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Document Purpose	Consultation/Discussion
Gateway Reference	10800
Title	Draft Guidance on NHS patients who wish to pay for additional private care
Author	Department of Health
Publication Date	04/11/08
Target Audience	PCT CEs, NHS Trust CEs, SHA CEs, Foundation Trust CEs , Directors of Finance, Medical Directors, Directors of Nursing, PCT PEC Chairs, NHS Trust Board Chairs, Special HA CEs, Directors of Commissioning/Specialised Commissioning Groups
Circulation List	
Description	Follows the Statutory Consultation Process
Cross Ref	'Improving Access to Medicines for NHS patients' (Nov 2008)
Superseded Docs	First bullet point under Section 2.13 of A Code of Conduct for Private Practice: Recommended Standards of Practice for NHS Consultants (Jan 2004)
Action Required	Respond to Consultation
Timing	**By 27 Jan 2009**
Contact Details	Policy Support Unit Department of Health Richmond House London SW1A 2NS additionalprivatecare@dh.gsi.gov.uk
For Recipient's Use	

Guidance on NHS patients who wish to pay for additional private care – A consultation

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First published 04/11/2008
Published to DH website, in electronic PDF format only.
http://www.dh.gov.uk/consultations

NHS

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Executive summary

1. This draft guidance constitutes part of the government response to Professor Mike Richards' review, Improving access to medicines for NHS patients.

2. It is out to consultation until 27 January 2009.

3. The purpose of this consultation is to gather views on the implementation of the policy the government has adopted. The policy itself was subject to an extensive engagement exercise as part of Professor Richards' review and is not under consultation here.

4. The questions for consultation are:

   - Is the principle of separateness clear?
   - Are sufficient safeguards in place?
   - Should there be more assurance mechanisms in place to ensure the guidance is followed and does not lead to any unintended consequences?

5. Comments can be e-mailed to: additionalprivatecare@dh.gsi.gov.uk

6. Comments can be posted to:

   Additional Private Care
   Room 603
   Richmond House
   79 Whitehall
   London
   SW1A 2NS

1. Introduction

1.1 This document provides new guidance on how to proceed in situations where NHS patients want to buy additional secondary care services that the NHS does not fund. It has been published in response to a review commissioned by the Secretary of State for Health and conducted by Professor Mike Richards, the National Clinical Director for Cancer. Professor Richards' report, published on 4 November, showed that there was a great deal of confusion about the rules in this area. Existing guidance was being interpreted differently in different places, and many patients were not clear whether they would still be entitled to NHS care if they purchased additional private drugs.

1.2 Professor Richards recommended that:

- The Department of Health should make clear that no patients should lose their entitlement to NHS care they would have otherwise received, simply because they opt to purchase additional care for their condition;
- Revised guidance should be issued as soon as possible to make this clear and to promote greater consistency across the NHS in England; and
- The guidance should set out mechanisms to ensure that these cases are handled in a way that supports good clinical practice and is fully consistent with the fundamental principles of the NHS.

1.3 This document responds to those recommendations, outlining guidance on NHS patients who receive private care and setting out a series of important safeguards.

1.4 This guidance comes into force on [x]. It does not apply retrospectively.

Revised guidance on NHS patients receiving private care

2. Scope

2.1 This revised guidance applies to all secondary and specialist healthcare in England and supersedes paragraph 2.13, bullet point 1 of the Code of Conduct for Private Practice (2004), and all other previous guidance on the same subject.

2.2 This guidance applies to Primary Care Trusts and all providers of services to NHS patients.

2.3 The boards of all provider organisations covered by this guidance are responsible for ensuring their organisations comply with it.

2.4 The guidance should be read alongside the legislative framework, including equality duties, and organisations should have regard to all relevant considerations when making a decision.

3. Principles

3.1 This guidance is grounded in the fundamental principles of the NHS and any decisions about a course of action under this guidance should be taken in accordance with those principles. The fact that some NHS patients also receive private care separately should never be used as a means of downgrading the level of service that the NHS offers.

3.2 As affirmed by the draft NHS Constitution:

- the NHS provides a comprehensive service, available to all;
- access to NHS services is based on clinical need, not an individual's ability to pay; and
- public funds for healthcare will be devoted solely to the benefit of the people that the NHS serves.

3.3 As overriding rules, it is essential that:

- the NHS should never subsidise private care with public money, which would breach core NHS principles; and
- patients should never be charged for their NHS care, which would contravene the founding principles and legislation of the NHS.

3.4 To avoid these risks, there should be as clear a separation as possible between private and NHS care.

4. Revised guidance

4.1 This guidance establishes that, where a patient opts to pay for private care, their entitlement to NHS services remains and may not be withdrawn.

4.2 Patients may pay for additional private healthcare while continuing to receive care from the NHS. However, in order to ensure that there is no risk of the NHS subsidising private care:

- It should always be clear whether an individual procedure or treatment is privately funded or NHS funded.
- Private and NHS care should be kept as clearly separate as possible.
- Private care should be carried out at a different time and place. A different place would include the facilities of a private healthcare provider, or part of an NHS organisation which has been designated for private care, including amenity beds.
- This guidance applies to additional private healthcare that patients receive over and above their NHS care. It does not permit a “pick and mix” approach where patients can pay to upgrade any individual elements of their NHS care.

4.3 Departing from these principles of separation should only be considered where there are overriding concerns of patient safety.

4.4 Clinicians should exhaust all reasonable avenues for securing NHS funding before suggesting a patient's only option is to pay for care privately. In these situations, which are likely to be exceptional, clinicians should consider:

- Whether NICE has issued a positive technology appraisal for the relevant indication. If so, it must be made available on the NHS;
- If not, whether the relevant Primary Care Trust has a local policy to fund the treatment, perhaps based on collaboration with other PCTs or, in the case of cancer drugs, advice from a cancer network. If so, it should be made available on the NHS;
- If not, whether exceptional funding can be secured for the patient via the PCT's exceptions procedure. If so, the treatment should be funded on the NHS; and
- Only if this is not the case should a clinician suggest the patient make a decision about whether he or she wishes to purchase the additional treatment.

4.5 In their system oversight role, Strategic Health Authorities (SHAs) should ensure that, in any separate provision of private and NHS care, the fundamental principles of the NHS are not undermined.

4.6 Any complaints that a patient's NHS care has been "withdrawn" as a result of choosing to have private care separately should be investigated as quickly as possible through the standard complaints procedure.

Case studies for illustrative purposes

a. Patient A chooses to pay for an unfunded cancer drug in addition to chemotherapy treatment she has been receiving on the NHS. Under agreed clinical governance protocols, she attends an appointment for chemotherapy in the morning in her Trust's chemotherapy suite and attends a separate appointment later that day in the same Trust's private wing, where she is given the unfunded drug. As well as the cost of the drug itself, the charge to patient A includes the cost of any staff involved in the provision of the drug and any scans or blood tests only needed as a result of taking the unfunded cancer drug.

b. Patient B needs a cataract operation. This procedure normally involves removal of the crystalline lens from the eye and replacement with an artificial lens with a single focus. After cataract surgery, patients normally have to wear glasses for some purposes, usually for close work. Patient B asks his NHS Trust to insert a multifocal lens at the time of surgery as this may reduce the need for him to wear glasses. The multifocal lens is not routinely available on the NHS. The patient is willing to pay for the cost of the multifocal lens but wants the NHS to provide the surgery involved free of charge as part of the cataract operation. The Trust informs the patient that it is not possible to pay for the multifocal lens while carrying out the surgery on the NHS as it is not possible to separate the private element from the NHS element of care. The Trust informs patient B that he can have the single focus lens free of charge on the NHS or the multifocal lens as an entirely private operation.

5. Safeguards for the NHS

5.1 To help protect the essential principles of the NHS, the following specific safeguards should also be applied when making decisions:

- NHS clinicians who carry out private care should avoid any actual or perceived conflict of interest between their NHS and private work. NHS clinicians should make all care options available to patients, including those not offered by themselves or their NHS organisation, in line with GMC guidance (*Consent: patients and doctors making decisions together*). However, NHS consultants should continue to comply with paragraph 2.9 of the Code of Conduct for Private Practice, which states that:

  In the course of their NHS duties and responsibilities consultants should not initiate discussions about providing private services for NHS patients, nor should they ask other NHS staff to initiate such discussions on their behalf.

- If a patient seeks information about private services, NHS clinicians should provide them with full and accurate information about the private services they or their NHS organisation can provide. As good practice, a record should be kept of all discussions with patients about care not routinely funded on the NHS in the patient's NHS medical notes.

- As with any other patient who changes between NHS and private status, patients who pay for private care in these circumstances should not be put at any advantage or disadvantage in relation to the NHS care they receive. They are entitled to NHS services on exactly the same basis of clinical need as any other patient.

- The patient should bear the full costs of any private services. NHS resources should never be used to subsidise the use of private care.

- There should be a clear separation of legal status, liability and accountability between NHS care and any private care that a patient receives. For example, if complications arise, it should be clear which clinician and provider is responsible for which element of care. The NHS clinical negligence schemes should not be expected to contribute towards any clinical negligence claim where responsibility lies with the clinician performing the private element of care.

- Any clinician who does not wish to carry out any element of private practice is not compelled to do so.

5.2 NHS consultants must manage any private practice, including private practice described in this guidance, as set out in the Code of Conduct for Private Practice (2004), and in the Terms and Conditions of the Consultant Contract (2003) or any future versions of these documents.

6. Use of NHS staff

6.1 Paragraphs 3.7 & 3.8 of the Code of Conduct for Private Practice continue to apply for the provision of any private care in NHS facilities:

NHS consultants may not use NHS staff for the provision of private services without the agreement of their NHS employer.

The consultant responsible for admitting a private patient to NHS facilities must ensure, in accordance with local procedures, that the responsible manager and any other staff assisting in providing services are aware of the patient's private status.

7. Good practice for clinicians

7.1 Effective communication with patients and patient representatives about treatment options should be maintained at all times. The necessary information should be provided for patients to make an informed decision about their care.

7.2 When decisions involve a child or young person, clinicians should follow the good practice guidance set out in the GMC guidance, *0-18 years: guidance for all doctors*, 2007.

7.3 When advising patients or patients' representatives on additional private care, clinicians should respect the patient's right to seek a second opinion, as set out in the GMC's Good Medical Practice guidance (2006).

7.4 NHS clinicians who have regular conversations with patients approaching the end of their life should take advantage of the training opportunities available to them on how to handle these conversations in a balanced and sensitive way.

Clinical accountability

Clinicians should be accountable for the advice that they give about unfunded treatments. The following steps should be observed:

1. A record should be kept in the patient's NHS medical notes of all discussions with patients about care not routinely funded on the NHS.
2. The patient should be given high quality written information about treatment to supplement face to face communication.
3. Exceptional funding should be sought from the PCT where appropriate.
4. The patient (or, where appropriate, the patient representative) should be given full information about the potential benefits, risks, burdens and side effects of any treatment before being asked to consent to treatment, in line with the GMC guidance, Consent: Patients and doctors making decisions together, 2008. The information provided to the patient should be recorded on the consent form.
5. Clinicians should contribute information to relevant national audits.
6. Records of discussions about unfunded treatments should be discussed at consultants' appraisals.
7. The outcomes of cases involving the administration of unfunded treatments should be discussed at multi-disciplinary clinical governance meetings.

Boards should satisfy themselves that these steps are being taken.

8. Clinical governance

8.1 Any situations where patients receive additional private care alongside NHS care should be handled with the highest standards of professional practice and clinical governance.

8.2 Transferring between private and NHS care should be carried out in a way which avoids putting patients at any unnecessary risk. Protocols should be in place to ensure effective risk management, continuity of care and coordination between NHS and private care at all times. If different clinicians are involved in each element of care, these protocols should include arrangements for the safe and effective handover of the patient between the clinician in charge of the NHS care, and the clinician in charge of the private care.

8.3 As when patients are transferred from one NHS organisation to another, it should always be clear which clinician and which organisation are responsible for the assessment of the patient, the delivery of any care and the management of any complications.

9. Charges for private care by NHS providers

9.1 Charges for any element of care provided by a consultant acting in a private capacity and using NHS facilities should be set in accordance with paragraph 3.4 of the Code of Conduct for Private Practice (2004), which states:

Where the employer has agreed that a consultant may use NHS facilities for the provision of private services:

- *the employer will determine and make such charges for the use of its services, accommodation or facilities as it considers reasonable;*
- *any charge will be collected by the employer, either from the patient or a relevant third party; and*
- *a charge will take full account of any diagnostic procedures used, the cost of any laboratory staff that have been involved and the cost of any NHS equipment that might have been used.*

9.2 There must be no subsidy by the NHS of the private element of care. The NHS should not be expected to meet any predictable costs resulting from the private element of care. The NHS should of course continue to treat any patient in an emergency.

9.3 NHS provider organisations continue to be responsible for recovering all appropriate charges from private patients.

9.4 Any monitoring or follow-up care which the NHS would have provided for the patient had he or she not had the additional private care should continue to be provided on the NHS.

9.5 The patient's agreement to the likely costs should be sought in advance of any private care being provided.

9.6 It is important that the NHS should not be seen to be profiting unreasonably from patients in these circumstances.

10. Indemnity arrangements

10.1 Indemnity provided by a NHS clinical negligence scheme will only apply to the NHS element of care. Any clinician providing private care must have private indemnity arrangements.

11. Wider policy on private practice in the NHS

11.1 Previous guidance on NHS work taking precedence over private work continues to apply. It remains the primary purpose of any NHS organisation to provide NHS care.

11.2 Any income generated under this guidance should be treated in the same way as any other income generated by the NHS acting in a private capacity.

Definitions

In this guidance:

- "Private care" refers to privately funded care (whether provided as a private service by an NHS body or by the independent sector);
- "NHS patient" refers to any person in receipt of services funded by the NHS;
- "Private patient" refers to any person in receipt of privately funded services;
- "Patient representative" refers to any person legally able to act on the behalf of the patient in question;
- A "NHS consultant" is a consultant involved in the provision of NHS care at the time in question; and
- A "NHS clinician" is a clinician involved in the provision of NHS care at the time in question.

References to any publications also apply to future versions of those publications.

The Consultation process: Next Steps

The Department of Health is keen to hear your views on this draft guidance.

Comments can be e-mailed to: additionalprivatecare@dh.gsi.gov.uk

Comments can be posted to:
Additional Private Care
Room 603
Richmond House
79 Whitehall
London
SW1A 2NS

Responses should be submitted by 27 January 2009.

Criteria for consultation

This consultation follows the 'Government Code of Practice', in particular we aim to:

- formally consult at a stage where there is scope to influence the policy outcome;
- consult for at least 12 weeks with consideration given to longer timescales where feasible and sensible;
- be clear about the consultations process in the consultation documents, what is being proposed, the scope to influence and the expected costs and benefits of the proposals;
- ensure the consultation exercise is designed to be accessible to, and clearly targeted at, those people it is intended to reach;
- keep the burden of consultation to a minimum to ensure consultations are effective and to obtain consultees' 'buy-in' to the process;
- analyse responses carefully and give clear feedback to participants following the consultation;
- ensure officials running consultations are guided in how to run an effective consultation exercise and share what they learn from the experience.

The full text of the code of practice is on the Better Regulation website at:

http://www.berr.gov.uk/whatwedo/bre/consultation-guidance/page44420.html

Comments on the consultation process itself

If you have concerns or comments which you would like to make relating specifically to the consultation process itself please contact.

Consultations Coordinator
Department of Health
3E48, Quarry House
Leeds
LS2 7UE

e-mail: consultations.co-ordinator@dh.gsi.gov.uk

Please do not send consultation responses to this address.

Confidentiality of information

We manage the information you provide in response to this consultation in accordance with the Department of Health's Information Charter (http://www.dh.gov.uk/en/FreedomOfInformation/DH_088010).

Information we receive, including personal information, may be published or disclosed in accordance with the access to information regimes (primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

The Department will process your personal data in accordance with the DPA and in most circumstances this will mean that your personal data will not be disclosed to third parties.

Summary of the consultation

A summary of the response to this consultation will be made available before or alongside any further action, such as laying legislation before Parliament, and will be placed on the Consultations website at
http://www.dh.gov.uk/en/Consultations/Responsestoconsultations/index.htm

Consultation Questions

- Is the principle of separateness clear?
- Are sufficient safeguards in place?
- Should there be more assurance mechanisms in place to ensure the guidance is followed and does not lead to any unintended consequences?