" or "administrative" task. As a minimum a formal review should take place once a year. More frequent reviews may be required in response to changing circumstances or at the request of service users or other persons, including carers…'*

29. Paragraph 63 of the 2010 Circular states, *'[The 1972 Order] requires that a person is charged for personal social services provided in residential care or nursing home accommodation arranged by a HSC Trust.* ***There is no such requirement, or authority, to charge for healthcare provided in the community, either in the service user's own home or in a residential care or nursing home'*** (the 2010 Circular's emphasis).

30. In addition, paragraph 88 of the 2010 Circular states, *'When contracting with homes, HSC Trusts should contract for the full cost of the placement, and where there has not been a determination of continuing healthcare need, seek reimbursement under [the Health and Personal Social Services (Assessment of Resources) Regulations (NI) 1993]'*.

31. The 2010 Circular also refers to the means by which an individual's health and social care needs are to be assessed. Specifically paragraph 15 of the 2010 Circular advises that the NISAT was *'developed primarily in the context of older people's needs'* and *'provides a validated assessment framework'.* Page four of the 2010 Circular states the NISAT '*supports the exercise of professional judgement in the care management process'*. The 2010 Circular states further, *'NISAT is designed to capture the information required for holistic, person-centred assessment. It is structured in component parts and using domains which will be completed according to the level of health and social care needs*

experienced, from non-complex to complex'.

32. The 2010 Circular explains the position in Northern Ireland in relation to the cost of providing nursing care in nursing homes. In this regard, paragraph 74 of the 2010 Circular advises, '*In October 2002, the Northern Ireland Assembly introduced a weekly HSC contribution towards the cost of nursing care provided in nursing homes. This flat weekly payment is intended to pay for the professional care given by a registered nurse employed in a nursing home. For individuals with assessed nursing needs who pay privately, the flat weekly rate is payable by HSC Trusts to homeowners. Alternatively, it is discounted from the charges raised by HSC Trusts for people who are required to refund HSC Trusts the full rate'.*

33. Paragraph 75 of the 2010 Circular continues, *'This payment is, however, subject to the outcome of a Nursing Needs Assessment where the individual's nursing needs are identified. HSC Trusts should ensure that homes discount the full value of any nursing payment, and that residents should not be charged more than the agreed rate less the contribution'.*

Trust's CHC Guidance

34. Section one of the Trust's CHC Guidance states ***'CHCN (continuing health care need) can only apply where the service users [sic] needs would normally have been met in a hospital environment and they require 1:1 supervision/ interventions from a specifically trained Health Care Professional'*** *(CHC Guidance's emphasis).*

35. Section five of the Trust CHC Guidance refers to the means by which an individual's health and social care needs are to be assessed within the Trust. It states, *'When considering health care needs the service user's need must be looked at in totality and a decision made as to whether the health care needs are much greater than those which normally fall within the normal nursing care threshold'.* Specifically, section five sets out the circumstances to be considered when determining if a service user's needs meet CHCN. These circumstances

include '*Nature; Intensity; Complexity, and; Predictability'*.

36. Section four of the Trust CHC Guidance sets out the Process for determining eligibility. Specifically, section four states, *'Assessing that a service user's need (s) is primarily a health need (s) sits within the normal assessment procedures established in the Trust to determine needs and how these will be met. Each service user is entitled to an assessment of need when they are referred into the NHSCT for services or assistance. The… NISAT will standardise the initial screening assessment for all service-users. As part of this assessment staff will be asked to consider if the needs identified would warrant consideration to determine if they are primarily health needs as opposed to nursing or social needs. A positive response will lead to a comprehensive multi-disciplinary assessment involving clinicians together with other health and social care professionals involved or likely to be involved in the care of the service user'.*

37. Section four of the Trust CHC Guidance states further, '*In situations where the Health and Social Care professionals decide that the service user may have CHC Needs, this will be referred to a panel to consider in more detail. The Panel will consist of staff independent from the assessment process. These will be Health and Social Care professionals at Consultant Level or at or above Band 8C…'* and *'will include appropriate clinical or medical personnel who will be able to consider the specific condition, associated risks and identified needs of the service user and be in a position to inform the decision making process in relation to CHCN'.*

38. In addition to the above, section seven of the Trust CHC Guidance provides *'An example to inform practice decisions'*. This sets out the *'conditions and needs of a service user who has been assessed as having continuing healthcare,'* as follows:
    - *Is tetraplegic and ventilator dependent*
    - *Requires 24 hour nursing care x 2 with waking night cover and complete assistance with all activities of daily living*
    - *Requires regular suctioning and oxygen delivery via ambubag*
    - *Requires bowel management and parenteral nutrition*

- *Requires constant supervision due to unpredictability and instability of condition. Potential Autonomic Dysrapheiixia – potentially life threatening.*

Trust's Care Management Guidelines

39. I considered also the Trust's Care Management Guidelines developed 'to support the implementation of [the 2010 Circular]'. In relation to Assessment of Need the Care Management Guidelines state, '*Proper, proportionate assessment of need will continue to be the cornerstone of the care management process'*. The Guidelines continue, *'Assessment of need is the systematic determination of health and social care needs in a manner which is proportionate to the individual's presenting circumstances… NISAT is the required assessment tool for over 65s…'*

40. In relation to reviews of needs and services provided, the Care Management Guidelines state *'[reviews] should take place at the times or intervals specified in the care plan or at any other time deemed necessary'*. The Guidelines state further, *'Reviews must not become a 'routine or administrative' task. As a minimum a formal review should take place once a year. More frequent reviews may be required in response to changing circumstances or at the request of service users or other persons including carers, or agencies involved in their care'.*

The Consultation Document 2017

41. In June 2017, the Department launched a public consultation on the future of continuing healthcare in Northern Ireland. The Consultation document 2017[14], explained that the term 'continuing healthcare' describes the practice of the health service meeting the cost of any social need which is driven primarily by a health need. It also explained that *'Eligibility for continuing healthcare depends an individual's assessed needs, and not on a particular disease, diagnosis or condition'*, and that *'If an individual's needs change, then their eligibility for [CHC] may also change.'* The Department's consultation document further

[14] https://www.health-ni.gov.uk/consultations/continuing-healthcare-northern-ireland-introducing-transparent-and-fair-system

advised that in Northern Ireland, HSC Trusts *'are responsible for ensuring that an assessment of need is carried out for individuals in a timely manner and with appropriate multidisciplinary professional and clinical input as required'*. The document also made clear, however, that, *'so as not to interfere with professional and clinical judgement, the Department [had] to date, refrained from drafting administrative guidance on a specific healthcare assessment.'*

42. In addition, the Department's consultation document 2017 explained that the assessment process *'covers both health and social care needs'*, and that should the outcome of such an assessment *'indicate a primary need for healthcare, [the relevant HSC Trust] is responsible for funding the complete package of care in whatever setting. This is what is known as [CHC] in the local context. Alternatively a primary need for social care may be identified and where such a need is met in a residential care or nursing home setting, legislation requires that the HSC Trusts levy a means-tested charge.'* The Consultation Document 2017 explained also that if an assessment identified that nursing home care was appropriate and the individual was responsible for meeting the full cost of their nursing home care, the relevant HSC Trust was responsible for making a payment of £100 per week directly to the nursing home provider to cover the cost of the nursing care.

Transforming Your Care Review

43. I considered the Health and Social Care Review (2011) which outlines proposals for the future of health and social care services in Northern Ireland. 'Reason 2' of the Transforming Your Care Review recommends *'more health and social care services should be delivered in GP surgeries, local centres and in people's homes'.* Although *'inpatient hospital care will always be an important of how care is provided… it is only best for a patient with acute medical needs'*. The Transforming Your Care Review emphasised the benefits of '*delivering care within people's homes and in their local communities'.* Page 46 of the Transforming Your Care Review states: '*There will be a much greater emphasis on enabling people to remain in their chosen home.'* Page 114 makes clear that people's homes include *'nursing homes or residential facilities'.*

Correspondence between the Department and the Trust

44. I considered the content of an e-mail from the Department to the Trust's Director of Community Care, dated 29 June 2007 in relation to CHC. The Department confirmed *'Trusts are responsible for carrying out assessments of need for individuals with continuing care needs. The outcome of the assessment could be either an identified need for [CHC], which is provided free, or social care for which a means tested charge is levied'*. The e-mail stated further, '*Everyone has the right to seek a review of an assessment at anytime, and if they remain unhappy with the outcome of the review, they have a right to make a formal complaint…'*

Trust's response to investigation enquiries

45. As part of investigation enquiries, the Trust was given the opportunity to respond to the complaint. In its response dated 13 April 2018, the Trust commented on its alleged failure to fulfil its obligations by not providing a CHC assessment for the patient. The Trust stated, *'[the patient] has been assessed under the Northern Ireland Single Assessment tool[15], has had a Nursing Needs Assessment, an Occupational Assessment together with a number of Permanent Placement Team reviews. The outcome of these assessments and reviews have indicated that [the patient] has certain needs which require to be administered by a registered Nurse however are not greater than that provided for under the Health and Personal Social Services (HPSS) Payment Contributions in respect of same in accordance with Article 36 of the Health and Personal Social Services (Northern Ireland) order 1972'.*

46. The Trust continued, *'NHSCT assessments/reviews are designed to consider the holistic need of the individual. This would include physical health, mental health and emotional wellbeing, awareness and decision making, medicines management, personal care and daily tasks, living arrangements and accommodation, relationships, work finance and leisure'.* The Trust stated further,

[15] The Trust refers here to a NISAT (Contact Screening and Core Assessment) that it carried out on the patient in 2010. This was before the patient was admitted on a temporary placement to Larne Care Centre in July 2014 which later became a permanent placement in February 2015.

'Within NI there is no clear definition of what constitutes a health care need and how this should be determined… we are awaiting the outcome of the consultation. The Trust has however a robust assessment/review process which addresses both health and social care needs. The outcome of which is all [the patient's] needs can and are being fully met within his current nursing placement. The Trust has… guidance to inform practice.'

47. In relation to the complainant's contention that the patient's *'care needs are clearly primarily for health needs and have been for some time'*, the Trust stated, *'Prior to receipt of the complaint, a review of [the patient's] needs had been carried out on the 8th November [2017]. The outcome of this was [the patient's] current level of need was being met within the care home.'* The Trust stated further that the review undertaken on 8 November 2017 indicated '*All of the [the patient's] needs were being met appropriately and there was no need for additional 1-1 support/interventions from a specifically trained healthcare professional, or anything beyond that normally provided in a nursing care home. Therefore he did not meet the criteria for CHC'.*

48. The Trust referred to the central tenet underpinning its CHC Guidance, which states *'CHCN can only apply where the service-users' needs would normally have been met in a hospital environment and they require one to one supervision/intervention from a specifically trained health care professional'*. The Trust stated further that *'[the patient] did not require such interventions'*.

49. The Trust also stated that members of the patient's family had attended the review on 8 November 2017, and that a copy of the review, alongside a letter confirming the review outcome and advising that the patient remained eligible for nursing needs payments, was sent to the patient's family. The Trust advised, *'There was no dispute from the family or the care home in relation the identified needs or that the home is fully able to meet the needs'*

50. In reference to paragraph five of the Trust Care Management Guidelines[16], the

[16] Paragraph 5 of the Trust Care Management Guidelines states, *'The needs of people and their circumstances change. Monitoring of the care plan will therefore be an ongoing task and where service user's needs are changing rapidly or frequently adjustments may have to be made to the care package…'*

Trust stated *'To date, the reviews [of the patient] have indicated no requirement for the [the patient's] care package to change which would result in him requiring any additional nursing services which are not currently covered by the HPSS payments'.*

51. Enquiries were also made of the Trust as to why it had declined the complainant's request for CHC assessment. The Trust advised that there is no specific CHC assessment tool in place in Northern Ireland. However, the Trust advised, '*the request for CHC assessment by [the complainant] came shortly after a review of [the patient's] needs in line with the Trust's Care Management Guidelines. The review was indicating no deterioration in the physical health of [the patient] and… amongst other things –*

    - *Risks associated with eating and drinking being were stated as none due to the adjustments made to his diet;*
    - *No concerns in relation to his skin condition were reported;*
    - *No issues with his breathing or sleeping were reported;*
    - *It was noted that [the patient] was no longer making use of the Nurse call system;*
    - *No challenging or inappropriate behaviours were reported; and*
    - *No requests were required to be made to particular medical practitioners with specialist interest'.*

52. The Trust stated that on the basis of the review undertaken in November 2017, it '*considered the patient's needs had been assessed in line with the Trust Guidance and the 2010 Circular the outcome of which did not suggest that a determination for Continuing Healthcare should be made'.*

53. The Trust also stated, as the review of November 2017 had been conducted only a short time before receipt of the formal complaint, the outcome of that review was *'the most up to date information'* as to the patient's needs and therefore was used as the basis to inform the Trust's response to the complaint and to confirm *'the position in relation to the issue of Continuing Health Care in Northern Ireland*

remained the same following previous correspondence with complainant'.

54. In relation to the Trust's decision making process which led to the conclusion that the patient did not meet the criteria for eligibility for CHC need, the Trust advised that its CHC Guidance was used as a reference to support the decision making process.'

55. Since the Trust's investigation of the complaint, it (the Trust) advised this Office that it had identified the following two learning points:

- *'The Trust plans to include a question in the review template with regard to any changes which would warrant an assessment as to whether CHC applies and should that be the case, then a further assessment would be undertaken which would be considered by a panel as outlined in the Trust CHC Guidance.*
- *The Trust will also recommend to the Director of Nursing for this question to be included in the Nursing Needs Assessment, however, as this is a regional document it will be require the agreement of all Health and Social Care Trusts'.*

Clinical Records

56. A review was undertaken of the documentation the complainant provided in support of his complaint, and of that provided by the Trust in response to investigation enquiries. Records from Larne Care Centre were also examined.

Relevant Independent Professional Advice

57. As part of investigating enquiries independent professional advice was obtained from a CHC independent professional advisor (the IPA). Relevant extracts of the IPA's advice are outlined below.

58. It was pointed out to the IPA that the Trust had stated[17] that it had undertaken a number of assessments of the patient's needs during the time he was resident of

[17] The Trust's letter of response to NIPSO dated 13 April 2018 (see Trust's response, paragraph 46 above)

Larne Care Centre[18]. The IPA was asked which, if any, of these assessments were appropriate for determining the patient's eligibility for CHC. The IPA advised, *'The assessments were not suitable for determining the patient's eligibility for CHC as it is not an assessment in itself that would make this determination. However, the level of assessment completed by the Trust was proportionate and was sufficient to identify if the patient had needs that required further assessment such as completing a NISAT and if required, the complex components of NISAT. If a primary need for healthcare was then indicated, the information within the assessments could be used by the MDT [multidisciplinary team] and Trust to apply a 'primary health needs test' in determining the patient's eligibility for [CHC].'*

59. In outlining the rationale for the above advice, the IPA advised, *'The Trust made a number of reviews of the patient during the time he was at Larne Care Centre… sufficient information regarding the patient's needs could be established through the review process and were sufficient to identify if there was a need for a more in-depth assessment using NISAT, for example because the care home was not meeting the patient's needs, or there was a need for intensive support or if a change in accommodation was needed.'*

60. The IPA continued, '*As the reviews and assessments concluded that the patient's needs were being adequately met at Larne Care Centre the level of assessment and review completed by the Trust was clinically reasonable and in accordance with an underpinning principle of [the 2010 Circular] 'make sure that contact screening and assessment are proportionate to the presenting circumstances and are completed in a way that the timely, effective and efficient'.*

61. The IPA was asked at what point in the chronology of the assessments completed[19] for the patient, the Trust would have gathered sufficient information

[18] These assessments included: a Psychiatric Assessment on 23 July 2014; an Occupational Therapy Assessment on 31 December 2014; a number of reviews of the patient (on 29 August 2014, 4 September 2015, 1 September 2016); the Nursing Needs Assessment (NNAT) on 29 April 2015 and an NNAT review ('Free Nursing Assessment Review') on 20 October 2015; a number of Permanent Placement Team Reviews (2 November 2016, 8 November 2017).

[19] This question refers to the assessments cited by the Trust in its response to enquiries made by this Office, dated 13 April 2018.

about his care needs to enable it to determine his eligibility for CHC. In response, the IPA advised, '*The Trust, in establishing that the patient's needs were being adequately met at Larne Care Centre in 2015, 2016, 2017 and 2018 without the need for additional services or intensive support, had sufficient information to establish that the patient's needs were not of a nature to warrant further assessment, e.g. the complex component of NISAT, or further consideration for eligibility for CHC'.*

62. Advice was sought from the IPA as to whether the assessments carried out by the Trust were, in themselves, sufficient to determine his eligibility for CHC, and if not, what further action by the Trust would have been required to enable such a determination to be made. In her response, the IPA reiterated that, *'The assessments and reviews contained sufficient information to determine that further in-depth assessment e.g. using NISAT was not required as the patient's presenting needs were not indicative of a primary need for health care…'* The IPA advised further, *'Northern Ireland does not have a National Framework or specific tools for CHC screening to guide practitioners as to when a full CHC assessment is required. Trusts are therefore reliant on the assessment processes and tools as set out in [the 2010 Circular] and [the 2006 Circular] in the determination of CHC eligibility.'*

63. The IPA continued, '*The Trust was in compliance with the 2010 Circular and the 2006 Circular 2006 by reviewing and assessing the patient periodically throughout the time he was at Larne Care Centre using the Trust's care management process, NNAT completed in 2015 and NISAT Completed in April 2018. These assessment[s] and reviews were sufficient in identifying if further assessment was required to determine if the patient's needs were primarily health needs as opposed to nursing or social needs'.*

64. In relation to the patient's case, the IPA advised, '*the assessments and reviews completed at Larne Care Centre all concluded that his [the patient's] needs were adequately met with no intensive or specialist support required. Therefore it was*

a clinically reasonable outcome of these reviews to conclude the patient's needs were not such to warrant further assessment using the NISAT'.

65. In consideration of what further action by the Trust would have been necessary to enable such a CHC determination to be made, the IPA referred to *'the Trust CHC guidance [which] states that during the assessment and review process staff would be asked to 'consider if the needs identified warranted further assessment to determine if they were primarily health needs as opposed to nursing or social needs'.* The IPA advised, '*to enable staff to make this determination, assessment and review tools, including NNAT, NISAT and Permanent Placement Team review documentation would need to guide professionals to explicitly state when further assessment was not warranted rather than leaving this to be assumed'.*

66. In this regard, the IPA referred to the two learning points identified by the Trust in its response to this Office dated 13 April 2018. These included the Trust's plan:

    - *'To include a question in the review template with regard to any changes which would warrant an assessment as to whether CHC applies and should that be the case, then a further assessment would take place which would be considered by a panel as described in the Trust's Guidance section 4; and*
    - *To recommend to the Director of Nursing for this question to be included in the Nursing Needs Assessment'.*

67. The IPA was also asked whether the action taken by the Trust in the patient's case, was in keeping with the approach set out in the 2010 Circular. With specific reference to paragraph 17 of the 2010 Circular, the IPA responded, *'Yes… the level of assessment completed by the Trust was clinically proportionate and was sufficient to identify if the patient did not have needs that were unmet or such to warrant further assessments to determine [the patient's] eligibility for CHC'*.

68. In relation to whether the Trust was compliant with paragraph 27, the IPA advised, '*Yes but not always using the assessment and review tools set out in Circular 2006' and 'No in response to [the complainant's] request for an*

assessment'. The IPA explained '*When a patient's needs are met in a Nursing Home, Paragraph 74 and 75 [the 2010 Circular] directs Trusts to [the 2006 Circular] 'Payment for Nursing Care in Nursing Homes'. This identifies that a Nursing Assessment is required to enable the weekly HSC contribution towards the cost of nursing care provided in nursing homes*.'

69. She explained further, Paragraph 26 of [the 2006 Circular] '*sets out that the Nursing Needs Assessment should be reviewed not later than three months following the initial assessment and every twelve months thereafter, or when there is a significant change in the patient's health status in line with the local care management arrangements. This review schedule is similar to the review schedule identified in the 2010 Circular. The Trust reviewed the patient on a periodic basis once his placement was made permanent…'*

70. In relation to whether the Trust was compliant with paragraph 63 of the 2010 Circular, the IPA advised, '*Yes. Paragraph 63 states that the Health and Personal Social Services (Northern Ireland) Order 1972 requires that a person is charged for personal social services provided in residential care or nursing home accommodation arranged by a HSC Trust. Therefore, taking account of the conclusions regarding the patient's CHC eligibility, the actions taken by the Trust in its attempts to charge the patient are in accordance to Paragraph 63'.*

71. In relation to paragraph 88 of the 2010 Circular, the IPA responded '*Yes. Paragraph 88 states that when contracting with homes, HSC Trusts should contract for the full cost of the placement, and where there has not been a determination of continuing healthcare need, seek reimbursement under the 1993 Regulations. There had been no determination of continuing healthcare and therefore the Trust sought reimbursement'.*

72. The IPA was referred to the complainant's request of 12 January 2016, *'that an updated care and financial assessment'* be carried out for the patient. Enquiries were made of the IPA as to the appropriateness of the Trust's response to this request. In her response, the IPA noted paragraph 26 of the 2010 Circular, which states '*a review of needs and services provided should take place at the times or*

intervals specified in the care plan or at any other time deemed necessary'. She noted also paragraph 27 which states *'More frequent reviews may be required in response to changing circumstances or at the request of service users or other persons including carers, or agencies in their care'*.

73. The IPA advised, the complainant '*wrote to the Trust on 12/01/2016 requesting an 'updated care and financial assessment', advising that [the patient's] condition had rapidly deteriorated to a point where his needs were 'now mainly medical not social'… His letter went on to describe the circumstances in which he believed the Trust were responsible for funding [the patient's] care. The date of [the complainant's] letter corresponds to the date [the patient] was admitted into hospital due to aspiration pneumonia and urosepsis'*.

74. In relation to the Trust's response, the IPA advised, '*The Trust's response to [the complainant's] request for a review focused upon CHCN eligibility and therefore failed to adequately respond to his request for an assessment of [the patient's] care needs which was clinically reasonable in light of [the patient's] recent hospital admissions. The Trust also did not follow guidance on reviews as set out in Paragraph 27 of the 2010 Circular…*'

75. The IPA was referred also to the Trust's stated position dated 3 January 2018, that *'Since receiving our reply of 10 February 2016, the situation regarding [CHC] remains the same. Though [the patient's] condition will have deteriorated, his needs remain similar'*. The IPA was asked whether this was a reasonable and appropriate response to the complainant's request for the patient's CHC eligibility to be assessed. Upon further detailed review of the case, the IPA, in her further advice to this Office, responded, '*yes and no'*. She explained, '*The 2018 assessments and care records evidence some deterioration in the patient's cognition but generally his care records and assessments illustrate a very similar pattern of care needs 2015 – 2018. Therefore the Trust's response to [the complainant] that his father's 'needs remain similar' was clinically reasonable as it is supported by the Trust's annual assessment of the patient in 2016, 2017 and 2018'.*

76. Notwithstanding, the IPA advised further, *'However the Trust response to [the complainant] regarding his request for reassessment was not in line with [the 2010 Circular]'.* The IPA referred again to paragraphs 26 and 27 of the 2010 Circular. In doing so, she explained *'the Trust's response to [the complainant's] request for review focused upon CHCN eligibility and therefore failed to adequately respond to his request for an assessment of his father's care needs which was also clinically reasonable in light of his father's recent hospital admissions'*. The IPA continued, *'The Trust also did not follow the guidance on reviews as set out in paragraph 27 of the 2010 Circular that states, '… reviews may be required in response to changing circumstances or at the request of service users or other persons…'*

77. Enquiries were made of the IPA as to whether the NISAT undertaken in April 2018, was carried out appropriately by the Trust. Having carried out further detailed review of the case, the IPA in her further advice, responded, *'yes'*. She advised, '*The Community Mental Health Team were asked to undertake the NISAT assessment at the Larne Care Centre and this took place on 13/04/2018. This was the only assessment using the NISAT tool that was completed during the time the patient resided there'*.

78. In relation to the NISAT process, the IPA advised, '*The NISAT assessment tool was completed by appropriately qualified practitioners, namely two Community Psychiatric Nurses (CPNs). An additional Medical Practitioner Report was requested as part of the assessment and this was completed by the patient's GP and dated 16/05/2018. [The complainant] was appropriately advised that the assessment was due to take place but was unable to be present (Trusts response to NIPSO dated 03/05/2018). Information regarding the patient's needs was supplied by the staff at the Larne Care Centre as was appropriate as they were most familiar with the patient's needs. The patient, due to the level of his cognitive impairment, was unable to contribute to the assessment and this is reflected within the assessment and his views are not recorded. The Initial / Short Term intervention, and Specialist Assessment Summary components of the NISAT were completed and in addition the Trusts 'Need for*

Assistance/Intervention form' which provides additional detail to the patient's presentation and care needs'.

79. On review of the NISAT Core Complex documentation, the IPA noted that '*some areas of the assessment tool have not been completed or indicated as not appropriate e.g. with a 'N/A', this includes the 'Assessment Triggers' section'*. The IPA advised, '*According to the guidance this section of the tool must be completed as designed to guide the assessment process'*. The IPA considered if these uncompleted areas of the assessment impacted the outcome of the assessment. She '*concluded it did not'.* In explaining her conclusion she advised, *'This is because… the information gained and documented through the assessment process was adequate to determine the nature of the patient's care needs and provided sufficient assurance that further assessment was not required'*.

80. The IPA was asked whether, following completion of this NISAT in April 2018, she considered that the needs identified warranted further consideration to determine if they are primarily health needs as opposed to nursing or social care needs. She was also asked if the patient ought to have been 'referred to a panel to consider in more detail'[20]. The IPA responded, *'No'.* She explained, *'No factors were identified that indicated at that time that further assessments of the patient's needs were required. This is confirmed by the Specialist Assessment Summary completed by the assessors following NISAT. This concluded that the patient was settled and content, his needs were being met by staff and the placement was appropriate'.*

81. In relation to whether the patient ought to have been referred to a panel, the IPA responded *'No… the range of health and social care needs described within the assessments did not identify any factors to suggest those needs were the type to be indicative of a primary need for health care. Therefore there was no need for the MDT [multidisciplinary team] to make a referral 'to a panel to consider in more detail'.*

[20] In accordance with section four of the Trust's CHC Guidance (as referred to in paragraph 37 above)

82. The IPA was referred to paragraph 63 of the 2010 Circular, which states that '*the [1972 Order] requires that a person is charged for* ***personal social services*** *[my emphasis] provided in residential care or nursing home accommodation arranged by a HSC Trust [but that there is] no such requirement, or authority, to charge for* ***healthcare*** *[my emphasis] provided in the community, either in the service user's own home or in a residential care or nursing home'*. The IPA was asked to explain the difference, if any, between 'nursing care' and 'healthcare' as referred to this provision (paragraph 63) of the 2010 Circular.

83. In response, the IPA advised that a definition of 'nursing care' is provided in the Department's guidance document, 'Payments for Nursing Care', published in June 2006[21], as follows: *'Nursing care means care by a registered nurse in providing, planning and supervising your care in a care home providing nursing care… It is different from personal care – care you need to help you in the activities of daily living; for example help with toileting and other personal needs like bathing, dressing and undressing, getting in and out of bed, moving around and help with feeding. It might also cover advice, encouragement and supervision in these activities. Care assistants rather than registered nurses will usually see to your personal care needs'*. In relation to 'healthcare' as referred to in paragraph 63 of the 2010 Circular, the IPA advised that this *'relates to not only the care of a Registered Nurse but also the care provided by a range of other health care professionals and services required to meet the totality of an individual's health care needs, for example in the community, GPs, therapists, dietitians, audiologists etc.'.*

84. The IPA was asked whether, on the basis of the available records and documentation, she considered the patient's primary need became more than social care at any time after he became a permanent resident of Larne Care Centre in February 2015. The IPA advised, '*No. The supplied assessments and records outside times of acute illness and hospital care do not evidence any significant change in the patient's care needs throughout the period to a point that his needs had become primarily health needs'.* The IPA explained, the patient's

[21] https://www.nidirect.gov.uk/sites/default/files/publications/%5Bcurrent-domain%3Amachine-name%5D/hpss-payments-for-nursing-care-information-leaflet.pdf

'Care records and assessments present a similar pattern of care with no significant change in the nature, complexity, intensity or unpredictability throughout 2015 and after the 2016 hospital discharge'. The IPA referred to her advice report and concluded, *'the nature of the patient's needs remained a combination of both personal social services and healthcare, with the main focus upon assisting him with daily living activities (personal social services)'.*

85. The IPA was invited to provide any further comments which she considered may assist the Ombudsman's consideration of this complaint. Upon further review of the case, the IPA advised that she *'had the opportunity to further consider the Trust's [CHC Guidance]*'. Having done so, she *'concluded that parts (5 and 7) of the guidance are not fully compliant with the position set out for Trusts in regard to establishing CHC eligibility in the 2010 Circular'.*

86. In relation to section five of the Trust's CHC Guidance, the IPA advised, the 2010 Circular *'does not refer to the factors that should be considered when establishing a primary need for healthcare. However, the factors identified by the Trust*[22] *appear reasonable as they closely align with the key characteristics or the 'Primary Health Need Test' for determining eligibility for Continuing healthcare set out within the National Framework for NHS Continuing healthcare for England and Wales'.*

87. The IPA continued, *'However, the [Trust's] guidance's 'underlying principle' set out within section 5… states… 'CHCN can only apply where the service users' needs would normally have been met in a hospital environment and they require 1:1 supervision /interventions from a specifically trained Health Care Professional'…* The IPA advised that this underlying principle *'is not in accordance with the 2010 Circular' and 'is somewhat contradictory' with the introduction to the Trust Guidance which states 'There are exceptional circumstances where continuing care may be provided free of charge in a non-hospital setting, including a hospice, registered nursing home or service users own home'.*

[22] These factors identified in Section five of the Trust's CHC Guidance are: Nature; Intensity; Complexity; and Unpredictability.

88. In relation to section seven of the Trust's CHC Guidance, the IPA referred to the example provided by the Trust setting out a *'description of patient's needs that would be illustrative of qualifying for CHC funding'*. The IPA advised *'this again [is] not in accordance with [the 2010 Circular]'*. The IPA provided a detailed rationale for her opinion in relation to the nature of the needs described in section seven of the Trust's CHC Guidance. In doing so, she advised *'the example given [is] of a patient with highly specialised care needs, of a level possibly not able to be provided for outside of an intensive care unit'.*

89. The IPA explained further, the 2010 Circular *'does not define for Trusts the level of need that constitutes a primary need for healthcare, stating within paragraph 17 'it is for clinicians, together with other health and social care professional colleagues and in consultation with the service user, his/ her family and carers, to determine through a comprehensive assessment of need whether an individual's primary need is for healthcare or for personal social services'… Therefore the statements within sections 5 and 7 [of the Trust's CHC Guidance]… may lead Trust staff to reasonably (but incorrectly) conclude that patients in the community, nursing homes, or those with lesser presenting care needs than those described with[sic] the [Trust's Guidance] are not eligible for CHC'.*

90. The IPA, in her advice, identified a number of learning and service improvements for the Trust. These included recommending that the Trust reviews its CHC Guidance *'especially in relation to sections 5 and 7 to ensure that it is fully reflective of the principles set out in the 2010 Circular'*. The IPA also recommended that the Trust considers offering a leaflet to service users and their relatives at initial assessments and reviews, to inform them of the Trust's CHC policy.

91. The IPA also referred to the Trust's response to this Office *'that they planned to include a question in the review template with regard to any changes in a patient's needs which would warrant an assessment as to whether CHC applied'*. She advised, *'If this has not been completed then the Trust should consider if an alternative method of recording when/if further assessments were warranted for the determination of CHC eligibility'*.

92. In addition, the IPA recommended that, *'Due to the complexity of identifying between health and personal care needs the Trust may wish to consider if staff completing reviews have a sufficient level of knowledge to be able to confidently inform patients and families of when CHC may apply and then, if warranted, apply the 2010 Circular guidance in the assessment of CHC and determination of a 'Primary Health Need'.*

93. The IPA concluded her advice by reiterating, *'There is a distinction set out by the Department in [the 2010 Circular] and associated guidance of having needs that require nursing care and needs that of a nature, complexity, intensity and unpredictability to indicate a primary need for health care'*. She concluded, *'The assessments and reviews completed by the Trust were sufficient for 'screening' the patient to establish if further assessments were warranted to determine his eligibility for Continuing Healthcare (CHC)…. The assessments and reviews of the patient's needs 2015 – 2018 did not illustrate a rapid deterioration in the patient's heath (outside of acute illness) or that nature of the patient's needs were indicative of a primary need for health care. His [the patient's] needs remained a combination of both personal social services and health care, with the main focus upon assisting him with daily living activities (personal social services)'.*

Trust's response to IPA Advice

94. The Trust was invited to comment on the initial advice obtained from the IPA. In response to the IPA's view that by declining the complainant's request for reassessment of the patient's needs, the Trust was not concordant with paragraph 27 of the 2010 Circular,[23] the Trust stated: [it] *'has already provided the [AAH] 'Immediate Discharge Summary dated 29 January 2016 which states, 'he has improved and is now fit for discharge'. This would indicate that [the patient's] needs could continue to be met in his Nursing Home placement...'*

95. In response to the IPA's advice regarding learning and improvement, the Trust stated *'Staff are aware that reassessments can be requested at any time and that*

[23] Paragraph 27 of the Circular 2010 *states 'reviews may be required in response to changing circumstances or at the request of the service user'*

they need to be completed in a timely manner. The Trust will do further awareness-raising regarding the process when a request is received for assessment of CHCN. The Trust will be clear that this request needs to be escalated to the Team Manager and that NISAT will be completed'.

96. In addition, The Trust stated '[*A]t present [CHC] in Northern Ireland is still at consultation and review stage. At present the Northern Health and Social Care Trust is working to the guidance on CHCN as is set out in the Circular HSC (ECCU 1-2010 Care Management, Provision of Services and Charging Guidance. When guidance from the Department of Health is received, this information will be added to the website'.*

97. The Trust also responded to the IPA's recommendation that the Trust may wish to consider a leaflet/handout to be offered by staff at initial assessments and reviews, to inform service users and relatives of the CHC Policy. In doing so, the Trust stated, it *'awaits the outcome of the consultation to enable the development of information for service users and their family'.*

98. The Trust acknowledged that *'At this time, the Northern Trust does not have a policy. The Trust is working to guidance that is based on the Circular… The…Trust awaits guidance from the Department of Health. In the interim, the Trust has included a question in the review template with regard to any changes which would indicate an assessment to determine if CHCN applies. Should this be the case, then a further assessment would take place to be considered by a panel as described in the Trust guidance 2010 section 4'.*

The Department's response to investigation enquiries

99. The public consultation on the review of CHC in Northern Ireland, which was launched by the Department on 19 June 2017, closed on 15 September 2017. During the course of the investigation of this complaint, enquiries were made of the Department to establish the current position on the review. In April 2019, the Department advised that a consultation response report had been drafted and would be published following consideration by a future Health Minister. In February 2020, following the end of the suspension of the Northern Ireland

Assembly, the Department advised that the consultation response report was yet to be submitted to the Health Minister and a decision taken on the way forward. In October 2020, the Department provided a further update on its review. It advised that there was no indicative timescale in relation to the publication of the consultation response report and the implementation of new CHC arrangements in Northern Ireland.

100. The Department also responded to this Office on 19 November 2019 and again as recently as October 2020, advising that HSC Trusts had been reminded that until such time as any revision to the current CHC arrangements had been agreed and implemented, the existing Departmental guidance, as set out in the 2010 Circular, continued to apply. It further advised[24] that *'it would be the Department's understanding/ expectation that each HSC Trust has in place policies/protocols/procedures and/or guidance to enable it to fulfil its responsibilities in relation to [CHC], in accordance with the [Department's] policy position set out in the 2010 Circular'.*

Trust's response to a draft copy of this report

101. A draft copy of this report was shared with the Trust for its comment. In response, the Trust said it *'accepts in principle the findings outlined in [the] draft report'*. In addition, the Trust said it accepted the recommendation that, on receipt of the final report, it provides an apology to the complainant in relation to the Trust's processing of his CHC requests and the timeliness of the NISAT which was subsequently undertaken. However, the Trust also said, it *'would strongly feel that, due to the regional significance of a new Policy/Guidelines, for a consistent approach, this would be best achieved with joint input from HSC Trusts regionally, but directed and led by the Department of Health'.*

The complainant's response to a draft copy of this report

102. In response to the draft report, the complainant said he agreed with the maladministration findings. However, he reiterated his view that the patient was *'fully eligible for CHC'*. In support of his view, the complainant said that the patient's placement at Larne Care Centre was due to his *'health-driven nursing*

[24] The Department's e-mail response to NIPSO dated 4 December 2019.

necessity'.[25] In relation to the differentiation made in the Trust's CHC Guidance between needs which are primarily health, as opposed to nursing needs or social needs, the complainant said that this was *'misleading as nursing needs… are indeed health needs and not something different'*. In relation to section seven of the Trust's CHC Guidance, the complainant reiterated that the patient's condition was similar to or met the threshold of needs outlined in the Trust's example to inform practice. The complainant said further, that *'this is clear evidence of maladministration as the Trust's Guidance was not followed and should have triggered [the multi-disciplinary team] panel assessment for CHC'.*

Analysis and Findings

103. The complainant submitted a complaint to this Office that the Trust failed to follow the Department's guidance in relation to his requests for CHC assessment for the patient. The complainant said that the Trust therefore failed to determine the patient's primary need as health and as a result, it denied the patient of his eligibility for CHC funding. I carefully considered this complaint and the Trust's responses to investigation enquiries as well as the advice obtained from the IPA. In doing so, I considered whether the Trust assessed the complainant's CHC requests in accordance with Departmental guidance, including whether it carried out the appropriate assessment to determine the patient's eligibility for CHC. I considered also whether the patient had a primary healthcare need in order to have been eligible for CHC funding.

The Trust's assessment of the complainant's applications for CHC

104. The complainant submitted his initial request for CHC assessment for the patient, on 12 January 2016. In doing so, the complainant said that when the patient became resident of Larne Care Centre he was financially assessed as self-funding and requiring nursing care. However, the complainant also said that the patient's health had *'rapidly deteriorated'* to a point where his needs had changed and had become mostly health related. The complainant requested

[25] In response to a draft copy of this report, the complainant referred extensively to case law in England and Wales which he considered supported his view that the patient was eligible for CHC. However, the case law to which the complainant referred, pertains to the arrangements for the determination of CHC in England. Those arrangements do not apply to CHC in Northern Ireland.

updated assessments to establish the patient's primary care need and for his eligibility for CHC to be assessed so that *'his care costs… [could be] fully met by the Trust, and back-dated for a substantial period of time…*'

105. I note the Trust's response to the complainant dated 10 February 2016, which advised that '*an assessment of [the patient's] needs was carried out prior to his placement [in Larne Care Centre]'* and *'this indicated [his] needs could appropriately be met in nursing home care without one to one interventions or supervision from a specifically trained health care professional'*. The Trust response also advised, *'[the patient's] needs continue to be met within nursing care and therefore do not meet the criteria for eligibility for Continuing Health Care Needs'.*

106. On review of the patient's records I note that the Trust completed a NISAT assessment of the patient's needs in 2010 and that, at the time the patient became a permanent resident of Larne Care Centre in February 2015, his primary need was personal social care. An NNAT was completed in April 2015 which determined that the patient should receive the £100 weekly payment for the cost of nursing care he received at Larne Care Centre. I note also that section four of the Trust CHC Guidance provides that *'assessing that a service user's need (s) is primarily a health need (s), sits within the normal assessment procedures established in the Trust to determine needs and how these will be best met. Each service user is entitled to an assessment of need when they are referred into the [the Trust] for services or assistance'*.

107. However, and notwithstanding the above assessments completed by the Trust, paragraph 26 of the 2010 Circular requires that *'A review of needs and services provided should take place at the times or intervals specified in the care plan or at any other time deemed necessary'*. In addition, paragraph 27 of the 2010 Circular states that, '*More frequent reviews may be required in response to changing circumstances or at the request of service users or other persons, including carers, or agencies involved in their care'.*

108. Moreover, I am satisfied that the 2010 Circular places a responsibility on Trusts *'to determine through a comprehensive assessment of need whether an individual's primary need is for healthcare or for personal social services'* where it is appropriate to do so, for example, where it appears that there may have been a change in an individual's circumstances or care needs. I note that the 2010 Circular establishes that the NISAT is the validated framework developed for the comprehensive assessment of older people's needs.

109. The complainant was convinced that the patient's care needs changed significantly in January 2016 to become primarily health care. He therefore requested an updated review of the patient's needs and for his eligibility for CHC to be assessed. On review of the records, I consider it clear that the context of the complainant's request of 12 January 2016, for CHC assessment for the patient, followed the patient's admission to hospital on the same date with urosepsis, aspiration pneumonia and acute kidney injury. I note also the patient's previous hospital admission on 8 November 2015 with a diagnosis of urosepsis. I therefore accept the advice of the IPA that the complainant's request of 12 January 2016 was '*clinically reasonable in light of [the patient's] recent hospital admissions'*.

110. In response to the complainant's request, the Trust did not complete an updated comprehensive assessment of the patient in accordance with the 2010 Circular in order to determine whether his primary need remained social care or whether, as the complainant contended, that primary need had changed to health care. Accordingly, I accept the IPA's advice that, *'The Trust… did not follow the guidance… as set out in Paragraph 27 of the 2010 Circular that states '…reviews may be required in response to changing circumstances or at the request of service users or other persons…'* I am satisfied therefore that the Trust, in its response to the complainant's application for CHC assessment, failed to apply all applicable provisions of the 2010 Circular.

111. In response to investigation enquiries made by this Office, and in relation to its response to the complainant of 10 February 2016, I note the Trust referred to the

patient's Discharge Summary note from AAH dated 29 January 2016. The Discharge Summary Note states, *'he has improved and is now fit for discharge'*. The Trust advised, *'This would indicate that the patient's needs could continue to be met in Nursing Home placement'*. I am concerned that the Trust's focus in this regard, appears to be on the 'setting' or 'placement' in which the patient's needs could be met. This approach is neither appropriate nor in accordance with the 2010 Circular.

112. Paragraph one of the Trust CHC Guidance states, *'there are exceptional circumstances where continuing health care may be provided free of charge in a non-hospital setting, including… a registered nursing home'.* This is consistent with paragraph 20 of the 2010 Circular which establishes that CHC is available irrespective of setting, where an individual's primary need is healthcare, and paragraph 63, which emphasises, '*There is no … requirement, or authority, to charge for healthcare provided in the community, either in the service user's own home or in a residential care or nursing home'.* I consider both the 2010 Circular and paragraph one of the Trust CHC Guidance indicate that individuals with a primary need for healthcare can be discharged to a nursing home. I am satisfied that the 2010 Circular makes no distinction between CHC applications from nursing home residents. I consider that this approach, to enable the provision of CHC in a nursing home setting, is in line with the proposed strategic direction for health and social care services in Northern Ireland which is set out in the regional review report 'Transforming Your Care'. The principles of this Review highlight the *'many benefits associated with delivering care within people's homes and in their local communities'* and emphasise that hospital care *'is only best for a patient with acute medical needs'*. Moreover, the Transforming Your Care Review is clear that care should be delivered in people's homes where possible, and *'[i]n some cases people's homes are nursing homes or residential facilities'.*

113. I do not therefore consider it reasonable or appropriate for the Trust to preclude the assessment of the patient's primary care need or CHC eligibility on the basis that the patient was discharged from hospital to the nursing home setting. I am satisfied that the Trust's approach in this regard, to use the

Summary Discharge Note as the basis for failing to assess the patient's primary need and CHC eligibility, was not appropriate or in accordance with the policy direction set out in the 2010 Circular.

114. The complainant wrote to the Trust again on 30 November 2017, seeking that the Trust complete updated assessments of the patient's primary care need and *'to make a formal complaint'* that the Trust had failed to undertake *'its duty of care for correctly assessing'* the patient for CHC. The complainant said '*In 2016 I wrote to…[the Trust] specifically describing the medical needs of my father, and how they meant his primary need for care was based on [sic] medical condition, not social need…*' The complainant said also that he considers the patient's needs are *'at least 70% health care needs and 30% social care need'*. He provided a list of the patient's needs which he considered illustrated that the patient's condition were more severe than those for whom CHC had been awarded in a landmark Court of Appeal case in England[26].

115. The Trust's response to this request dated 3 January 2018, advised that '*though [the patient's] condition will have deteriorated, his needs remain similar'*. As previously, the Trust in its response did not meet the complainant's request to carry out an updated comprehensive assessment to determine if the patient's primary care need had changed and to determine his CHC eligibility. I am satisfied therefore that the Trust failed again to act in accordance with the provisions of the 2010 Circular.

116. I note the IPA's view that the Trust's response that *'[the patient's] needs remain similar' was clinically reasonable as it is supported by the Trust's annual assessment of the patient in 2016, 2017 and 2018'*. Notwithstanding, I note the IPA advised, *'[h]owever, the Trust response to [the complainant] regarding his request for reassessment was not in line with [the 2010 Circular]'.* The IPA advised further, the Trust once again '*failed to adequately respond'* to the complainant's request which was *'clinically reasonable in light of [the patient's] recent hospital admissions*'. The Trust therefore *'did not follow guidance on*

[26] R Coughlan v North and East Devon Health Authority (2000).

reviews as set out in Paragraph 27 of the 2010 Circular'. I accept the IPA's advice in this regard.

Assessments carried out by the Trust

117. In relation to its response to the complainant of 3 January 2018, the Trust in its letter to this Office dated 13 April 2018, referred to various assessments and reviews[27] it had undertaken of the patient. These included a review on 8 November 2017 which the Trust stated, indicated the patient's needs could *'be met within the current nursing home placement'*. I am satisfied that this response from the Trust, that is reference to recently completed reviews of the patient's needs having indicated that his needs were being met in Larne Care Centre, is not an appropriate explanation as to why a CHC assessment of the patient in line with the 2010 Circular and the Trust guidance, was not to be undertaken.

118. I am concerned that in providing this explanation to this Office, the Trust referred to section five of the Trust CHC Guidance, that *'as identified [therein] CHCN can only apply where the service user's needs would normally have been met in a hospital environment and they require one to one interventions from a specifically trained health care professional'*. As stated above, I am satisfied that the 2010 Circular, specifically paragraphs 20 and 63, makes no distinction between the availability of CHC to nursing home residents and those who are in a hospital setting. Accordingly, I accept the advice of the IPA that section five of the Trust's CHC Guidance is not in accordance with the 2010 Circular. I discuss this further later in the report.

119. In relation to the Trust's reference to assessments it had already carried out of the patient, I note section four of the Trust CHC Guidance. This provides that assessment of a service user's primary need(s*) 'sits within the normal assessment procedures established in the Trust to determine needs and how these will be best met…'* I acknowledge that the Trust undertook regular assessments and reviews of the patient during his residency at Larne Care

[27] The assessments and reviews undertaken of the patient included a NISAT in 2010, the NNAT in April 2015 and a number of Permanent Placement Reviews.

Centre which the IPA advised were *'sufficient'* and *'proportionate'* to the patient's presenting circumstances at the time. In relation to the level of assessment carried out for the patient, I note the advice of the IPA that *'normally this would be a proportionate level… for a patient resident in a nursing home when those reviews confirmed the patient's needs were being adequately met without any need for additional services or change in accommodation'.*

120. However, I am satisfied that paragraph 27 of the 2010 Circular provides that while reviews should take place as minimum once per year, more frequent reviews may be completed at the request of service users, or other persons. This is consistent with the direction provided by the Department in its e-mail to the Trust dated 29 June 2007, *'everyone has the right to seek a review of an assessment at anytime [sic]'*. Furthermore, I am satisfied that none of assessments and reviews undertaken and referred to by the Trust in its response, were the correct comprehensive assessment tool (NISAT) for assessing CHC eligibility in accordance with the 2010 Circular.

121. As the IPA pointed out in her advice, the complainant made a *'clinically reasonable'* request for CHC assessment for the patient and thus the '*reasonable response'* by the Trust would have been to carry out a reassessment of the patient using NISAT in accordance with the 2010 Circular. I accept the IPA's advice in this regard.

122. I am satisfied the complainant, in his letter to the Trust of 30 November 2017, made an explicit and direct request for the patient's CHC eligibility to be determined. I note that the letter made clear the complainant's belief that the patient's health and had *'deteriorated'* 'and it set out clearly his view that the patient's primary care need had become healthcare. In addition, the complainant referred to his letter of 12 January 2016 which explained the context of the requested CHC assessment for the patient. He also outlined a list of the patient's needs which he considered illustrated a primary health care need. I am satisfied therefore that the Trust, in its response to this request, ought to have carried out a NISAT assessment of the patient in accordance with its responsibility under the

2010 Circular. I consider the Trust's failure to do so, was contrary to the policy direction set out in the 2010 Circular.

123. Overall, based on the available evidence, I accept the advice of the IPA that the complainant's requests for CHC assessment for the patient were *'clinically reasonable'* and that by failing in response to offer reassessment of the patient's primary need using NISAT, the Trust did not act in accordance with the 2010 Circular. In addition, I am satisfied that the assessments which the Trust sought to use to decide the patient's primary care need were not the correct comprehensive assessment tool (NISAT) for assessing CHC eligibility in accordance with the 2010 Circular. I therefore uphold this element of the complaint.

124. The available evidence indicates that the Trust carried out a reassessment of the patient's needs using the appropriate multidisciplinary assessment tool NISAT on 13 April 2018. I note this was over two years after the complainant initially requested an assessment of the patient's CHC eligibility. It was also over three months after the Trust had responded to the complainant's second application for CHC assessment for the patient, in which it stated '*we are unable to meet your request on this occasion'*. Having considered the timeliness of the Trust's updated comprehensive multidisciplinary assessment of the patient's needs, I have found failing on the part of the Trust.

125. I refer to the Principles of Good Administration. In particular, the first principle of Good Administration, *'Getting it right'*, requires the Trust to act in accordance with the law, policy and guidance. The second principle, '*being customer focused'* requires the Trust to *'ensure people can access services easily'.*

126. The failings identified above in relation to the Trust's handling of the complainant's CHC requests, indicate that the Trust did not meet the standards required by the Principles. The Trust did not respond appropriately to the complainant's requests for CHC assessment for the patient. Specifically, the Trust failed to carry out the proper multidisciplinary assessment to determine whether the patient's primary need had changed to become health or remained a

combination of personal social services and nursing care, in accordance with the 2010 Circular. When the Trust did undertake an assessment of the patient's primary need using NISAT, it had delayed doing so by over two years since the initial request was made by the complainant. Accordingly, the Trust failed to provide the complainant with the opportunity to have a timely and appropriate CHC assessment. I consider these failures constitute maladministration on the part of the Trust.

The patient's eligibility for CHC

127. In addition to considering how the Trust responded to the complainant's requests for CHC assessment, I considered whether the Trust carried out a proper multidisciplinary assessment of the patient. I considered also whether the patient's primary need was health care in order to be eligible for CHC funding.

128. As part of my consideration of whether the patient was eligible for CHC, I examined the documentation of the patient's NISAT assessment undertaken by the Trust on 13 April 2018. I note the Initial / Short Term Intervention and Specialist Assessment Summary components of the NISAT were completed, as well as the Need for Assistance /Intervention form. In commenting on the draft of this report, I note the complainant's concerns that parts of the patient's NISAT had not been completed. I am critical of the Trust's failure to fully complete the NISAT. However, notwithstanding, I accept the advice of the IPA that the NISAT was carried out *'appropriately'*, and that, although she identified some areas in the Core/Complex assessment which were not completed as per guidance, she was satisfied that this did not impact the outcome of the assessment. I note the IPA explained, this was because '*the information gained and documented through the assessment process was adequate to determine the nature of the patient's care needs and provided sufficient assurance that further assessment was not required'.*

129. I acknowledge that in commenting on the draft report, the complainant reiterated his firm view that the patient's primary need was healthcare. I note also the complainant's comments on the draft report, that the patient's needs met the

threshold outlined in the Trust's Guidance at section seven. However, I am satisfied that the IPA advised that the *'records and assessments do not evidence that the patient had needs of a nature of the example given in section [seven] of the Trust guidance'*. Furthermore, based on the IPA's analysis of the patient's NISAT documentation I accept her advice that '*the range of health and social care needs described within the [NISAT] assessments did not identify any factors to suggest those needs were the type to be indicative of a primary need for health care'*. Accordingly, I note the IPA advised that both the NISAT assessment information and the patient's assessments and reviews *'did not illustrate… that the nature of the patient's needs were… a primary need for health care'*. Rather, the IPA concluded the patient's '*needs remained a combination of both personal social services and health care, with the main focus upon assisting him with daily living (personal social services)'*. I accept the IPA's advice in this regard.

130. I considered also section four of the Trust's CHC guidance which outlines the process for determining CHC eligibility within the Trust. I note it provides that the NISAT assessment will standardise the initial screening for service users, and as part of this assessment *'staff will be asked to consider if the needs identified would warrant further consideration to determine if they are primarily health needs as opposed to nursing or social needs'*. Section four states that a positive response will lead to a comprehensive multidisciplinary assessment involving clinicians and other health and social care professionals. Where the panel decides that the service user may have CHC needs, the service user will then be referred to a panel to consider in more detail.

131. I note the Trust acknowledged that at the time of assessing the patient using NISAT in April 2018 there was no question in the review documentation with regard to any changes which would indicate an assessment to determine if CHCN applies, in order to then refer the service user to a panel for consideration. The Trust since informed this Office that it has now included such a question in the review template pursuant to this element of its Trust CHC Guidance. I do not consider the omission of this question impacted the outcome of the patient's CHC application. This is because I accept that the IPA was satisfied, based on her

detailed analysis of the patient's NISAT documentation, that his needs were not *'the type to be indicative of a primary need for health care'*. Accordingly, in relation to the Trust's process for determining CHC eligibility as outlined in section four of its CHC Guidance, I accept the advice of the IPA that she did not consider the patient's NISAT identified needs which warranted further consideration to determine if they were primarily health as opposed to nursing or social care needs. I note the complainant's comments on the draft report that he considers the patient ought to have been referred to a panel for further consideration. However, I accept also the IPA's considered view that '*therefore there was no need for the MDT to make a referral to consider [the patient] in more detail'.*

132. I note the complainant's view, outlined in response to the draft report, that '*health derived nursing needs… are health needs'* for the purposes of CHC. I note the complainant also said that '*the Trust's CHC Guidance is therefore misleading'* and that as such, the patient was *'fully eligible for CHC'.* However, I am satisfied that Circular 2010 makes clear that CHC eligibility is based on an individual's primary need being for healthcare, not nursing care. I consider it clear that the patient's records demonstrate that he had a range of nursing needs. This is confirmed by his receipt of the £100 flat weekly payment towards his nursing care at Larne Care Centre. I note that nursing care is described in the Department's 'Payments for Nursing Care[28]', as *'care by a registered nurse in providing, planning and supervising your care in a care home providing nursing care'.* However, I note the IPA advised that healthcare, as referenced in paragraph 63 of the 2010 Circular, *'relates to not only the care of a Registered Nurse but also the care provided by a range of other health care professionals and services required to meet the totality of an individual's healthcare needs, for example in the community, GPs, dieticians, audiologists etc'.* There is therefore a clear distinction between healthcare and nursing care.[29]

[28] https://www.nidirect.gov.uk/sites/default/files/publications/%5Bcurrent-domain%3Amachine-name%5D/hpss-payments-for-nursing-care-information-leaflet.pdf

[29] I note also the advice of the IPA that personal care is *'care you need to help you in the activities of daily living; for example help with toileting and other personal needs like bathing, dressing… moving around and help with feeding. It might also cover advice, encouragement and supervision in these activities. Care assistants rather than registered nurses will usually see to your personal care needs'*.

133. I am satisfied that CHC eligibility is predicated on an individual's primary need being for health care. I accept the IPA's view, based on her detailed analysis of the patient's NISAT assessment and his care records, that the patient's primary need was not health care at any time he was a self-funding resident of Larne Care Centre. As a result, I consider the Trust's conclusion that *'the outcome of this [NISAT] reassessment does not indicate that [the patient] requires Continuing Healthcare',* to be both reasonable and appropriate. I do not therefore uphold this element of the complaint.

Trust's CHC Guidance

134. The failings identified in this complaint demonstrate the need for the Trust to ensure that it has appropriate administrative arrangements in place to assess an individual's application for CHC in accordance with the direction set out in the 2010 Circular.

135. As stated in paragraph 119 I am concerned that the Trust's current approach as outlined in the underlying principle in section five of its CHC Guidance, is contrary to the Department's policy position set out in the 2010 Circular. The principle states, '*CHCN can only apply where the service users needs would normally have been met in a hospital environment...*' In my view I consider this approach curtails the determination of CHC eligibility for nursing home residents and ignores the possibility of individuals having a long term primary healthcare need which can be met in other settings. This is contrary to the strategic direction proposed in the regional consultation report 'Transforming Your Care Review'.

136. I am concerned also by section seven of the Trust's CHC Guidance *'An example to inform decisions'* which outlines a description of a patient's needs that would be indicative of a CHCN. I accept the advice of the IPA that this *'example given being of a patient with highly specialised care needs, [is] of a level possibly not able to be provided for outside of an intensive care unit...'* and therefore *'is not in accordance with [the 2010 Circular]'.* The IPA advised, that sections five and seven of the Trust CHC Guidance *'may lead Trust staff to reasonably (but incorrectly) conclude that patients in the community, nursing homes or those with*

lesser presenting care needs than those described within the Trust's guidance are not eligible for CHC'. I accept the IPA's advice in this regard.

137. I note that the IPA pointed out in her original advice report, that the approach adopted by the Trust as set out in the underlying principle in section five of its CHC Guidance, reflects one of the options outlined in the Department's Public Consultation document 2017. However, on further detailed review of the case, the IPA advised that this approach was not in accordance with the 2010 Circular. I accept the IPA's change in advice in this regard. I am satisfied that the Department's Public Consultation document 2017, has not yet been decided upon. Furthermore, I note the Department's position as confirmed to this Office on 19 November 2019 and again as recently as October 2020, that the 2010 Circular is still the '*extant departmental guidance'* and *'Trusts have been reminded that in the interim until such time as any revision to the current arrangements have been agreed and implemented, the extant Departmental guidance as set out in [the 2010 Circular] continues to apply.'*

138. I note that the 1972 Order does not provide an explicit statutory framework for the provision of CHC in Northern Ireland, nor does it expressly require that CHC be provided to people in Northern Ireland. I note also that paragraph 63 of the 2010 Circular, states *'[The 1972 Order] requires that a person is charged for personal social services provided in residential care or nursing home accommodation arranged by a HSC Trust.* ***There is no such requirement, or authority, to charge for healthcare provided in the community, either in the service user's own home or in a residential care or nursing home'*** (the 2010 Circular's emphasis). There is, therefore, a clear difference between healthcare needs and social care needs, in terms of the legal authority for a HSC Trust to charge for the care provided to an individual who has been placed in a residential care or nursing home.

139. It is therefore imperative that the Trust ensures it has a robust and fair procedure for determining whether individuals are eligible for CHC, to ensure applicants are not wrongly required to make significant financial contributions to their care. In commenting on the draft report, I note the Trust said that it 'strongly

feel[s]… the implementation of a new Policy/Guidelines… would be best achieved with joint input from HSC Trusts regionally, but directed and led by the Department of Health'. I acknowledge there is a lack of regional administrative guidance in relation to the determination of CHC eligibility. However, I do not consider the absence of such guidance and leadership from the Department, ought to prevent the Trust from fulfilling its responsibilities under the 2010 Circular. Thus, I consider the Trust ought to put in place, either individually or collectively with other HSC Trusts, the local administrative arrangements that are necessary to enable it to fulfil its responsibilities under the 2010 Circular and to ensure that all charges applied for residential and nursing home placements comply with the provisions of the 1972 Order.

140. I am satisfied that the Department confirmed to this Office that it is *'the Department's understanding and/or expectation that each HSC Trust has in place policies/protocols/procedures/ guidance to enable it to fulfil its responsibilities in relation to [CHC], in accordance with the policy position set out in the 2010 Circular'.* I acknowledge that, in establishing its Trust CHC Guidance, the Trust sought to develop and implement a local process for assessing CHC applications in relation to its nursing home residents. However, from the available evidence outlined above, I consider that the Trust has not implemented a local procedure for determining CHC applications which complies fully with the 2010 Circular.

141. The first and sixth principle of good administration, *'getting it right'* and *'seeking continuous improvement'*, require the Trust to '*act in accordance with the law and with the regard to the rights of those concerned'* and to review '*policies and procedures regularly to ensure they are effective'* while also ensuring it *'learns lessons from complaints and uses these to improve services and performance'*. In the absence of any further guidance from the Department, the Trust is obligated to develop local procedures that are compliant with the 2010 Circular. Accordingly, as discussed above, I consider that the Trust failed to implement a local procedure for the assessment of CHC applications which is fully in accordance with the 2010 Circular. I consider this failure constitutes maladministration.

Injustice

142. Consequently, I consider the failings I have identified in this report above to be maladministration on the part of the Trust. I consider that the complainant had a reasonable expectation that the Trust would respond to the requests for a CHC assessment, in accordance with the policy direction provided by the Department in the 2010 Circular. It is clear that that that expectation was not met, and that the complainant was denied the opportunity to have the patient's primary need determined in a timely manner. I consider this would have caused him the injustice of frustration, uncertainty and upset over a protracted period of time. This injustice resulted from the Trust's failure to respond appropriately to the complainant's requests for CHC assessment, and the delay in the Trust undertaking an updated NISAT assessment of the patient. I am pleased to note in its response to this Office dated 19 April 2019, the Trust now acknowledged that '*Staff are aware that reassessments can be requested at any time and that they need to be completed in a timely manner… and that NISAT will be completed'.*

CONCLUSION

143. The complainant submitted a complaint to this Office about the actions of the Trust in relation to its failure to process appropriately his requests for CHC assessment for the patient and to determine the patient's primary need as health care to enable his entitlement to CHC.

144. I investigated the complaint and found maladministration in relation to the following:

- Failure to respond appropriately to the complainant's requests for CHC assessment for the patient in accordance with the policy direction set out in the 2010 Circular;
- Failure to provide the complainant with the opportunity to have an appropriate CHC assessment for the patient undertaken in a timely manner;
- Failure to implement a local procedure for the assessment of CHC applications which is fully in accordance with the provisions set out in the 2010 Circular; and

- Failure to implement a CHC procedure that is consistent with the principles set out in the Transforming Your Care Review.

145. I am satisfied that the maladministration I identified caused the complainant to experience the injustice of frustration, uncertainty, upset and loss of opportunity to receive a CHC assessment for the patient in a timely manner.

146. I did not find maladministration in relation to the following:

- The Trust's CHC assessment of the patient carried out in April 2018, which concluded he was not eligible to receive CHC funding.

Recommendations

147. I recommend that the Trust provides the complainant with an apology for the failings identified in this report in relation to its processing of his CHC requests and the timeliness of the NISAT which was subsequently undertaken. This apology should be in accordance with the NIPSO guidance on apology and should be issued within **one month** of the date of my final report.

148. I further recommend that the Trust, either individually or collectively with other HSC Trusts and organisations, and in the absence of a decision on a regional approach by the Department, takes action to ensure that it has in place the administrative arrangements that are necessary to enable it to consider all future requests for a determination of CHC eligibility – irrespective of setting - in a timely, consistent and transparent manner and in accordance with the Department's policy direction, as set out in Circular 2010. In particular, the Trust should:

(i) Develop a local policy on the implementation of the provisions of the 2010 Circular;

(ii) Develop and implement local protocols and procedures in relation to the determination of an individual's primary need and consequently, their CHC eligibility;

(iii) Deliver training on the provisions of the 2010 Circular, and the Trust's related local CHC policy, protocols and procedures to be implemented, to staff involved in the assessment of individuals' health and social care needs; and

(iv) Publish details of the Trust's position on the determination of primary need and CHC eligibility.

149. The Trust should implement an action plan to incorporate these service improvement recommendations and provide this Office with an update within six months of this report, supported by evidence to confirm that appropriate action has been taken.

MARGARET KELLY **December 2020**

Ombudsman

APPENDIX ONE

PRINCIPLES OF GOOD ADMINISTRATION

Good administration by public service providers means:

1. Getting it right

- Acting in accordance with the law and with regard for the rights of those concerned.
- Acting in accordance with the public body's policy and guidance (published or internal).
- Taking proper account of established good practice.
- Providing effective services, using appropriately trained and competent staff.
- Taking reasonable decisions, based on all relevant considerations.

2. Being customer focused

- Ensuring people can access services easily.
- Informing customers what they can expect and what the public body expects of them.
- Keeping to its commitments, including any published service standards.
- Dealing with people helpfully, promptly and sensitively, bearing in mind their individual circumstances
- Responding to customers' needs flexibly, including, where appropriate, co-ordinating a response with other service providers.

3. Being open and accountable

- Being open and clear about policies and procedures and ensuring that information, and any advice provided, is clear, accurate and complete.
- Stating its criteria for decision making and giving reasons for decisions
- Handling information properly and appropriately.
- Keeping proper and appropriate records.
- Taking responsibility for its actions.

4. Acting fairly and proportionately

- Treating people impartially, with respect and courtesy.
- Treating people without unlawful discrimination or prejudice, and ensuring no conflict of interests.
- Dealing with people and issues objectively and consistently.
- Ensuring that decisions and actions are proportionate, appropriate and fair.

5. Putting things right

- Acknowledging mistakes and apologising where appropriate.
- Putting mistakes right quickly and effectively.
- Providing clear and timely information on how and when to appeal or complain.
- Operating an effective complaints procedure, which includes offering a fair and appropriate remedy when a complaint is upheld.

6. Seeking continuous improvement

- Reviewing policies and procedures regularly to ensure they are effective.
- Asking for feedback and using it to improve services and performance.
- Ensuring that the public body learns lessons from complaints and uses these to improve services and performance.