



Choice in mental health care

Guidance on implementing patients' legal rights to choose the provider and team for their mental health care

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www.england.nhs.uk/mental-health/about/choice/

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Foreword

We are radically transforming mental health care in England.

The government has published its plans to provide better access to mental health services¹ over the next five years and the NHS Five Year Forward View² emphasises the need for the NHS to drive towards an equal response to mental and physical health, and towards the two being treated together. The Five Year Forward View commits to increasing the direct control patients have over the care that is provided to them and making good on the NHS' promise to give patients choice over where and how they receive care.

In physical health, we know that only half of patients say they were offered a choice of hospitals for their care, and only half of patients say they are as involved as they wish to be in decisions about their care and treatment. In introducing choice in mental health, we have the opportunity to accelerate the drive for greater patient involvement in their care.

The changes in law that have given patients with mental health conditions the same legal rights as they have had in physical health

services are significant steps towards parity. They are part of the more significant shift to increase the direct control patients have over their care and every one of us working in mental health has a part to play to help implement these rights and make them work well for patients.

Transparency is at the heart of making choice work well for patients. This includes transparency about the services available, the outcomes they offer patients, the experience that patients have when using them and the ways in which care can be delivered: at home, in communities through technology, as well as in traditional care settings. By gathering and sharing information about services we help patients make well-informed, meaningful choices, we empower healthcare professionals to compare themselves with others as a spur to improved performance, and we help CCGs and NHS England commission the right services, of the right quality, to meet patients' needs and preferences.

This guidance has been developed with colleagues from across the mental health sector. It seeks to promote a common

understanding of what mental health patients' legal rights are, where they apply, and what they mean in everyday practice. It should enable consistency in the application of these rights, while also acknowledging the need for clinical judgments and decisions according to the circumstances of individual patients.

Embedding the legal rights to choice in mental health will take time and effort to achieve, and this guidance is part of a wider programme of work to support the implementation of choice.

I look forward to continuing to work with you.



Professor Sir Bruce Keogh
National Medical Director NHS England

The Choice Offer

Patients' legal rights to choice

Patients' legal rights to choice in mental health were introduced in 2014 as part of the drive to achieve parity with physical health and increase patients' direct control over their care. We know from physical health that these legal rights require interpretation to ensure that they are well understood and work well for patients. This guidance seeks to provide a clear interpretation of the legal rights that is meaningful to the mental health sector, and to support their consistent application.

The legal rights to choice covered in this guidance are:

- patient choice of mental healthcare provider
- patient choice of mental healthcare team

The regulations introducing these legal rights state that: *Patients must be offered, in respect of a first outpatient appointment with a team led by a named consultant or a named healthcare professional, a choice of any clinically appropriate health service provider with whom any relevant body has a commissioning contract for the service required as a result of the referral, and a choice of a team led by a named consultant or a named healthcare professional. This is subject to exclusions set out in legislation³.*

This guidance seeks to interpret these regulations and set out the principles for how these legal rights to choice should operate. It is important to note that the right to choice does not mean that a patient only has their first outpatient appointment



with their chosen provider: consistent with physical health care, once a patient has chosen a provider, that provider will normally treat the patient for their entire episode of care, unless the patient's diagnosis changes significantly.

What do these rights mean?

The legal rights to choice of mental health provider and team apply when:

- the patient has an elective referral for a first outpatient appointment
- the patient is referred by a GP
- the referral is clinically appropriate
- the service and team are led by a consultant or a mental healthcare professional
- the provider has a commissioning contract with any Clinical Commissioning Group (CCG) or NHS England for the required service

No prior commissioner approval is required for consultant-led elective care or in the case of mental health, services led by a healthcare professional, where the patient has exercised choice of provider under the legal rights set out in the NHS Constitution.

Commissioners may put in place arrangements such as single points of access (SPA). However, an SPA should not have the effect of restricting patient choice and where patients have a legal right to choose their provider, this should always be enabled.

Key terms explained:

- **Elective referral**
 - A referral by a GP where a patient wishes to be referred for treatment that is not urgent or emergency (crisis) care.
- **Outpatient appointment**
 - An outpatient appointment is any arrangement for a patient to receive elective care from a healthcare professional, where the patient is not admitted as an inpatient.
- **First outpatient appointment**
 - A patient's first appointment with their chosen provider at the start of their new episode of care following a referral by a GP.
- **Clinically appropriate**
 - This is a clinical judgement about what is in the best clinical interests of the patient, working within the published National Institute for Health and Care Excellence (NICE) guidelines and specifications. See fuller description of clinical appropriateness on page 17.

What do these rights mean?

- **Team, led by a consultant or a mental healthcare professional**
 - In physical health, elective referrals to outpatient services are often to teams led by a consultant in hospital outpatient settings. In contrast, in mental health, much of the equivalent provision occurs in the community and is delivered by a variety of mental health professionals. To make the legal rights to choice work well and on an equivalent basis in mental health, the rights apply to teams led by a mental health consultant or other mental healthcare professional.
 - For ease of reference, throughout this guidance we use the term 'team led by a healthcare professional' to cover both.

Further information:

The Government's mandate to NHS England states that from April 2015 people with long term conditions who could benefit will have the option of a personal health budget. Services provided by a personal health budget are agreed during the care planning process, and operate outside of the independent funding review panel route. Further information is available [online](#)⁵.

How far do these choices extend?

Patients' legal rights to choice in mental health are part of the drive to achieve parity with physical health. In seeking to deliver this, the following should be considered:

Community care

Much mental health outpatient provision occurs in the community, and such provision is covered by the legal rights. Where the patient lives outside the area where the chosen mental healthcare community service is delivered, it will be necessary for the patient and the GP to consider how the patient would be able to travel to and from the provider, when making a choice of provider. It is important to note that there is no obligation on the provider of community services to travel to the patient. This is to facilitate as wide a choice as possible for patients while not placing impractical demands on providers.

Primary care

Mental health services provided under a General Medical Services (GMS), Personal Medical Services (PMS) or Alternative Provider Medical Services (APMS) primary care contract are not covered by the legal rights to choice of provider and team.

Section 75 Agreements with local authorities

The legal rights to choice apply when the chosen service is commissioned under a Section 75 Agreement of the Health Act 2006 with a local authority.

Self-referrals

As in physical health, patients' legal rights to choice apply following a referral by a GP to any provider that has a Commissioning Contract with any CCG or NHS England for the required service. Patients may access some services, such as Improving Access to Psychological Therapies (IAPT) and Children and Adolescents Mental Health Services

(CAMHS), via self-referral or other locally agreed referral processes, e.g. through schools. In these instances, patients' choices will be determined by commissioners' local choice offers.

Beyond the first outpatient appointment

Having chosen a provider, the patient must be treated by that provider for the entire episode of care for which the patient was referred (unless the provider does not provide the clinically appropriate service that the patient needs or, in the provider's reasonable professional opinion, a patient is unsuitable to receive the relevant service, for as long as they remain unsuitable).

If a patient's diagnosis changes significantly, the provider should contact the patient's GP to discuss whether it is still clinically appropriate for the patient to be treated by that provider and whether the commissioner will continue to fund the episode of care.

When do the rights to choice not apply?

There are some exclusions from these legal rights to choice.

These are where a patient is:

- already receiving mental health care following an elective referral for the same condition
- referred to a service that is commissioned by a local authority, for example a drug and alcohol service (unless commissioned under a Section 75 Agreement)
- accessing urgent or emergency (crisis) care
- accessing services delivered through a primary care contract
- in high secure psychiatric services
- detained under the Mental Health Act 1983

- detained in a secure setting. This includes people in or on temporary release from prisons, courts, secure children's homes, certain secure training centres, immigration removal centres or young offender institutions
- serving as a member of the armed forces (family members in England have the same rights as other residents of England).

Key terms explained:

- **Already receiving mental health care following an elective referral for the same condition**
 - The patient is already being treated by a healthcare professional, following an elective referral, for the condition for which they are presenting to their GP.

- **Urgent or emergency (that is, crisis) care**

- In the same way that the legal rights to choice of provider do not apply in the case of a physical health care emergency, such as a heart attack or stroke, they similarly do not apply in situations requiring mental health crisis care. The Mental Health Crisis Care Concordat: Improving outcomes for people experiencing mental health crisis⁶ sets out an effective approach to ensuring people experiencing mental health crisis can access the support they need, when they need it.

- **Services delivered through a primary care contract**

- Mental health services provided under a GMS, PMS or APMS primary care contract are not covered by the legal rights to choice of provider and team.

Meaningful choice

The legal rights to choice must be offered at points where patients can make meaningful decisions about the provider and team from which to receive their care⁷. This decision might, for example, take place in their GP's surgery, or when a patient is assessed following a GP referral. Further detail is provided below and in the flow diagram on page 11.

Patient choice and the Mental Capacity Act 2005

As a guiding principle, patients should be involved as much as possible in decisions about their care, as set out in the Government's response to *Liberating the NHS: No decision about me, without me*⁸.

Across the range of mental health conditions that patients might experience, patients may be vulnerable and their ability to exercise choice that is clinically appropriate could be compromised. Referrers are required

under the Mental Capacity Act 2005⁹ to support their patients in making decisions about their care. The Act requires all health professionals to take 'all practicable steps' to help people make their own decisions. When an impairment is such that the patient lacks capacity, the Act requires that he or she must be involved as much as possible in any decisions about their best interests. Moreover, when capacity is likely to deteriorate over time, the principles of the Act should form the basis of any discussions about the future.

GPs offering choice

In many cases the patient will have a long term relationship with their GP. Their GP will be well placed to understand the needs of the patient and have a meaningful conversation with the patient about what is clinically appropriate given the patient's needs and preferences.

GPs should have as full a choice conversation with their patients as possible. This may include the need for further clinical assessment to determine the diagnosis and potential care options, or consideration of how the patient would be able to travel to and from a provider (such as a distant community healthcare provider which does not have an obligation to travel to the patient).

Assessment following GP referral

Prior to receiving care, a patient might need to be assessed. There are different models in use across the country, some of which offer a predominately administrative referral service while others offer a clinical assessment where the patient is reviewed by a healthcare professional and triaged to the most appropriate service.

Meaningful choice

Common terms in use for such services include:

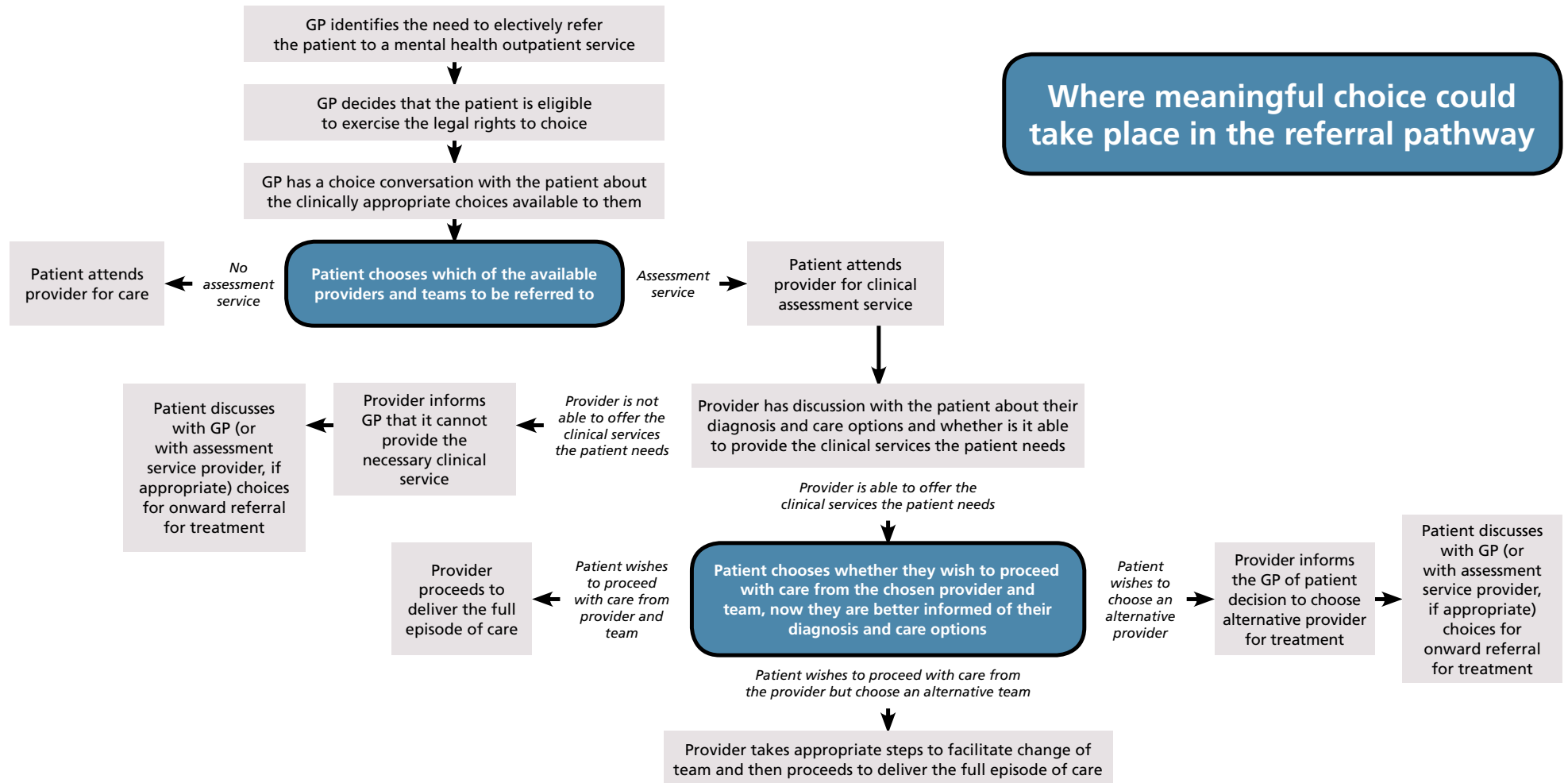
- clinical assessment services
- referral management centres
- single point of access. Given this variety, commissioners, providers and referrers will need to consider how the models in use will support patients to make choices about their provider and team at a point where those choices are meaningful.

Choice could become more meaningful if for example:

- a patient attends a single point of access and receives further information about their diagnosis or care options
- clinical assessment results in significant changes to the patient's diagnosis and/or care options.

Providers of clinical assessment services, referral management centres or single points of access must consider the need to offer patients their legal rights to choice and do so impartially. Wherever a patient's choice is clinically appropriate, providers are required to support the patient's decision in line with the requirements in the Commissioning Contract.





For commissioners

Commissioning services

Commissioners are required to provide services that meet the reasonable needs of the populations for which they are responsible. In order to do this they must determine what to commission for their population, and ensure that if a treatment/service isn't routinely available, there are processes in place to enable the patient to receive that treatment/service, if agreed to by both the responsible clinician, and the individual funding request panel.

To support patient choice commissioners must ensure that arrangements are in place for providers, irrespective of whether they are public, independent or third sector organisations, to qualify and secure commissioning contracts for the provision of elective outpatient services that meet

patients' needs. For this reason, it is not sufficient for a commissioner to do nothing more than recontract with existing qualified providers that are performing satisfactorily.

It is a statutory requirement for commissioners to secure the provision of clinical services, other than primary care, using NHS Standard Contracts. The terms of the NHS Standard Contract also provide commissioners with assurance that providers are obliged to meet high standards of quality and safety. Despite the requirement on commissioners to use the NHS Standard Contract, the legal right to choice extends to all clinically appropriate providers holding a contract with any NHS commissioner for provision of the service that a patient needs. Where

a patient chooses a provider that is not commissioned using an NHS Standard Contract, commissioners should seek to put in place an NHS Standard Contract with that provider at the earliest possible opportunity.

Where a provider delivers an assessment/triage service the commissioner should discuss with the provider how it will ensure that patients can exercise their legal rights to choice and should include relevant standards and reporting requirements within its contract with the provider.

Pricing and payment of mental health services

The National Tariff Document's mental health guidance¹⁰ includes the following:

- Payment rules for mental health services: these require the implementation of transparent payment approaches for mental health services for working age and older people, and adult IAPT. These approaches require consideration of the needs of patients and reward improved quality and outcomes in line with Five Year Forward View for Mental Health. The guidance also provides specific rules requiring new ways of paying for mental health services for working age adults and older people, and adult IAPT services.
- Support local change with guidance: supports commissioners and providers to make progress in implementing payment approaches that meet the payment rule requirements.
- Requirements and guidance on national data reporting: clarifies existing rules that require reporting of care clusters for Mental

Health Services Dataset (MHSDS) and reference cost purposes, and requirements around data and information quality.

The National Tariff Document signals a clear move away from unaccountable block contracts and towards more transparent payment approaches that support improved quality and improvement in the outcomes that matter most to patients. Unaccountable block contracts do not facilitate a transparent understanding of the services being delivered, the outcomes achieved, or the costs of delivering effective services.

However, block contracts are not a reason for restricting a patient's legal right to choice of provider, as arrangements can be put in place to facilitate choice where block contracts are in operation. Arrangements should include commissioners working with providers to monitor the impact of the right to choice of provider on patient referral patterns. Where commissioners have block contracts with providers, and those contracts do not contain

caps and collars, if numbers of referrals vary outside anticipated levels, commissioners may wish to seek a variation to contracts to help ensure that money follows the patient.

For services covered by the nationally mandated currencies, NHS Improvement and NHS England have recommended that all mental health commissioners and providers move to contracts that are based on anticipated cluster caseload.

Paying for mental health services

Where a patient chooses a provider with which their responsible commissioner holds a Commissioning Contract for the outpatient services required, payment should proceed as per current arrangements.

Where patients choose a provider with which their responsible commissioner does not hold a Commissioning Contract, the responsible commissioner will need to pay the provider, consistent with the Who Pays?¹¹ guidance.

Pricing and payment of mental health services

As set out in Who Pays?¹¹, non-contract activity is undertaken by the provider on the terms of the NHS Standard Contract in place between the provider and its main host commissioner. A contract on those terms will be implied as between the patient's responsible commissioner and the provider.

The provider should invoice the responsible commissioner for these services, in line with the normal requirements set out in Service Condition 36 of the NHS Standard Contract.

Consistent with the Guidance on mental health currencies and prices¹², for non-contracted activity, the commissioner should expect to receive an invoice for any assessment and/or care provided.

Where they exist, daily cluster prices should be used. This will introduce consistency in charging and will reduce the need for lengthy negotiations between providers and commissioners about the price of non-contracted activity.

Reference costs for 2015/16¹³ are a source of indicative information, providing a breakdown of the reported costs of admitted and non-admitted care associated with each cluster, and the costs of a number of other specialist services.

Checklist for delivery

Commissioners have a responsibility for ensuring that patients' legal rights to choice of mental health service provider and team are upheld in the commissioning and delivery of services. The following checklist may help commissioners to ensure that they are discharging this responsibility.

Commissioning plan

- Publicly demonstrate how they are working within their local area to implement choice of mental health provider and team.
- Be clear about how they take into account patient preferences and how they change and emerge over time, when making decisions about which mental health services to commission.

Commissioning services

- Ensure arrangements are in place for both existing and new mental health services providers (public, independent and third sector) to qualify and secure contracts to provide services under a Commissioning Contract.
- Ensure that they take into account the National Tariff Document when putting in place contracts with providers.

Contract management

- Consider how they will utilise the

Commissioning Contract to ensure that the mental health providers they contract with fulfil the requirements on them to support patient choice.

- Liaise with their local authorities to ensure that information is shared appropriately across organisations providing care to a patient.
- Ensure systems are in place to process non-contract activity invoices.

Referral protocols

- Make arrangements to ensure that, at the point of GP referral or after assessment, mental health patients in need of elective care are offered a choice of any clinically appropriate mental health service provider and team.
- Work with providers to ensure that choice is offered alongside clinical assessment services, referral management centres and single points of access.
- Inform GPs, and keep them updated, about the types of mental health services

they routinely commission, since a GP referral constitutes authority to treat on behalf of the CCG.

- Approve providers' services on NHS e-Referral Service (e-RS), thereby allowing GPs to refer to the services on e-RS.
- Make arrangements to ensure that, when upholding any complaint that an eligible patient did not receive the legal rights to choice, the patient is then offered a choice of any clinically appropriate provider and team.

Information for patients

- Publicise patients' rights to choice.
- Inform patients where they can find information about mental health providers and teams in order to help them make choices.
- Inform patients how they can complain if they feel they have not been offered a choice or do not have access to information on which to base their choice.

For GPs

Assessing eligibility

'The choice offer' on page 4 of this guidance sets out which mental health patients, conditions and services are covered by the legal rights to choice, as well as those patients, services and circumstances for which the rights to choice do not apply.



Considerations for clinical appropriateness

It is for the GP to decide what is clinically appropriate when offering eligible patients their legal rights to choice.

Particular consideration needs to be given to clinical appropriateness where a patient has complex mental health needs and requires an integrated package of health and social care to avoid their care being fragmented.

When discussing clinically appropriate choices with patients, using the information available at the point of referral, GPs should consider:

Involving patients in decision making

- Discussing the patient's personal circumstances.
- Discussing the patient's continuity of care, for example any co-morbidities and existing care and treatment the patient is receiving or needs to receive.
- Discussing the patient's rights to choose the provider and team at the points at which the choice is meaningful.
- Discussing whether the patient would benefit from accessing an advocacy service.
- Discussing whether the patient would benefit from receiving further information in a more accessible format.

Provider services and outcomes

- Whether the provider offers evidence-based and effective care for the patient's condition.
- The quality and clinical outcome indicators for the providers' services.
- Patient and user feedback for the providers' services.

Clinical considerations

- Whether there is risk of fragmenting care through the choice that a patient wishes to make, for example where a patient requires a high level of integrated health and social care.

- Any implications patient choice of provider has for the delivery of crisis care should it be required during their episode of care.
- Whether the patient has been recently discharged and the potential clinical benefits of continuity of care.

Practical implications

- Discussing how the patient would be able to travel to and from the provider if the patient lives outside the area served by the provider.
- Any local provision for patient transport to and from their chosen provider.

Conflicts of interest

Where a non-primary care provider of mental health services has staff within a GP practice, either to provide advice on diagnoses and/or to administer care, the GP may seek their advice to help determine the patient's condition(s) and the type(s) of services that the patient needs. The mental health staff and the GP must however avoid any conflicts of interest in supporting the patient's choice of provider to deliver the care.

Where a non-primary care provider of mental health services to which the legal rights apply has staff co-located within a GP practice to administer care, the GP practice may not prevent or otherwise restrict patients from other GP practices accessing those services if patients exercise their legal right to choose to be referred to those services for their first outpatient appointment.

NHS e-Referral Service (e-RS)

e-RS is well established as the principal electronic means of referring patients to outpatient services, and is being increasingly used for referrals to mental health services. GPs need to support patients in making informed choice and e-RS allows GPs to view available providers, send referral information electronically to that chosen provider, and enable the patient to be booked into an appointment slot.

e-RS:

- can facilitate the choice conversation between GPs and patients
- includes a direct link to provider profiles on NHS Choices
- has the ability to support different referral pathways
- e-RS supports GPs in asking for advice and guidance before making a referral
- is secure and auditable for all users.

e-RS supports first elective referrals and the booking of adults, children and adolescents directly into an appointment, or to a mental health clinical assessment service, if required. Patients may be able to book their appointments while in the GP practice or later online or via the national Telephone Appointment Line (TAL).

Making an elective referral to a mental health service provider and team is broadly similar to an elective referral to any other service on e-RS. For new users of the system, the 'Referring a Patient'¹⁴ e-learning tool available from the e-RS website gives a comprehensive step by step guide.

NHS e-Referral Service – Mental Health Services¹⁵ provides further guidance.

As with existing practice and where appropriate, GPs should ensure social services are kept informed of where the patient is being treated.

Assessment services

Clinical Assessment Services, Referral Management Centres and Single Points of Access

Where a clinical assessment service, referral management centre, or single point of access sits between the initial GP referral and the provision of care, it is important that the GP discusses this arrangement with the patient as it may have implications for the point at which the patient can make a meaningful choice. Suggestions about the points at which choice is meaningful can be found on pages 9-11.

The patient's rights to choice should be exercised at the point where the patient can make a meaningful choice about the provider and the team. If this occurs within the clinical assessment service, referral management centre, or single point of access the healthcare professionals having a choice conversation with patient should refer to the guidance on page 17 about supporting patients to make clinically appropriate decisions. In doing so providers must avoid any conflicts of interests⁷.

Further information

If a patient is receiving care from a provider or a team and the relationship breaks down this can result in the patient disengaging from care and can ultimately affect their likely clinical outcomes. If a patient is not happy with the service they are receiving they may discuss their concerns with a care professional. This may be with the provider in the first instance or the patient may return to their GP if for any reason they do not want to continue to receive care from their chosen provider. In which case, although the patient will not have a legal right to choose an alternative provider, the GP should discuss what is in the patient's best interests, and any other options available.

For Providers

Provision of mental health services

Mental health is a sector where there is already a wide range of providers. There is potential for changes in referral patterns across existing providers and for new providers to enter the sector over the coming years in response to patients exercising their rights to choice. Commissioners must provide appropriate opportunities for new providers to qualify for and secure a contract to deliver such services.



Supporting meaningful choice

The right to choice of provider should be exercised at the point where the patient is able to make a meaningful, informed choice.

Providers of clinical assessment services, referral management centres or single points of access must consider the need to offer patients their legal rights to choice and do so impartially.

Wherever a patient's choice is clinically appropriate, providers are required to support the patient's decision in line with the requirements in the Commissioning Contract¹⁶ and with the guidance on complying with with the choice and competition licence conditions⁷. Supporting meaningful choice should form part of discussions between the commissioner and the provider of the clinical assessment service, referral management service or single point of access.

Service information

Contractual requirements to make service information available

Meaningful and informed choice of provider for patients with mental health conditions depends on patients and GPs having access to good quality, up to date information from providers about the mental health services they offer. The Commissioning Contract requires providers to:

- describe and publish all relevant services (except high secure services) and associated appointment slots on e-RS
- make their service information available to the public on NHS Choices.

Mental health service providers who have a Commissioning Contract with a CCG or NHS England must meet these contractual requirements¹⁶.

NHS e-Referral Service

e-RS:

- can facilitate the choice conversation between GPs and patients
- allows providers to promote suitable mental health services online
- has the ability to support different referral pathways
- e-RS supports GPs in asking for advice and guidance before making a referral
- is secure and auditable for all users.

e-RS supports first elective referrals and the booking of adults, children and adolescents directly into an appointment, or to a mental health clinical assessment service, if required.

Service information

How to set up services on NHS e-Referral Service

The principles of setting up a mental health service are broadly the same as setting up any other service in e-RS.

Providers need to:

- decide which of their services are appropriate to publish on e-RS
- upload key clinical information for each service using Speciality/Clinic Types and SNOMED clinical terms (e.g. anxiety disorder)
- upload relevant information for each service about its single or multi-disciplinary teams, including information about the service's named healthcare professional(s).

Guidance and information¹⁷ to support providers in setting up their services on NHS e-Referral Service is available.

Some existing and prospective mental health providers do not yet have electronic systems that communicate directly with e-RS.

They are still able to list their services on the e-RS system, but the booking of appointments requires manual intervention.

All mental health providers should therefore be able to make the necessary information about their services available to help patients and their GPs choose a clinically appropriate service to meet the patient's needs. Further guidance is available in NHS e-Referral Service - Mental Health Services¹⁵.

Integrated care

To secure best outcomes many patients will need interventions from a range of health and social care professionals working together across organisational and geographical boundaries. Providers will currently have systems in place to support delivery of care for out of area patients, and where necessary these should be utilised to enable delivery of high quality care to patients who have exercised their legal right to choice.

The Commissioning Contract (Service Condition 4)¹⁶ requires providers to co-operate with others and have due regard to the welfare and rights of patients including having a duty to ensure that a patient's care remains integrated. Where a patient's choice of provider has practical implications for any wider package of care the patient might be receiving, or needs to receive, or the patient's choice raises issues

about patient safety, the provider should discuss this with the patient and contact the referring GP to discuss and agree an appropriate way forward.

Sharing patient information between organisations

A key source of information for providers, which includes links to further guidance is Information: To Share or not to Share Government Response to the Caldicott Review¹⁸

When regular exchanges of information need to take place between different agencies it is important to have a formal agreement in place to ensure that everyone understands what information will be exchanged, for what purpose, and to whom.

Crisis care

Some patients with mental health conditions are more at risk than others of experiencing a crisis. Crisis might happen during the course of elective outpatient care. It is important that wherever patients receive crisis care, the provider of that care can access up to date information about the patient and any elective care they have been receiving.

The Mental Health Crisis Care Concordat⁶ was published in February 2014 and aims to improve the system of care and support so people in crisis are kept safe and helped to find the support they need. People should be helped to receive that support whatever the circumstances in which they first need help and from whichever service they turn to first.

Receiving referrals

Providers should accept referrals that are made to them through the exercise of patients' legal rights to choice, in line with the conditions set out in the Commissioning Contract. Once a referral has been accepted the patient must be treated by that provider for their entire episode of care.

If a patient's diagnosis changes significantly the provider should contact the patient's GP to discuss whether it is still clinically appropriate for the patient to be treated by that provider and whether the commissioner will continue to fund the episode of care.



Pricing and payment of mental health services

The National Tariff Document's mental health guidance¹⁰ includes the following:

- Payment rules for mental health services: these require the implementation of transparent payment approaches for mental health services for working age and older people, and adult IAPT. These approaches require consideration of the needs of patients and reward improved quality and outcomes in line with Five Year Forward View for Mental Health. Specific rules require new ways of paying for mental health services for working age adults and older people, and adult IAPT services.
- Support local change with guidance: supports commissioners and providers to make progress in implementing payment approaches that meet the payment rule requirements.

- Requirements and guidance on national data reporting: clarifies existing rules that require reporting of care clusters for Mental Health Services Dataset (MHSDS) and reference cost purposes, and requirements around data and information quality.

The National Tariff Document¹⁰ signals a clear move away from unaccountable block contracts and towards more transparent payment approaches that reward improved quality and improvement in the outcomes that matter most to patients. Unaccountable block contracts do not facilitate a transparent understanding of the services being delivered, the outcomes achieved or the costs of delivering effective services. However, block contracts are not a reason for restricting a patient's legal right to choice of provider, as arrangements can be put in place to facilitate choice where block contracts are in operation.

Arrangements should include providers and commissioners working together to monitor the impact of the right to choice of provider on patient referral patterns. Where block contracts are in place, and those contracts do not contain caps and collars, if numbers of referrals vary outside anticipated levels, commissioners may wish to seek a variation to contracts to help ensure that money follows the patient.

For services covered by the nationally mandated currencies, NHS Improvement and NHS England have recommended that all mental health commissioners and providers move to contracts that are based on anticipated cluster caseload.

Charging for mental health services

Where a patient chooses a provider that has a Commissioning Contract with the patient's responsible commissioner, payment should

Pricing and payment of mental health services

proceed as per current arrangements.

Where patients choose a provider that does not hold a Commissioning Contract with the patient's responsible commissioner, the provider will need to charge the responsible commissioner, consistent with the Who Pays? guidance¹¹. The provider should invoice the patient's responsible commissioner for these services, as they would for any other non-contracted activity. Non-contract activity is undertaken by the provider on the terms of the Commissioning Contract which is implied as between the patient's responsible commissioner and the provider.

Who Pays?¹¹ clarifies the general arrangements for services provided as non-contract activity and sets out how providers should invoice for such activity. There is specific guidance on mental health currencies and prices¹² which includes a section on choice and non-contract

activity. Using the principles set out in this document, where a provider receives a non-contracted activity referral through the exercise of the legal right to choice, the provider should use the following charging process:

- Separate out any assessment, non-admitted and/or admitted care that has been provided for the patient.
- Charge for the assessment and add the appropriate daily cluster price (or locally agreed alternative) per patient per day.
- Invoice the patient's commissioner on a monthly basis.

Where any emergency, urgent or crisis intervention is required from a provider with whom the responsible commissioner does not have a contract, the commissioner will be expected to fund this as non-contracted activity, in line with the Who Pays?¹¹ guidance.

How mental health services are priced

When charging for non-contracted activity, daily cluster prices should be used, where they exist. The process for calculating these cluster prices can be found in the NHS Improvement and NHS England guidance on mental health currencies and prices¹².

Reference costs for 2015/16¹³ are a source of indicative information, providing a breakdown of the reported costs of admitted and non-admitted care associated with each cluster, and the costs of a number of other specialist services.

NHS England suggests that where a patient requires services that are not included or specified within an existing priced cluster, the price the provider should charge the responsible commissioner should be calculated in a manner that is consistent with the principles of the National Tariff for local prices, particularly under section 6 of

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the National Tariff Document's mental health guidance¹⁰.

Charging for crisis care

The Mental Health Crisis Care Concordat: Improving outcomes for people experiencing mental health crisis⁶ sets out an effective approach to ensuring people experiencing mental health crisis can access the support they need, when they need it. If the patient seeks crisis care from a provider with whom the responsible commissioner does have a Commissioning Contract, payment should proceed as per current arrangements.

If a patient seeks crisis care from a provider with whom the responsible commissioner does not have a Commissioning Contract, the commissioner will be expected to fund this as non-contracted activity, in line with the Who Pays?¹¹ guidance. The provider

should assess the patient and then assign the patient to the appropriate cluster. The provider should then proceed to invoice the commissioner as set out above.

Disagreement on payments

Commissioners and providers should work together in good faith to minimise disagreements relating to payment for non-contract activity. Any formal disputes over payment for non-contract activity should be resolved in accordance with the dispute resolution procedure set out in the Commissioning Contract.

Checklist for delivery

Providers have a contractual responsibility for ensuring that patients' legal rights to choice of mental health service provider and team are upheld, in line with the Commissioning Contract. The following checklist may help providers to ensure that they are discharging this responsibility.

Facilitating the exercise of legal rights to choice

- Accept all clinically appropriate referrals in line with the Commissioning Contract.
- Liaise with the patient's GP where the provider considers the referral clinically inappropriate.

Supporting meaningful choice

- Consider how choice will be offered alongside any clinical assessment service, referral management service or single point of access the provider delivers.
- Comply with guidance regarding licence conditions⁷

- Provide staff with the appropriate information and training to enable them to hold a meaningful choice conversation with patients.

Making service information available

- Describe and publish all primary care referred services in the e-RS through a Directory of Service.
- Publish up to date service and team information on NHS Choices.

Supporting integrated care

- Ensure systems are in place to facilitate information sharing with the organisations relevant to a patient's care, including where these organisations are not local.

- Consider putting in place additional information sharing arrangements where appropriate.

- Keep the patient's GP informed of relevant aspects of the patient's care.

Charging for services

- Price services delivered as non-contracted activity in line with the National Tariff guidance.
- Comply with requirements for information reporting and information quality.
- Invoice the responsible commissioner on a monthly basis, clearly stating prices for assessment and the appropriate daily cluster price (or locally agreed alternative) per patient per day.

Programme of further work

Embedding the legal rights to choice

The aim is to embed these legal rights, so that they operate well and in the best interests of patients. This means that:

- All patients with mental health conditions are aware of their rights, and have the information and support they need to make well informed choices that meet their needs and preferences.
- All GPs offer choice to eligible patients and support them in making informed decisions.
- All providers of mental health outpatient services make good quality, up to date information about their services available to enable meaningful choice by patients, and accept all appropriate patient referrals, in line with their Commissioning Contract.

- All commissioners enable the right to choice of services by:
 - commissioning services that meet the needs of patients
 - having referral protocols with GPs that support patient choice
 - using the levers in the Commissioning Contract to ensure choice works well for patients.

Embedding the legal rights to choice in mental health will take time and effort to achieve. This guidance is part of a significant programme of work that will support the implementation of the legal rights. Details of this programme of work are available on the NHS England website¹⁹.



As part of this programme of work, additional resources to help support the implementation of the legal rights to choice, are available on the NHS England website¹⁹. There will be ongoing engagement with stakeholders as the programme progresses and additional supporting resources will be coproduced and added to the website.

FAQs

Where the rights apply

Mental health patients and the circumstances in which they have a right to choice.

Q1: Do patients have a right to choice of clinically appropriate provider and team in circumstances where their mental capacity is impaired?

A: Patients should be involved as much as possible in decisions about their care. However, across the range of mental health conditions that patients might experience, patients may be vulnerable and their ability to exercise choice that is clinically appropriate could be compromised. All issues relating to mental capacity should be decided with reference to the Mental Capacity Act (MCA) 2005⁹ and its Code of Practice. Under the Act, all referrers

are required to support their patients in making decisions about their care, including patients with a mental impairment.

Patients aged 16 or over are assumed to have capacity to make their own decisions, including decisions relating to their healthcare. If all practicable steps have been taken to help a person to make their own decision, and the person is assessed to lack capacity in accordance with the MCA, then care decisions in the person's best interests may be made for them.

The Mental Capacity Act 2005 (Code of Practice)²⁰ provides guidance on making decisions for people who are assessed to be lacking the capacity to make such decisions for themselves (see chapter 2 of the Code of Practice).

There are a number of sources of guidance on the law concerning consent to physical examination and treatment. The Department of Health's Reference Guide to Consent for Treatment or Examination²¹ provides further advice on considering a person's mental capacity when obtaining consent to treatment.

The General Medical Council guidance on consent, *Consent: patients and doctors making decisions together*²² and the British Medical Association's *Consent Tool Kit*²³, also provide useful guidance on making decisions about medical examination and treatment for people who lack capacity to make those decisions for themselves.

Where the rights apply

Q2: Do patients have a legal right to choice of clinically appropriate provider and team when detained in a secure ward?

A: No. Patients who are sectioned under the Mental Health Act 1983 do not have legal rights to choice of provider or team, therefore any patient detained under the Act would not be eligible to exercise their legal rights to choice.

Q3: Do patients have a legal right to choice of clinically appropriate provider and team when being admitted to a locked acute ward?

A: No. The legal rights to choice of provider or team do not apply to inpatient services.

Q4: Do children and young people have the right to choice of clinically appropriate provider and team for their mental health care?

A: Patients aged 16 or over are assumed to have capacity to make their own decisions,

unless there are grounds to suggest otherwise. If a patient is under 16 the GP should assess their Gillick competency and take a decision, with the patient, about their ability to make an informed choice. If the child is Gillick competent the GP should still include the child's parents or guardians in their choices. If the child refuses, and the child's well-being depends on their choices, and it is in their best interests to proceed without parental involvement, the GP should proceed accordingly (the 'Fraser Guidelines'). Where a young person, aged 16-17, has capacity under the Mental Capacity Act but is unable to make a decision because they are overwhelmed by its implications, the GP should involve the patient's parents or guardians. If the patient is under 16 and is not Gillick competent then the patient's parents or guardians may exercise choice on their behalf.

Children and young people should be kept as fully informed, just as an adult would be, and should receive clear, detailed

information concerning their care, explained in an age-appropriate way they can understand. The Department of Health's Reference Guide to Consent for Treatment or Examination²¹ provides further advice on when children and young people can consent to treatment and therefore make decisions about their own care. The General Medical Council's 0-18 Years: Guidance for all doctors²⁴ and the British Medical Association's Consent Tool Kit²³, also provide useful guidance on helping children and young people make valid consent decisions about their treatment.

Q5: Are learning disability services included in the legal rights to choice?

A: Yes. As long as the services meet the criteria set out in legislation then patients have a right to choose their learning disability provider and team.

Where the rights apply

Q6: Do patients have a right to choice if they require integrated health and social care?

A: Patients are eligible for choice of mental health provider and team including where they require integrated packages of care involving social care. Patients should discuss their options with their GP to ensure that their choices are clinically appropriate to meet their needs and preferences and to ensure that care can continue to be delivered in an integrated way that is effective in meeting their needs.

Q7: Do patients have a right to choose independent or third sector providers?

A: Yes. Patients have a right to choose any clinically appropriate mental health service provider, including an independent or third sector provider that has a Commissioning Contract with any CCG in England or with NHS England for the provision of the required services.

Q8: Is choice of provider and team compatible with personal health budgets?

A: Yes. As part of receiving a personal health budget, patients can choose to receive clinical services from any provider, including those who are not currently commissioned by a CCG or NHS England. This does not need to be agreed by an Independent Funding Review Panel but must be agreed by the party responsible for approving personal health budget plans within the patient's CCG. CCGs should be in a position from April 2015 to offer personal health budgets to eligible individuals that would benefit from one. Further information is available on the personal health budget web page⁵.

Q9: What happens if a patient is not happy with the provider or team they have chosen: do they have a legal right to make further choices?

A: No. But, if a patient is not happy with the service they are receiving they may discuss their concerns with a care professional. This may be with the provider in the first instance or the patient may return to their GP if for any reason they do not want to continue to receive care from their chosen provider. In which case, although the patient will not have a legal right to choose an alternative provider, the GP should discuss what is in the patient's best interests, and any other options available. Ultimately, if still not satisfied, the patient may choose to make a complaint through the NHS Complaints Procedure²⁵.

How the rights work

Q10: What should patients do if they are not offered their legal right to choice?

A: GPs should ensure that patients are aware of their choice options and that eligible patients are offered the choices to which they are entitled. However, if choice is not offered, the NHS Choice Framework²⁶ provides information on the steps that patients can take. Patients should contact their local CCG in the first instance. Ultimately, if still not satisfied, the patient may choose to make a complaint through the NHS Complaints Procedure²⁵.

Q11: Do the legal rights to choice apply only to those services for which the 18 week referral to treatment standard applies?

A: No. The legal rights to choice apply to all elective outpatient services led by a consultant or healthcare professional. Further details are outlined on pages 5-7. legislation then patients have a right to choose their learning disability provider and team.



Out of area referrals

Q12: Who meets the travel costs for patients attending outpatient appointments?

A: The NHS travel costs guidance Healthcare Travel Costs Scheme: Instructions and Guidance for the NHS27 provides further information on the support available for the travel costs of people on low incomes.

Q13: Would patients exercising their legal rights to choice of provider and team wait longer for treatment?

A: All patients, whether accessing services through their legal right to choice or through standard, local referral protocols, should be treated equally with regards the time they wait to access services.

Mental health providers should provide waiting time information about their services on NHS Choices so that patients and GPs may take this into account when patients choose which provider they want to attend for their first outpatient appointment. e-RS

shows the indicative waiting time for first outpatient appointments which can help patients and GPs make a more informed choice.

Q14: Should commissioners allow referrals to providers which offer an equivalent but more expensive service than those routinely contracted by the patient's CCG?

A: Yes. Details on calculating the price to charge the responsible commissioner are on page 29.

Q15: If so, who pays?

A: The commissioner responsible for the patient pays. The guidance document Who Pays?¹¹, clarifies the general arrangements for payment of services provided as non-contract activity.

Changes in referral patterns

Q16: What should commissioners and providers do if changes to patient flows decrease to the point of making some services unsustainable?

A: It is unlikely that changes to patient flows resulting from the introduction of choice in mental health will be the primary reason for a service becoming unsustainable. Services should be designed around the needs of local communities and strive to achieve and demonstrate the best quality and patient outcomes. Where patients experience high quality local services, we do not anticipate significant changes in patient flows.

Mental health providers should provide quality, outcomes and waiting times information about their services on NHS Choices so that patients and GPs may take this into account when patients choose which provider they want to attend.



References

1. Department of Health (2014). Achieving better access to mental health services by 2020.
www.gov.uk/government/publications/mental-health-services-achieving-better-access-by-2020
2. NHS Five Year Forward View (2014).
www.england.nhs.uk/wp-content/uploads/2014/10/5yfv-web.pdf
3. The NHS Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) Regulations 2012 (Regulation 39).
www.legislation.gov.uk/ukxi/2012/2996/contents/made as amended by the NHS Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) (Amendment) Regulations 2013 www.legislation.gov.uk/ukxi/2013/2891/contents/made
4. As set out in the Standing Rules (see endnote 3) the legal rights apply to elective referrals made by a general medical practitioner, general dental practitioner or optometrists (Regulation 38). Of these, referrals to mental health services will be made by GPs so this term is used throughout this guidance.
5. NHS England personal health budget web page.
www.england.nhs.uk/personal-health-budgets/
6. Department of Health and Concordat signatories (2014). Mental Health Crisis Care Concordat.
www.gov.uk/government/uploads/system/uploads/attachment_data/file/281242/36353_Mental_Health_Crisis_accessible.pdf
7. Monitor (2014). Choice and competition licence conditions: guidance for providers of NHS-funded services (page 16).
www.gov.uk/government/publications/nhs-healthcare-providers-working-with-choice-and-competition
8. Department of Health (2012), Liberating the NHS: No decision about me, without me.
www.gov.uk/government/uploads/system/uploads/attachment_data/file/216980/Liberating-the-NHS-No-decision-aboutme-without-me-Government-response.pdf
9. Mental Capacity Act 2005.
www.legislation.gov.uk/ukpga/2005/9/contents

10. Monitor and NHS England (2013) National tariff payment system 2017/18 and 2018/19.
<https://improvement.nhs.uk/resources/national-tariff-1719/>
11. NHS England (2013). Who Pays? Determining responsibility for payments to providers.
<https://www.england.nhs.uk/resources/resources-for-ccgs/#finance>
12. Monitor and NHS England (2013). Guidance on mental health currencies and payment.
<https://www.gov.uk/government/publications/mental-health-currencies-and-payment-guidance>
13. Department of Health (2014) NHS reference costs 2015 to 2016.
www.gov.uk/government/publications/nhs-reference-costs-2015-to-2016
14. NHS e-Referral Service.
www.content.digital.nhs.uk/referrals
15. NHS e-Referral Service – Mental Health Services.
www.content.digital.nhs.uk/media/17209/Mental-Health-Services/pdf/Mental_Health_Services.pdf
16. NHS England. NHS Standard Contract.
www.england.nhs.uk/nhs-standard-contract
Service condition 6.3 in the 2017/19 NHS Standard Contract sets out the requirements on providers to describe and publish all relevant services and associated appointment slots in the NHS e-Referral Service and to make information available on NHS Choices website. 2017/19 service conditions available from: www.england.nhs.uk/nhs-standard-contract/17-18/
17. NHS e-Referral Service – Providers.
<http://www.content.digital.nhs.uk/referrals/providers>
18. Department of Health (2013). Information: To share or not to share? Government response to Caldicott Review.
www.gov.uk/government/publications/caldicott-information-governance-review-department-of-health-response
19. NHS England website.
www.england.nhs.uk/ourwork/pe/patient-choice/
20. The Stationary Office (2007). Mental Capacity Act 2005 Code of Practice.
www.gov.uk/government/publications/mental-capacity-act-code-of-practice
21. Department of Health (2009). Reference guide to consent for examination or treatment 2nd ed.
www.gov.uk/government/publications/reference-guide-to-consent-for-examination-or-treatment-second-edition

22. **General Medical Council (2008).**
Consent guidance: patients and doctors making decisions together.
www.gmc-uk.org/guidance/ethical_guidance/consent_guidance_index.asp
 23. **British Medical Association (2009).**
Consent tool kit.
www.bma.org.uk/advice/employment/ethics/consent/consent-tool-kit
 24. **General Medical Council (2007).** 0-18 years: guidance for all doctors.
www.gmc-uk.org/guidance/ethical_guidance/children_guidance_index.asp
 25. **NHS Choices website - Making a complaint.**
www.nhs.uk/choiceintheNHS/Rightsandpledges/complaints/Pages/NHScomplaints.aspx
 26. **Department of Health (2014).** 2016 Choice Framework.
www.gov.uk/government/publications/the-nhs-choice-framework
 27. **NHS Choices website - Help with health costs.**
www.nhs.uk/nhsengland/Healthcosts/pages/Travelcosts.aspx
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Further resources

Additional supporting material is available on the NHS England website. Please visit:

www.england.nhs.uk/ourwork/pe/patient-choice/