Investigation Report

Investigation of a complaint against the Belfast Health & Social Care Trust

NIPSO Reference: 18735

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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.

TABLE OF CONTENTS Page

EXECUTIVE SUMMARY

I received a complaint about the Belfast Health and Social Care Trust (the Trust). The complainant said the Trust failed to properly assess his application for Continuing Healthcare (CHC). The complainant believed that due to his multiple medical conditions, his care should be funded by the Trust as he has a primary health care need.

In order to assist with the consideration of the issue raised in the complaint, advice was obtained from an independent advisor who specialises in CHC. The investigation of the complaint identified failures in how the Trust implemented a CHC framework for assessing applicants. The Trust's determination that the complainant did not have a primary heathcare need because he was able to be cared for in a nursing home was not consistent with the relevant CHC standards. This deprived the complainant of the opportunity to have a timely and appropriate CHC assessment.

I recommended the Trust issue an apology in accordance with the 2016 NIPSO guidance on apology for the anxiety, distress, upset, and uncertainty she experienced as a result of the failings identified within the report. I also recommended that the Trust develop a policy on the implementation and to determine CHC eligibility for applicants, in whatever setting.

THE COMPLAINT

1. This complaint is about the actions of the Belfast Health and Social Care Trust (the Trust).The complainant said the Trust did not correctly process his request to have his primary need assessed to determine his eligibility for Continuing Health Care (CHC). The complainant believes that he should have been assessed as having a primary health care need, which would have made him eligible for CHC funding.

ISSUES OF COMPLAINT.

2. The issues of complaint which I accepted for investigation were:

Issue 1: Whether the complainant's request to be assessed in relation to Continuing Health Care was appropriately processed?

Issue 2: Whether it was appropriate and reasonable to determine that the complainant was not eligible for Continuing Health Care?

3. 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 raised by the complainant. This documentation included information relating to the Trust's processing of the complainant's request for a CHC assessment.

Independent Professional Advice Sought

4. After further consideration of the issues, I obtained independent professional advice from the following independent professional advisor (IPA) with 35 years' experience including 15 years' experience within NHS Continuing Health Care.

5. The information and advice which informed my findings and conclusions are included within the body of my 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

6. 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.

7. The general standards are the Ombudsman's Principles[1]:

- The Principles of Good Administration
- The Principles of Good Complaints Handling
- The Principles for Remedy

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

9. I have considered the following relevant policies:

- Department of Health, Social Services, and Public Safety, Circular ECCU 1/2006 - HPSS Payments for Nursing Care in Nursing Homes; dated 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; dated 11 March 2010) (the 2010 Circular)
- 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)

10. I have not included all of the information obtained in the course of the investigation in this report but I am satisfied that everything that I consider to be relevant and important has been taken into account in reaching my findings.

INVESTIGATION

Issue 1 Whether the complainant's request to be assessed in relation to Continuing Health Care was appropriately processed?

Issue 2 Whether it was appropriate and reasonable to determine that the

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

complainant was not eligible for Continuing Health Care?

Detail of Complaint

11. In considering the complaint, I have decided to report on both issues of complaint together. I consider it provides greater clarity on the role of the Trust in making CHC determinations. The complainant believes that he meets the criteria for CHC on the basis that he is completely dependent on nurses and carers. The complainant suffers from two chronic medical conditions and cannot move his body from the neck down. As a result of his medical conditions, he believes the Trust's *'decision to turn down [his] application [was] ill founded, in that the decision was not based on a proper clinical assessment, and that it inflicted a personal financial injustice'.* The complainant also complained about *'the unsatisfactory way in which his application was handled'* which he complained *'constitutes maladministration'.*

Evidence Considered.

(i) Relevant legislation, policy and guidance

The Health and Social Services (NI) Order 1972

12. The main legislation governing the provision of health and social care services in Northern Ireland is 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 be 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 and nursing home care placements) and the Health Services (Primary Care) (NI) Order 1997 are provided free of charge, except 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.

Circular HSC (ECCU) 1/2010 - Care Management, Provision of Services and Charging Guidance

13. The 2010 Circular, issued by the Department of Health[2] (the Department) provides guidance on:
    - the care management process, including the assessment and case management of health and social care needs;
    - the 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.

14. 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.'*

15. 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).

16. 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].'*

[2] Department of Health, Social Services and Public Safety at the time the 2010 Circular was issued

17. The 2010 Circular also refers to the means by which an individual's health and social care needs are to be assessed. Specifically (on page 4) the 2010 Circular advises that the Northern Ireland Single Assessment Tool (NISAT) '*has been developed and validated, primarily in relation to assessing the needs of older people'*, and that the NISAT *'supports the exercise of professional judgement in the care management process'*. The 2010 Circular further states, *'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.'* There is further reference to the NISAT in paragraph 15 of the 2010 Circular, which states, *'The NISAT, developed primarily in the context of older people's needs, provides a validated assessment framework.'*

18. The 2010 Circular also explains the position in Northern Ireland in relation to costs associated with the provision of 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.'*

Circular ECCU1/2006 - HPSS Payments for Nursing Care in Nursing Homes

19. The 2006 Circular 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 2 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 have been '*responsible for paying the nursing care of residents who otherwise pay the full cost of their nursing home care.'* Paragraph 10 of the 2006 Circular advises that HSC Trusts *'should encourage Nursing Homes to explain to [residents] that*

a nursing needs assessment is a requirement to determine eligibility for [HSC] payments.' 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…'*

Health Minister's Response to Northern Ireland Assembly Question on Continuing Healthcare in Northern Ireland

20. In September 2013, the then Minister of Health (the Health Minister) provided a written answer to a Northern Ireland Assembly question about CHC. The Minister's answer further explained the legislative position regarding CHC in Northern Ireland.[3] The Minister stated, '*[l]egislation governing the provision of health and social care in Northern Ireland differs significantly from that in England. This is a result of Northern Ireland benefitting from a fully integrated system of health and social care, with services delivered by [HSC Trusts]. Departmental Circular ECCU 1/2010 'Care Management, Provision of Services and Charging Guidance' provides HSC Trusts with direction on the assessment process to be undertaken to identify both health and social care needs. As set out in the circular an individual's primary need can be either for health care – which is provided free – or social care for which a means tested contribution may be required. My Department sought confirmation from all HSC Trusts in October 2012 that they were compliant with this circular. All HSC Trusts confirmed that this was the case.'*

Department of Health's Public Consultation on Continuing Healthcare in Northern Ireland

21. In June 2017, the Department launched a public consultation on the future of the continuing healthcare system in Northern Ireland. The consultation document, *'Continuing Healthcare in Northern Ireland: Introducing a Transparent and Fair System'*[4], explained that the term 'continuing healthcare'

[3] AQW25318/11-15
[4] https://www.health-ni.gov.uk/consultations/continuing-healthcare-northern-ireland-introducing-transparent-and-fair-system

describes the practice of the health service meeting the cost of any social need which is driven primarily by a health need. It was also explained that *'Eligibility for continuing healthcare depends on an individual's assessed needs, and not on a particular disease, diagnosis or condition'*, and that *'[i]f an individual's needs change, then their eligibility for [CHC] may also change.'* The Department's consultation document further 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 explained, however, that *'[s]o as not to interfere with professional and clinical judgement, the Department [had] to date, refrained from drafting administrative guidance on a specific healthcare assessment.'*

22. The Department's public consultation document on CHC further 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 [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 to levy a means-tested charge.'* It was also explained in the Department's consultation document 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.

NI Direct Website

23. The NI Direct website, the official government website for Northern Ireland citizens, refers, in proving advice on the *'HSC contribution towards the cost of nursing care provided in nursing homes'*, to CHC in Northern Ireland. In submitting his complaint to this Office, the complainant provided a print-out of the relevant NI Direct webpage, as at 4 March 2017. The webpage[5], which

[5] https://www.nidirect.gov.uk/articles/paying-your-residential-care-or-nursing-home-fees

remains unchanged at the date of this report, states, '*If you live in a nursing home and have assessed nursing needs, your local trust will pay £100 per week towards the fees to cover the cost of the nursing element. If your assessment indicates that your primary need is for health care, your Trust will pay the full cost of your care. This is called "continuing healthcare".'*

Transforming Your Care Review

24. 'Reason 2' of the Transforming Your Care Review suggested *'more health and social care services should be delivered in GP surgeries, local centres and in people's homes'.* Although *'[i]npatient 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 emphasized 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 issued by the Department of Health

25. On 24 September 2012, the Department of Health wrote to all Trusts requesting details of current practice on eligibility for CHC. The Trust responded that, *'In practice, clients who the Trust deems to require continuing health care are those whose needs could not safely be met within current nursing home environments. Clients placed in nursing homes primary the Trust recognises that need will have been assessed as personal care. The Trust recognises that approaches to determining the eligibility for [CHC] in England and Wales are very different and that there exists a range of specialist assessment tools in the area of continuing care eligibility. Locally our assessment tools (NISAT) would not support this determination nor are staff in a position to make this determination without definition or training.'*

26. In response to the Department of Health question whether, *'[a]t present, within [the Trust], are decisions on eligibility determined by a clinician, together with other health and social care professional colleagues – as set out in Circular*

ECCU 1/2010', the Trust answered *'yes'.*

27. In response to a question tabled in the Northern Ireland Assembly on 5 September 2013 regarding whether residents in nursing homes could avail of CHC in Northern Ireland, then Minister of Health issued the following written answer on 13 September 2013:

> '*Departmental Circular ECCU 1/2010 'Care Management, Provision of Services and Charging Guidance' provides HSC Trusts with direction on the assessment process to be undertaken to identify both health and social care needs. As set out in the circular an individual's primary need can be either for health care – which is provided free – or social care for which a means tested contribution may be required. [The DOH] sought confirmation from all HSC trusts in October 2012 that they were compliant with this circular. All HSC Trusts confirmed this was the case.'*

28. On 4 November 2014, the Department wrote to the Chief Executives of all Trusts regarding the application of continuing healthcare in Northern Ireland. The Department stated '*current departmental guidance on continuing healthcare is framed within the context of assessment of need, and is set out in paragraph 17 of [the 2010 Circular].'* The Department acknowledged the *'need to develop further extant guidance on continuing healthcare'.* The Department's letter explained '[*i]t is the responsibility of HSC Trusts to ensure that appropriate assessments of needs for individuals are carried out, including those with continuing healthcare needs… [a]s you will be aware within the integrated system in Northern Ireland, it is clinicians, together with other health and social care professionals, who are responsible for assessing the needs of the individual and for making decisions about appropriate long term care. This is done in consultation with the client, the client's family and their carers.'*

29. In June 2017, the Department issued a consultation document. Paragraph 10 states *'[a]t present, if the outcome of an assessment indicates a primary need for healthcare, then the HSC is responsible for funding the complete package of care in whatever setting.'*

30. Paragraph 11 states *'[i]f the assessment identifies that nursing home care is appropriate and the individual is responsible for meeting the full costs of their nursing home care, then the relevant HSC Trust is responsible for making a payment of £100 per week to cover the cost of private nursing care.*

31. Paragraph 18 states *'[t]he outcome of the review has provided the Department with sufficient evidence that further clarity and revision to the local continuing healthcare policy is now required…it is important that all decisions regarding an individual's care requirements are based on a clinical assessment of need.'*

32. Paragraph 20 states *'if the Department chose to continue with the status quo, this would mean that no changes are made to the current Departmental guidance. Multidisciplinary panels in HSC Trusts would remain primarily responsible for determining whether a client was eligible for continuing healthcare if the assessment indicated a primary need rather than a social care need.'*

33. The outcomes of the Departmental Review noted *'one of the key drivers for HSC Trusts receiving a request for a continuing healthcare assessment is once an individual needs to, or has, moved into a nursing home. In such circumstances the individual is required to contribute to the cost of their care according to their financial means, for as long as they are able to do so…All HSC Trusts confirmed that individuals are assessed using the Single Assessment Tool (NISAT), which is the standardised, multi-professional assessment tool providing a framework for holistic, person centered assessment. HSC Trusts also confirmed that a Nursing Needs Assessment (NNAT) is undertaken when required.'*

Trust's responses to investigation enquiries

34. The Trust stated *'[a] NISAT Complex assessment should usually take place when a person's needs change significantly or when there is a change of domicile as a result of changing needs. Regrettably, the Care Plan in place at the time of [the complainant's] admission to the Somme PNH (Private Nursing Home) on 1 April 2017 was not accompanied by an updated set of NISAT*

assessment documentation, rather his social care assessment was updated. This does not reflect the detail and professional involvement which had occurred.'

35. The Trust also stated 'the complainant *'had spent approximately seven weeks in this particular home in the year previously on four separate occasions. The Senior Nurse from the Somme PNH supported this permanent arrangement having assessed and understood his care needs and the care manager approved the arrangement. [The complainant] did not however receive a written nursing assessment as recommended under the [2010 Circular]'.* The Trust commented that during the meeting on 28 June 2017 with the Assistant Services Manager and the Care Manager, the complainant *'was advised that where an individual was deemed to have continuing health care needs, they would remain in hospital under the care of a consultant led multidisciplinary team and when ready for discharge, their needs would be deemed to be met in a nursing home or at home with domiciliary care supports.'*

36. The Trust acknowledged that *'the letter sent by [the complainant] requesting an assessment for continuing health care was not treated as such, but rather dealt with through a complaints procedure. The Trust does not have an application process to provide nursing assessments in order to determine whether an individual has health care needs which may support full payment of nursing home fees. It is in this context that a nursing assessment was requested by [the complainant] however the Trust acknowledges that a multidisciplinary assessment should have taken place prior to or shortly after his decision to permanently reside in the Somme Care Home irrespective of any continuing healthcare application. The Trust has since sought to rectify this position however [the complainant] has declined an assessment.' 'The Trust acknowledge that despite the fact that [the complainant] independently initiated the arrangements for his admission to the Somme Private Nursing Home, good practice requires an updated multi-disciplinary assessment to accompany and support the placement and we regret this did not take place.'*

37. The Trust stated *'[w]here the primary need for health care within BHSCT (the Trust), the individual will remain in a hospital, intermediate care setting. This is*

usually for a temporary period until their assessed needs change when the individual will return home with a domiciliary care package where there is no change or to a nursing residential home'. The Trust also stated *'the assessment of whether an individual's needs should be best met in a healthcare or social care setting is the outcome of multi-disciplinary assessment and reviews in hospital and community settings. The Trust has carried out a number of multidisciplinary assessments of [the complainant] needs.'* The Trust stated *'it is for the multidisciplinary team to determine whether a person's needs are primarily for health or social care'.*

38. The Trust believes it *'is fully compliant with the Departmental Guidance as set out in [the 2010 Circular]',* stating it *'does not place patients whose primary need is for healthcare in care homes. Where an individual's primary need is health care…individuals will receive care in a hospital or intermediate care setting.'*

39. The Trust stated it *'has carried out a number of multidisciplinary assessments of [the complainant's] needs. As highlighted, there are no indicators that the complainant's needs have not been managed safely and appropriately within the care home setting, nor is there any indication that he requires care in a hospital or intermediate care setting… In [the complainant's]case, all the assessments indicated that his needs were for personal social services.*

Trust's Complaints File.

40. The complainant wrote a letter to the Trust on 10 April 2017 requesting the Trust review its financial contribution towards his nursing care '*especially in the light of the published Continuing Health Care guidance*.' In the first paragraph, the complainant stated he '*would like the Trust to treat this letter as [his] formal application under continuing health care*'. The complainant included annexes to his letter. Annex A detailed his extensive medical history and conditions. Annex B set out a list of equipment that he had purchased as a result of his condition.

41. On 9 May 2017, the Trust wrote to the complainant acknowledging his April 10 letter as a complaint. On 30 June 2017, the complainant and his wife, met with

the Assistant Service Manager and the Care Manager. The Assistant Service Manager explained continuing healthcare '*was not available in Northern Ireland'.* She documented she had *'advised of consultation document and will email this [the complainant].'* On 9 August 2017, the complainant emailed the Trust requesting an NNAT. The response form the Assistant Service Manager indicated '*the Trust is currently maintaining the original position of care outside a hospital setting being financially assessed.'*

42. The Department's Head of Elderly and Community Care Unit emailed the complainant on 24 August 2017. This email advised that the 2010 Circular continued to be '*the Department's policy position on this matter at the present time… It is the responsibility of the HSC Trusts to ensure that an assessment of need is carried out for individuals in a timely manner and with appropriate multi-disciplinary professional and clinical input as required. The assessment will determine whether the individual's primary need is for health care, which is provided free of charge in whatever setting… As I am sure you will appreciate, the specific issues regarding your case are matters which [the Trust] must address. It is not appropriate for the Department to intervene or play any part in the handling of individual cases.'*

43. The complainant sent an email to the Trust on 12 September 2017 querying whether the 7 September 2017 assessment by the Nurse was consistent with the Departmental CHC guidance. He noted that it had already taken five months to process his application. In considering the complainant's request for '*a copy of the process used in reaching decisions on applications for continuing healthcare'* an internal Trust email noted this request was *'not applicable in Belfast Trust [because] patients with continuing health care needs remain in hospital until ready for discharge to a community setting.'*

44. The Permanent Secretary of the Department wrote to the complainant in response to a letter sent on 16 October 2017, stating '*that a final decision on the future of the Department's policy on continuing healthcare has not yet been made. The Department [was] analysing all consultation responses…In the meantime, the Department's charging policy for personal social services provided in residential care homes and nursing homes, continues to be based*

on the principle that help should be given to those who cannot help themselves. Current law requires those who can afford to contribute to the cost of their care, to do so, until such times are they are eligible for financial support.'

45. On 6 February 2018, the Trust wrote to the complainant denying his application for CHC funding. The Trust stated *'[i]t may be helpful to clarify that the [Trust's] approach to the issue of continuing healthcare which differs from [continuing healthcare] policies in England, Wales and Scotland… [a]s the [Trust] is an integrated health and social care system, when an individual needs are increasing or becoming more complex, it is the responsibility of the multi-disciplinary team to provide a comprehensive assessment of both health and social care needs. Where a consultant led multidisciplinary team determines that an individual's health needs require on-going and specialist clinical supervision, patients will remain in hospital sometimes for extended periods until their condition stabilises, or they can be transferred to community rehabilitation facilities which are not subject to charging. Where an individual's needs are deemed to require personal social care services an appropriate clinical pathway is recommended… [The Trust] does not place patients with continuing health care needs in nursing homes as these facilities would not be able to meet their clinical needs… [t]he Trust also does not provide continuing health care assessments for the purposes of abatement of nursing home fees.'*

46. On 14 February 2018, the complainant wrote to the Trust for two purposes. First, to request a review of the decision not to provide CHC. Second, to lodge a formal complaint in relation to *'[t]he Trust's handling of [his] application, which [he] contends amounts to Maladministration and… the actual decision as being ill founded and unjust.'* The complainant said the Trust took ten months to process his application for CHC, during which time he had no communication from the Trust. The complainant explained his complaint *'essentially boil[ed] down to the absence of a multidisciplinary clinicians assessment of [his] medical condition… and a failure to apply the required test, namely whether [his] primary need is health care.'*

47. The Trust responded on 13 March 2018, acknowledging that the complainant had '*rightly identified, this is an area that requires clarification and the Trust is*

struggling with this issue in the absence of an appropriate framework and operational guidance in relation to continuing health care.' In a further letter on 30 March 2018, the Trust noted '*the issue of continuing healthcare within Northern Ireland has been recognised by the Department of Health to require further policy clarification. I fully accept the frustrations that this has caused you and this is deeply regrettable… As previously explained, [the Trust] does not place people with continuing healthcare needs in general nursing homes, as these facilities would not be able to meet their clinical needs. The Trust does also not provide continuing healthcare assessments for the purpose of abatement of nursing home fees.'* In this letter, the Trust also offered to '*bring forward [the complainant's] annual review and…request updated multidisciplinary assessments.'*

48. The complainant responded on 2 April 2018, stating he had never received a multidisciplinary assessment since taking up residence in the Somme and stated '*it would seem to be a pointless exercise now given the Trust's decision and stated position on nursing home's in general'*. The complainant went on to note '*[i]f we leave to one side the absence of fairness in charging for care in a nursing home and the fact that domiciliary care delivered at a person's own home is free, it could be said that the key difference in interpretation is that the Trust has regard to the person's setting (a nursing home), whereas the scheme purports to be person centric regardless of setting.'* On 19 April, the complainant had a discussion with Assistant Service Manager. The notes from this conversation indicate the complainant felt a further Multidisciplinary assessment would be a *'waste of time' … 'given the Trust's current position regarding continuing care he did not wish for multidisciplinary assessments to be carried out which could include SALT, neurology, nursing, medical, etc.'*

Clinical records

49. I reviewed the complainant's past medical history. I note he previously had NISAT assessments on 9 June 2015 and 7 November 2015. The complainant had domiciliary care reviews on 31 May 2015 and 17 May 2016. On 23 May 2017, the Care Manager completed a *'Care Home Service User's Review'.*

50. The senior practitioner met with the complainant on 6 February 2017 and

entered a note in the records stating 'the complainant *'enquired about continuing care. [The senior practitioner] explained that [she] is unaware of this being approved in NI, but agreed to follow this up… Discussed continuing care with a colleague. She advised that [*the complainant*] would need to make a case for this and should write into the trust. She also advised that they contact the Law Society. Telephone call to [the complainant] to advise re continuing care.'*

51. A note entered on 8 May 2017 indicates that the Care Manager received a letter from the complainant requesting a review of financial contribution *'and asking that this letter is treated as a formal application under continuing health care'* The Care Manager discussed this with the Assistant Service Manager who *'advised that this should be treated as a complaint and therefore forwarded to complaints department.'* Eventually, in response to the complainant's request for a CHC assessment, a nursing assessment was carried out on 7 September 2017. The nurse documented a past medical history of multiple sclerosis[6], left ventricular failure[7], and diverticulitis[8]. She also documented a social history. In particular she recorded that the complainant lived at home with his wife prior to admission and had a care package which the Trust delivered.

52. In relation to the complainant's ability to maintain a safe environment, the nurse documented the complainant is '*virtually bed bound'*, except for being '*hoisted to commode for short period to facilitate toilet needs.'* The nurse recorded the complainant's Braden score as 12, and noted he was at risk of pressure ulcers. She noted that the complainant had no cognitive impairment. She noted he required assistance to eat all meals and that his appetite was poor. She noted that he had an indwelling urinary catheter which was prone to regular blockage. She noted that the urinary catheter had recently been removed due to low fluid intake and an increased risk of infection. She also noted that the complainant

[6] Multiple sclerosis (MS) is a condition that can affect the brain and spinal cord, causing a wide range of potential symptoms, including problems with vision, arm or leg movement, sensation or balance. It's a lifelong condition that can cause serious disability.
[7] left ventricular heart failure in which the left ventricle fails to contract forcefully enough to maintain a normal cardiac output and peripheral perfusion.
[8] Diverticular disease and diverticulitis are related digestive conditions that affect the large intestine (bowel). Diverticula are small bulges or pockets that can develop in the lining of the intestine as you get older

had three episodes of sepsis in the past which required hospital admission. The Nurse noted that the complainant says he no longer attends hospital appointments, even neurologists for Multiple Sclerosis reviews, *'as he sees no point in this at this time'.* She also noted that he *'does not want GP informed of issues as he does not want to be a bother to others.'*

53. On 4 October 2017, the Senior Practitioner discussed CHC with the complainant and provided a copy of the Nursing Needs Assessment report. The complainant advised him that he *'should be grateful if could advise [the evaluating Nurse] that the report needs to be corrected to make clear that, contrary to as recorded, I have absolutely no movement whatsoever in my arms, hands, or fingers.'* The Nurse who carried out the complainant's assessment emailed the Senior Practitioner in reference to the complainant's feedback about the assessment she had performed. Her email stated the complainant *'refers to the Nursing Needs Assessment. I need to ensure that there is no mix up at this point. A Nursing Needs Assessment Tool is a different assessment used to determine if someone is entitled to the free nursing care as part of their NH placement. There is a very specific documentation and training for its use. I am not trained in the assessment and do not undertake these. Furthermore, this was not what I was asked to complete at the time.'*

Relevant Independent Professional Advice (IPA)

54. As part of the investigation process, I obtained independent professional advice from a Specialist Practitioner with 15 years' experience within NHS Continuing Health Care (IPA). In relation to the complainant's condition, the IPA advised that the complainant *has been totally dependent on others for all aspects of daily living due to his condition for a number of years'.* In relation to the nursing assessment that was carried out following the complainant's CHC application, the IPA advised '*the Trust arranged for a nursing assessment and this was completed on 7/9/17 at the Somme Nursing Home but the assessment was neither 'multidisciplinary' nor was it completed using the Northern Ireland Single Assessment Tool (NISAT) or Nursing Needs Assessment Tool (NNAT).'* The IPA advised *'[t]he nursing assessment was shared with [the complainant] and*

although the accuracy was challenged by him in relation to his ability to move his thumbs, he did not identify any other inaccuracies.'

55. In relation to the type of assessment that should have been carried out on the complainant, the IPA advised the 2010 Circular '*sets out guidance for Trusts in the assessment of both health and social care needs using the NISAT. NISAT has 3 primary components: (i) the Contact Screening' (ii) the Core Assessment, with prompts to specialist assessment, where necessary; and (iii) the Complex Assessment, with prompts to specialist assessment, where necessary…The NISAT, developed primarily in the context of older people's needs, provides a validated assessment framework which may, depending on the presenting needs of the individual, involve different levels of assessment.'*

56. The IPA advised *'[t]he NNAT is usually completed shortly following admission to a nursing home and the assessment establishes nursing needs and eligibility for Health and Personal Social Services payments (HPSS). The Trust arranged for a nursing assessment to take place, but no arrangements were put in place to assess* the complainant *using the NNAT or the NISAT pursuant to the 2006 Circular and the 2010 Circular respectively, enabling both health and personal services needs to be fully assessed.'*

57. In relation to the process used by the Trust to determine the whether the complainant is eligible for CHC, the IPA advised *'the Trust have not supplied details of their process or protocol that describes the local process used by them when determining whether an applicant is suitable for HPSS or [CHC], but states it is fully compliant with the Circular.' 'The Trust's action / response following the request by [the complainant] for assessment was not in accordance with the Circular; the process that took place was inadequate in assessing [the complainant's]health and social care needs and consequently for his suitability for CHC or HPSS.'*

58. In relation to whether the complainant's primary need was for healthcare or personal social services, the IPA advised that *'it remains undetermined whether [the complainant's] primary need is for primary social services or healthcare as the process set out for assessment within the Circular 'has not been followed.'*

The IPA advised that *'[t]he Circular sets out how an individual's needs should be appraised (NISAT) but is not in other ways specific to the type of needs that would indicate 'whether an individual's primary need is for 'healthcare or for personal social services' or in what setting individuals assessed as having a 'primary need for healthcare' can be cared for.'*

59. The IPA reviewed the Consultation document issued in 2017. In particular, the IPA Considered paragraph 10 and paragraph 20. Having reviewed this material, the IPA advised that *'Paragraphs 10 and 20 are contrary to the process followed by the Trust In determining if [the complainant's] primary need is for healthcare or for personal social services. The Trust, in reaching its decision that [the complainant's] primary need is personal social services, have relied upon his needs being adequately met in a nursing home.'* The IPA advised that *'it remains undetermined whether* [the complainant] *is suitable or not for continuing healthcare as the Trust had insufficient multidisciplinary assessment information to reach a position as to if [the complainant's*] *primary need is for personal social services.'*

60. In relation to the purpose of a multi-disciplinary assessment in the context of continuing healthcare, the IPA advised *'multidisciplinary refers to a team of professionals from different disciplines (such as social work, nursing and occupational therapy etc.) working together to assess and/or address the holistic needs of an individual. The purpose of a multidisciplinary assessment is to ensure that professionals who are knowledgeable about the individual's health and social care needs collectively contribute and produce a comprehensive and holistic assessment, taking into account the views of the individual or their representative. In the context of Continuing Healthcare, following a comprehensive multidisciplinary assessment, the multidisciplinary Team (MDT) will go on to consider whether an individual's primary need is for healthcare or for personal social services.*

61. The IPA advised the Trust failed to carry out a multidisciplinary assessment as part of the complainant's CHC assessment. The IPA advised *'multidisciplinary assessments had been completed in the past whilst [the complainant] was at home, but none were completed following his admission to the Somme Nursing*

Home or as part of his request to be assessed for Continuing Healthcare.' The IPA explained that the complainant *'made a request for continuing healthcare to the Trust shortly following his admission to the Somme. His request did not trigger a multidisciplinary assessment process, but was treated as a complaint and so managed through the complaint process*.' In relation to the complainant's request for an NNAT in August 2017, the IPA Advised that '*the request for assessment was granted by the Trust however the assessment arranged was not a multidisciplinary assessment or the NNAT that [the complainant] expected.'*

62. The IPA advised *'a multidisciplinary assessment should have been conducted as part of [the complainant's] request for consideration for Continuing Healthcare shortly after his admission to The Somme and also due to the progressive nature of [the complainant's] health condition. A multidisciplinary assessment would have established whether [the complainant's] primary need is for healthcare or for personal services.'* The IPA considered the nursing assessment completed on 7 September 2017. The IPA advised that this assessment *confirmed* the complainant's *needs were being met, but [was] not completed as part of a multidisciplinary assessment process. As such, the assessments did not differentiate or provide any in depth analysis of [the complainant's] health and social care needs'.* The IPA advised the Trust should have '*arranged a multidisciplinary assessment (NISAT) as the Trust has stated such an assessment was required to confirm whether [the complainant's] needs at that time were primarily for health or social care.'*

63. The IPA advised that the nursing assessment was not satisfactory as it '*did not reflect a holistic multidisciplinary assessment of [the complainant's] health and social care needs'*. This assessment *'being completed by a single nurse practitioner, could not be considered as multidisciplinary'.* The IPA advised the Trust's stated position that *'patients with continuing health care needs remain in hospital until ready for discharge to a community setting'* is not consistent with the 2010 Circular. The IPA acknowledged that there is a lack of clear guidance on this issue, but advised that *'[t]he Trust has not produced local processes setting out [its] position in relation to the assessment and criteria for Continuing*

Healthcare.' The IPA advised *'[t]he guidance to Trusts contained within the 2010 Circular is not specific in establishing the type of needs eligible for Continuing Healthcare, the decision making process associated with this, and the location where care could be delivered, and therefore is open to local interpretation. '*

64. In relation to paragraph 88 of the Circular, the IPA advised *'it suggests that individuals with a primary need for healthcare can be discharged into the care homes… Therefore the Trust's position "that a local process is not applicable…" is not consistent with the guidance set out in the 2010 Circular and stated In the June 2017 Consultation document.'* The IPA also advised that the Trust does not have appropriate guidance for staff in the application of CHC in the context of the 2010 Circular. The IPA advised that *'the nursing assessment completed by [the Nurse] does not appear to be completed using any formal assessment tool and there are a number of key areas of care not covered by the formal assessment, such as:*

    *- The need for assistance to move [*the complainant's*] position to reduce the risk of pressure ulcers developing.*
    - Any need for specific positioning or manual handling, risk to [the complainant's]or staff due to involuntary spasms or contractures.
    - The need for the administration of medication, symptom control and monitoring including pain management, or the need for 'as required' medication, type of medication, etc.
    - The frequency that care interventions were required.
    - Sleep, night time care needs.

65. In relation to the September 2017 Consultation document, the IPA advised *'the Department identified that there is confusion about Continuing Healthcare and identified an apparent variance in the application of Departmental Guidance and in continuing healthcare practice across the HSC Trust.'* Therefore*, 'the nursing assessment that was done was not adequate for determining if [the complainant's] needs were primarily health or social care needs.'* The Consultation has closed, however as yet the results of the consultation have not been published. The IPA advised that the Trust has *'taken the position that*

Continuing Healthcare is only available to individuals in hospital. This position is not consistent with the current description of the application of Continuing healthcare and process set out within the Consultation document. Due to the Trust position that Continuing Healthcare is only available to individuals in hospital, the Trust have not developed local Continuing Healthcare process or infrastructure to make a determination on continuing healthcare allocations received from individuals requesting assessment whilst in the community.

66. The IPA advised *'[t]he Trust's lack of local policy and process has not provided adequate support to Trust staff to respond to [the complainant's] request for Continuing Healthcare assessment'.* The IPA also advised the *'Trust's position that [*the complainant's] *primary need is for personal social services is consistent with the Consultations preferred eligibility option in 2017.'* In relation to the Consultation document and the Trust's current position, the IPA advised *'the single eligibility question (option 3) is in alignment to the Trust's current position that patients with continuing healthcare needs remain in hospital until ready for discharge to a community setting'.*

67. The IPA recommended the Trust should consider developing *'a local policy and protocols in relation to the 2010 Circular so that clear guidance is available to staff and the public in the response to requests for Continuing Healthcare assessments'.* The IPA also recommended the Trust *'develop local processes regarding the use of [NISAT] in relation to establishing Continuing Healthcare as set out within the [2010 Circular].'*

68. The IPA advised the Trust should also ensure *'staff involved in the assessment of individuals with complex health and social care needs are adequately trained in the use of NISAT and NNAT, covering the process used in determining whether an individual's primary need is for healthcare or personal social services.'*

Trust's response to IPA Advice

69. The Trust stated it '*does not have established protocols or procedures for responding to requests for CHC Care, or a framework to support staff to undertake assessments for Continuing Health Care…[the Trust] continues to*

await the outcome from the Department of Health's consultation on Continuing Health Care and awaits the issuing of updated regional guidance in relation to the management of requests for CHC. The Trust also accepted '*the Nursing assessment which took place did not constitute a full Multi-Disciplinary assessment. The [Trust] later sought to rectify this in offering to complete a MDT assessment. [The Complainant] declined any further assessment in correspondence to the [Trust] and no further progress was made... [the nursing assessment] brought clarity to his nursing needs as presenting at that stage. [The complainant] agreed to this assessment and this identified that his health and social care needs were being met in this non-clinical setting. [The nurse] used the recognised Roper, Logan, Tierney*[9] *model as a basis for her assessment.* The Trust acknowledged '*that a request for CHC consideration should trigger a full set of multi-disciplinary assessments.' '[*The complainant*] has advised that in no circumstances did he wish to be transferred to hospital. This has limited the availability of updated information in relation to [the complainant's] medical condition.'*

70. The Trust emphasized '*the lack of regional guidance available in relation to CHC and appreciate that this case has again highlighted this is an ongoing concern.*' The Trust believes '*it cannot issue clear guidance to service users, ahead of further direction from the Department of Health.'* In reference to prior investigations, conducted in 2017, the Trust noted it had '*highlighted this matter in previous cases with [NIPSO] and it was accepted that the [Trust] cannot unilaterally implement a CHC framework.'* The Trust does not believe it is *'in a position to develop [the learning suggested by the IPA] at this time, as the [Trust] continues to await the outcome of the Department of Health's consultation and the development of regional guidance in relation to this matter.'*

71. The Trust '*accepts that consideration of medical and care record information should inform the assessment and review of individuals in nursing homes. The [Trust] recommends that this is done through the request of an updated*

[9] The Roper, Logan and Tierney model of nursing (originally published in 1980, and subsequently revised in 1985, 1990, 1998 and the latest edition in 2000) is a model of nursing care based on activities of living (ALs). The model is named after the authors

assessment to be completed by the relevant professional. The [Trust] does not believe that it is necessary to collect copies of all medical and care records as it would present significant information governance risks.

Prior NIPSO Investigations into Continuing Healthcare.

72. In its response to the IPA advice, the Trust referenced a previous complaint against the Trust related to the application and administration of Continuing Healthcare. This Complaint was resolved in August 2017. Following a meeting between NIPSO and the Trust, the Trust wrote to NIPSO confirming it had *'agreed to review the recommendations following the outcome of the DHSSPS consultation on [Continuing Healthcare]. The DHSSPS issued this consultation…on the 19 June 2017… This consultation closes on the 15 September 2017. Following this, and the subsequent direction by the DHSSPS, the Trust will implement the recommendations as directed by the Department of Health…[F]ollowing the outcome of the [Department's] consultation the Trust will ensure that clarity will be provided about what constitutes CHC to all relevant staff teams alongside appropriate training and procedures. The Trust will also ensure that [Continuing Healthcare] as directed by the [Department] will be communicated effectively with the public and other stakeholders. It is anticipated that this will be developed and finalized within 12 months'.*

Communications with the Department of Health

73. The Investigating Officer corresponded with The Department to confirm the Department's position in relation to the application and administration of CHC. The Department confirmed to the Investigating Officer on 19 November 2019 that it remains the responsibility of HSC Trusts to ensure 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 assessment will determine whether the individual's primary need is for health care, which is provided free of charge in whatever setting.

74. The Department stated it *'remains committed to seeking to achieve an outcome which will ensure that a transparent and fair system is in place for all individuals in Northern Ireland who may or may not have a continuing healthcare need. However, in light of the current political situation it is not possible to provide a*

definitive timeline for progressing this area of work. Consequently HSC 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.'

75. The Department also confirmed '*it would be 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 continuing healthcare, in accordance with the policy position set out in the 2010 Circular.'*

Responses to Draft Report

76. In response to the Draft Report, the complainant expressed a desire that a multidisciplinary assessment be conducted within a date certain, suggesting two months as an appropriate timeframe. The complainant understands the rationale behind the draft report's recommendation that the multidisciplinary assessment carried out '*after the administrative, local policy and training on new systems are in place'.* However, the complainant is concerned about the potential delay which could arise if the assessment were to wait until after the Trust has developed new policies.

77. In response to the Draft Report, the Trust thanked NIPSO for '*thoughtful consideration of this complex issue and the comprehensive piece of work undertaken by you and your IPA*.' The Trust *'[d]eeply regrets the distress and frustration caused to [the complainant] as a consequence of the lack of clarity that exists around the issue of [CHC].'*

78. In relation to the prior investigations carried out by NIPSO, the Trust said *'at that time of reporting [on those investigations], no one could have anticipated that we would have a position where the assembly would be suspended for a significant period and that this matter would be further delayed. [The Trust] understands that it is now [the view of NIPSO], that the absence of policy and procedures for staff and service users can no longer continue and that the Trust must now remedy this matter.'* The Trust accepted that *'the aforementioned Circular places a duty on the Trust in*

relation to CHC, however, it is [the Trust's view] that the Department of Health has not articulated in the Circular or supported by any other policy document how Trust are to equitably, consistently or proportionately discharge this duty.'

79. The Trust reiterated concerns around the possibility that '*local policies will add to the confusion for patients and staff'* and *'a lack of equity regarding how this issue is managed.'* The Trust said '*[r]egional variation would bring challenges, as the Trust provides many services to people with complex needs through regional hospital inpatient units. The arising issue would be as to who has responsibility for assessing the healthcare need and could staff ultimately in regional centres end up dealing with five different sets of policy and eligibility criteria.'*

80. The Trust also expressed concerns regarding how *'regional clinical staff could be trained in local Trust policies and how staff would be expected to communicate decisions compliant with individual Trust policies, in a way that is clear and transparent to the patient and their family.'*

81. The Trust said '*it is the consensus of professionals and decision makers on the front line, that regional guidance would be very much required and welcomed. Regional policy, procedures and tools would enable us to understand the thresholds for CHC, and the presenting level of needs that would indicate a primary healthcare need. This would enable is to implement local standards and to develop training and support for front line decision makers. All of these would support clear, consistent and transparent assessment and decision making for patients and their families in relation to CHC.'*

82. In relation to the recommendation that the Trust carry out a new multidisciplinary assessment on the complainant, The Trust said it remains *'keen to undertake these assessments. We acknowledge that care needs change and may have changed significantly for [the complainant] in the past 3 years. We will meet with him if possible to apologise for the protracted nature of the management of his request for CHC and continue to offer*

updated assessment.

83. The Trust also recognised that *'the use of the criteria that [a patient] is not eligible for CHC if [their] needs can adequately be met in a Nursing home' is not 'a person centred approach'. The Trust stated it is 'now reviewing how we handle this matter.'*

The Trust also committed to *'engaging with other Trusts to understand how they are managing their requests. We also commit to re-escalating this issue with the Department of Health and to continue to escalate the matter through our Delegated Statutory Function reporting to the Health and Social Care Board.'*

Analysis and Findings

84. I carefully considered this complaint. There are several issues that I consider fall to be addressed. First, the extent of the Trust's obligation to develop and implement local guidance for the assessment of CHC requests pursuant to the 2010 Circular; second, whether the Trust assessed the complainant's CHC claim in a manner that is consistent with its obligations; and third, whether the complainant has a primary healthcare, or personal social services need. I have considered these issues in turn below.

The Trust's obligations under the 2010 Circular.

85. I considered the Trust's position regarding the need for regional guidance in administering CHC. During the investigation, the Trust has repeatedly stated it is awaiting the results of the 2017 consultation. Its position is perhaps best summarised by the following extract from its 28 August 2019: correspondence:

'[The Trust] acknowledge[s] the lack of regional guidance available in relation to CHC and appreciate that this case has again highlighted this is an ongoing concern. The [Trust] regret[s] that it cannot issue clear guidance to service users, ahead of further direction from the Department of Health. The [Trust has] highlighted this mater in previous cases with your office and it was accepted that the [Trust] cannot unilaterally implement a CHC framework.'

86. When NIPSO concluded its investigation into a similar complaint in June 2017 (one of the *'previous cases'* the Trust referenced), it was anticipated that the Department would issue updated regional CHC guidance within a matter of months. This anticipated regional guidance was to provide a clear framework for all Trusts to implement local CHC procedures. The Trust anticipated that as a result of the 2017 Consultation, it would have implemented updated procedures '*within 12 months'.* The Trust's position was acceptable to NIPSO at that time due to the anticipated implementation of new guidance flowing from the completed 2017 Consultation. Regrettably, well over three years later, the Department has still not issued any recommendations from the 2017 Consultation. I am conscious that although the Department has confirmed the outcome form the 2017 Consultation will be submitted to the Health Minister for a decision on how to proceed, there is no current time frame for any decision. As there is no timeframe for any updated regional guidance, I do not consider it appropriate to continue to await the outcome of the 2017 consultation. I note the Trust's response to the Draft Report, stating '*no one could have anticipated that we would have a position where the assembly would be suspended for a significant period and that this matter would be further delayed.'* I agree, which is why the rationale applied in 2017 and the resulting determination is no longer a workable way forward for patients.

87. In the absence of updated guidance, I note the Department has repeatedly affirmed that the Trusts remain responsible for ensuring they have local processes that are consistent with the 2010 Circular until the Department of Health issues updated guidance. Accordingly, absent an anticipated timeframe for the implementation of a regional framework, which the Trust correctly states is '*an ongoing concern'*, the Trust must ensure it is compliant with the 2010 Circular. In response to the Draft Report, the Trust said it '*understands that it is now [the view of NIPSO], that the absence of policy and procedures for staff and service users can no longer continue and that the Trust must now remedy this matter.'* However, it is not only the view of NIPSO that the Trust must ensure the implementation of the 2010 circular, as this viewis consistent with the Department of Health's position 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.' In response to the Draft Report, I note the Trust accepted that *'the aforementioned Circular places a duty on the Trust in relation to CHC, however, it is [the Trust's view] that the Department of Health has not articulated in the Circular or supported by any other policy document how Trust are to equitably, consistently or proportionately discharge this duty.* It is undisputed that the 2010 Circular requires a multidisciplinary assessment as part of a CHC application and the Trust has acknowledged this. It is also undisputed that the Trust does not currently have any procedure in place for assessing CHC applications from nursing home residents. While I agree with the Trust that *'the Department of Health has not articulated in the Circular or supported by any other policy document how Trust are to equitably, consistently or proportionately discharge this duty'*, absent such guidance, it is the responsibility of the Trust's to ensure their current processes are consistent with the 2010 Circular. The Trust's current position is '*patients with continuing health care needs remain in hospital until ready for discharge to a community setting'*

88. Therefore, the Trust '*does not place patients with continuing health care needs in nursing homes as these facilities would not be able to meet their clinical needs…[and] also does not provide continuing health care assessments for the purposes of abatement of nursing home fees.'*

89. Paragraph 20 of the 2010 Circular establishes that CHC is available in whatever setting and Paragraph 88 explicitly references the availability of CHC to nursing residents, noting *'[w]hen 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.'* I accept the IPA's advice that this paragraph *'suggests that individuals with a primary need for healthcare can be discharged into the care home.'* I also note the Trust recognised in its response to the Draft Report that *'the use of the criteria that [a patient] is not eligible for CHC if [their] needs can adequately be met in a Nursing*

home' is not *'a person centred approach'.* I welcome the Trust's statement that it is *'now reviewing how we handle this matter.'*

90. I have also considered the Trust's position that patients with a primary healthcare need '*remain in hospital under the care of a consultant led multidisciplinary team and when ready for discharge'.* This ignores the possibility of individuals having a long term primary healthcare need which can be cared for in other settings, such as in the community. It is also inconsistent with the principles of the Transforming Your Care Review, which emphasized the '*many benefits associated with delivering care within people's homes and in their local communities'* and stressed how hospital care '*is only best for a patient with acute medical needs*'. 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'*. I do not agree that Continuing Healthcare needs can be equated with the acute medical care provided in a hospital setting.

91. 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. That said, I also note 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.

92. I do not accept the Trust's position that CHC is not available to nursing home residents. The 2010 Circular makes no distinction regarding applications from nursing home residents. The Trust has pointed out that domiciliary care and hospital care are provided free of charge. While this is

true, this only serves to reinforce the need for a proper local procedure for assessing requests for CHC funding. Without a process for determining whether they are eligible for CHC, applicants may be wrongly required to make significant financial contributions to their care.

93. Accordingly, I accept the IPA's advice that the Trust's position *'is not consistent with the current description of the application of Continuing Healthcare and process set out within the Consultation document.'* The Trust's current position that people are retained in hospital or intermediate care is unsustainable and against the principles of Transforming Your Care. The Trust's ability to charge for care must be based on a determination that personal social services are being provided. There is an affirmative obligation on the Trust to make this determination when an applicant requests a CHC assessment, before charging the applicant for care. From the available evidence, I consider that the Trust has not implemented a proper local procedure for determining continuing healthcare applications. Such assessments should be multidisciplinary and should determine the applicant's primary need – either healthcare, or personal social services. Paragraphs 20 and 88 create an expectation that continuing healthcare applies to nursing home residents, who should receive a multi-disciplinary assessment upon request in order to determine whether their primary need is for healthcare, or personal social services.

94. 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 of Health, the Trust is obligated to develop local procedures that are compliant with the 2010 Circular. Accordingly, I consider that the Trust has failed to implement a local procedure for the assessment of continuing healthcare applications in accordance with the 2010 Circular. I find that this failure constitutes maladministration.

The Trust's Assessment of the complainant's Application for Continuing Healthcare

95. I considered how the Trust processed the complainant's application for CHC and specifically whether the Trust carried out a proper multidisciplinary assessment in a timely fashion, in accordance with the Department's position. I also considered whether the Trust's decision to deny the complainant's application was based on appropriate criteria.

96. I note the Trust acknowledged that the complainant's initial request for CHC was dealt with *'inappropriately…as it was managed as a complaint rather than a request for assessment.'*

97. Eventually, after acknowledging the complainant's request as a CHC assessment, the complainant was incorrectly informed on 30 June 2017 that CHC '*was not available in Northern Ireland'* by the Assistant Services' Manager and again by the senior practitioner's note on 6 September 2017 stating she was *'unaware of [CHC] being approved in NI'.* The confusion over the complainant's request for a CHC assessment was symptomatic of the systemic lack of understanding across the Trust about the nature and function of CHC. On at least three separate occasions, Trust staff were unable to appropriately respond to the complainant's requests for CHC information. This clearly indicates a lack of clarity concerning the Trust's position (which I do not accept) on the issue of CHC.

98. Thereafter, the complainant requested a NNAT Assessment in the hope that such an assessment would prompt the Trust to determine he was eligible for CHC. A nursing assessment was carried out, but the IPA pointed out that this was not an NNAT assessment, to which the Trust agreed.

99. I have considered the assessment that was carried out by the Trust on 7 September 2017 in response to the complainant's request and the letter from the Trust to the complainant rejecting his application. I note that both the Trust and the IPA agree that this assessment was not a multidisciplinary assessment. I therefore accept the advice of the IPA that *' the Trust should have arranged a multidisciplinary assessment (NISAT) as the Trust has stated such an assessment was required to confirm whether the complainant' needs at that time were primarily for health or social care'.*

100. Having considered the IPA's analysis of the nursing assessment, I

accept the IPA's advice that although the assessment '*confirmed the complainant's needs were being met, [it was] not completed as part of a multidisciplinary assessment process. As such, the assessments did not differentiate or provide any in depth analysis of [the complainant's] health and social care needs'.*

101. I note that the Trust did not provide the complainant with a decision on his application for Continuing Health Care until February 2018, ten months after his request was submitted. As noted by the IPA, this delay was largely due to '[t]*he Trust's lack of local policy and process [which does not] provided adequate support to Trust staff to respond to [the complainant] request for Continuing Healthcare assessment'.*

102. I have considered the Trust's letter to the complainant setting out its reasons for denying his CHC funding request. Absent from this letter is any substantive analysis of the complainant's medical condition or needs. Instead of providing an assessment and determination of the complainant's primary need, the Trust based its denial of the complainant's application on the grounds that his need were being met in the nursing home. As noted above, this is not the correct test for a CHC application.

103. The first and second principle of good administration, getting it right and being customer focused, requires the Trust to **'***provide an effective service*' and '*ensure people can access services easily'*. The Trust did not carry out a multidisciplinary assessment on the complainant to determine whether his primary need was for health, or personal social services, contrary to the 2010 Circular. The Trust then delayed its decision on the complainant's application and even when the Trust did issue a decision, it failed to apply the correct 'primary need' standard in determining the complainant's applicability for CHC. Accordingly the Trust failed to provide the complainant with the opportunity to have a timely and appropriate CHC assessment. This failure constitutes maladministration.

The complainant's Primary need.

104. The maladministration identified above was such that I considered the question of the complainant's entitlement to continuing healthcare funding.

105. Without the benefit of a NISAT multidisciplinary assessment, it is difficult to determine whether the complainant's primary need was healthcare or personal social services when he submitted his application. I have considered the IPA's advice in this regard, who advised the Trust's assessment '*confirmed [the complainant's] needs were being met, [but was] not completed as part of a multidisciplinary assessment process. As such, the assessments did not differentiate or provide any in depth analysis of [the complainant's] health and social care needs'.*

106. As the complainant's has not had a proper CHC multidisciplinary assessment since he moved to the Somme, there is limited information about his condition for the IPA to come to a determination on whether his primary need is healthcare, or personal social services. Accordingly I accept the IPA's advice that '*it remains undetermined whether [the complainant's] primary need is for primary social services or healthcare as the process set out for assessment within the Circular 'has not been followed.'*

107. As such, I am concerned that the Trust continues to charge the complainant's without having made a determination on the complainant's primary need - either for health, or personal social services – the Trust has no basis for determining the complainant's primary need is personal social services. The Trust has accepted that the necessary multidisciplinary assessments are a pre-requisite for determining primary need. Without these assessments, I can see no basis for the Trust to charge the complainant for care.

108. Unfortunately, without the benefit of a multidisciplinary assessment, I am unable to conclude whether the complainant's primary need is for healthcare. I am therefore unable to conclude whether the complainant is entitled to CHC funding. However, I am satisfied this maladministration identified above caused the complainant the injustice of frustration, uncertainty, upset and the loss of opportunity to receive a CHC assessment.

109. The complainant's complaint demonstrates that the current position of awaiting the outcome of the 2017 Circular is unworkable and the Trust must ensure that appropriate procedures are put in place until the Department

issues further guidance. In light of the findings discussed above, I am satisfied that the Trust has not implemented the 2010 Circular '*Care Management, Provision of Services and Charging Guidance*' appropriately.

110. The central issue is the Trust's failure to have a local policy in place to assess an applicant's primary need. I have carefully considered how to suggest an appropriate remedy for the complainant. The Trust noted that despite rejecting the complainant's application, it has since offered to complete a multidisciplinary assessment for the complainant. The complainant declined as he saw little value in such an assessment when the Trust's clearly stated position is to deny CHC applications from nursing home residents. A multidisciplinary assessment would be futile without some indication the Trust would use this assessment to determine the complainant's primary need. I note the Trust *'[d]eeply regrets the distress and frustration caused to [the complainant] as a consequence of the lack of clarity that exists around the issue of [CHC].'*

111. I note that in response to the Draft Report, the complainant expressed a desire that a multidisciplinary assessment be conducted within a specified date, suggesting two months as an appropriate timeframe. As The Trust is *'keen to undertake [multidisciplinary] assessments…[and] acknowledge that care needs change and may have changed significantly for [the complainant] in the past 3 years',* I agree this evaluation should take place within two months.

112. Good administration requires local procedures are put in place for the Trust to assess applications in a systemic and consistent manner, and for applicants to be made aware of the decision making criteria. I carefully considered the advice of the IPA that the Trust should develop *'a local policy and protocols in relation to the 2010 Circular so that clear guidance is available to staff and the public in the response to requests for Continuing Healthcare assessments… [and the] use of [NISAT] in relation to establishing Continuing Healthcare as set out within the [2010 Circular].'* I also carefully considered the IPA's advice that the Trust should ensure *'clear guidance is available to staff and the public in the response to requests for Continuing Healthcare assessments'.*

113. I note the concerns raised by the Trust in response to the Draft Report. These concerns are primarily based on the potential impact that could be caused by individual Trusts implementing individual policies. I agree that five individual policies developed by the Trusts could potentially cause confusion. However, having recently concluded three investigations into how CHC has been implemented in three separate Trusts, it is clear that confusion already exists between and within the Trusts about how CHC should be implemented. For this reason, I believe the best course of action at present is for the Trust, in consultation with the other Trusts and health and social care organisations across Northern Ireland should agree a uniform approach in the absence of a decision by the Minister of Health.

114. In the event that the Trusts are unable to develop a consistent approach to assessing CHC applications, the Trust should develop its own policy. I consider the potential difficulties which might be caused by individual Trust policies are outweighed by the significant injustice being experienced by CHC applicants, who are not receiving a meaningful assessment consistent with the 2010 Circular.

CONCLUSION

115. The complainant submitted a complaint concerning how the Trust processed his application for CHC.

116. I investigated the complaint and found maladministration in relation to the following;

(i) Failing to implement a local procedure for the assessment of CHC applications in accordance with the 2010 Circular;

(ii) Failing to provide the complainant with the opportunity to have a timely and appropriate CHC assessment

(iii) Failing to have a CHC policy that is consistent with the principles set out in the Transforming Your Care Review.

117. I am satisfied that the maladministration and failure in care and treatment I identified caused the complainant to experience the injustice of

frustration, uncertainty, upset and the loss of opportunity to receive a CHC assessment.

Recommendations

1. I recommend that the Trust, either individually or collectively with other HSC Trusts and organisations, take 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 – in whatever setting – in a timely, consistent and transparent manner, and in accordance with the Department's policy direction, as set out in the 2010 Circular. 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 related local CHC policy, protocols and procedures to be implemented, to staff involved in the assessment of individuals' complex health and social care needs; and
   (iv) publish details of the Trust's position on the determination of primary need and CHC eligibility.

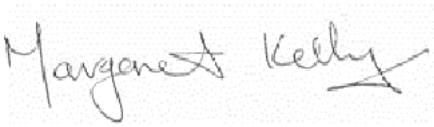
118. The Trust should implement an action plan to incorporate these service improvement recommendations and provide this Office with an update within six months of the date of this report, supported by evidence to confirm that appropriate action has been taken.

119. I also recommend that, the Trust offer a new CHC assessment to the complainant to determine his primary need. The assessment should include the necessary multidisciplinary assessments and should take place within the next two months

120. I also recommend that the Trust provides the complainant with an apology in accordance with the NIPSO guidance on apology. This is for the

failings identified in this report, and should be issued within **one month** of the date of my final report.

121. I recommend that the Trust puts the necessary administrative arrangements in place to enable it to consider all future requests for assessment for funded Continuing Health Care in line with the 2010 Circular.



MARGARET KELLY
Ombudsman **November 2020**

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.