

# Social Care Responsibility for Section 117 Aftercare

Barnet, Enfield and Haringey Mental Health NHS Trust

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# Overview of Session

- Section 117 – reminder of the basics
- Legal framework for establishing the responsible social care commissioner
  - Ordinary Residence
  - Worcestershire
  - Worked Case Study
- Impact of Worcestershire of Health Responsibility for s.117
- Local Authority Responsible Commissioner Disputes

# Section 117 Aftercare – the basics

# Section 117 - The Basics

- Joint health (ICB) and social care (LA) duty
- Only applies to certain qualifying provisions of the MHA
  - Section 3 - admission for treatment
  - Section 37 - hospital order
  - Section 45A - hospital direction
  - Section 47 - prisoner transfer direction
  - Section 48 - prisoner on remand transfer direction
- Freestanding Duty – not a gateway provision
- Engaged at discharge

# Section 117 – The Basics (2)

- “Aftercare services” is defined in Section 117(6):

*"after-care services, in relation to a person, means services which have both the following purposes –*

*(i) meet a need arising from or relating to a person's mental disorder; and*

*(ii) reducing the risk of a deterioration of a person's mental condition (and accordingly, reduces the risk of the person requiring admission to a hospital again for treatment for the disorder)."*

- The following can be commissioned as aftercare services:
  - Healthcare
  - Social care
  - Employment services
  - Supported accommodation
  - Services to meet the person's social, cultural and spiritual needs
  - Services to regain or enhance the individual's skills
- S.117 accommodation must be 'accommodation plus'

# Determining Local Authority Responsibility for Section 117 Aftercare

# Local Authority Responsibility

- Historical position pre Care Act (1 April 2015) = responsibility based on 'residence' rather than ordinary residence.
- Current position = ordinary residence under section 117(3), fall-back on residence and then area of discharge
  - In this **section** “the clinical commissioning group or Local Health Board” means the clinical commissioning group or Local Health Board, and “the local social services authority” means the local social services authority
  - (a) if, **immediately before being detained**, the person concerned was ordinarily resident in England, for **the area in England in which he was ordinarily resident;**
  - (b) if, immediately before being detained, the person concerned was ordinarily resident in Wales, for the area in Wales in which he was ordinarily resident; or
  - (c) in any other case for the area in which the person concerned is resident or to which he is sent on discharge by the hospital in which he was detained.



# Ordinary Residence 1 – The Shah Test and Element 1 (Abode)

- Shah v London Borough of Barnett (1983):

*a man's **abode** in a particular place or country which he has adopted **voluntarily** and for **settled purposes** as part of the regular order of his life for the time being, **whether of long or short duration***

- In majority of cases it will be obvious where an individual is ordinarily resident i.e. where they live.
- The issue of where an individual is ordinarily resident will usually arise when they spend their time in more than one area or have moved between areas.

# Ordinary Residence 2 – Element 2 (Settled Purpose) and Factors to Consider

- Consider the following non-determinative factors:
  - In which geographic area is the individual's residence or home?
  - Is there anything to indicate that the individual is not physically present in the area voluntarily?
  - What is the individual's purpose for being physically present in the area?
  - Does the individual have any connections to the area? For example, family, work, study etc.
  - Is the individual's housing situation stable and settled? For example, home owner/tenancy agreement.
  - How long has the individual been physically present in the area for?

# Ordinary Residence 3 - Other Key Points

- Ordinary residence can be acquired as soon as the person moves to an area and there is no minimum period in which a person has to be living in a particular place for them to be considered ordinarily resident there.
- A person can have ordinary residence in one area even if they own or have an interest in property in another area. However, it is not possible for a person to have more than one ordinary residence. If a person genuinely divides their time between two homes it would be necessary to establish to which of the two homes the person has a stronger link.
- Ordinary residence is not affected by the individual taking a temporary absence from the area e.g. for a holiday.
- It should only be in rare circumstances that it is concluded that an individual is of no settled residence. A person of no settled residence is considered ordinarily resident in the area in which they are physically present.

# Point of clarification

- *To confirm, the deeming provisions in the Care Act 2014 and Children Act 1989 do not apply to section 117 aftercare*

# Ordinary Residence 4 – Element 3 (Voluntarily Adopted)

- All decisions relating to mental capacity should be decided with reference to the Mental Capacity Act 2005.
- Where it is determined that a person lacks the capacity to decide where to live and uncertainties arise about their place of ordinary residence, case law and the Guidance indicate that the ICB should disregard the fact that the adult by reason of their lack of capacity is not living in the place voluntarily.
- The ICB should look at the place of the person's physical presence, their purpose for living there, their connection with the area, the duration of their residence and the person's views, wishes and feelings (insofar as these are ascertainable and relevant) to establish whether there is a settled purpose, whether of long or short duration.

**Determining ordinary residence where P has  
had more than one detention –  
Worcestershire**

# *R (Hertfordshire CC) v LB Hammersmith and Fulham* [2011] EWCA Civ 77

- Court of Appeal case pre Care Act 2014.
- Dispute between H&F and Hertfordshire as to who was responsible for meeting JM's section 117 aftercare.
- The court looked at the relationship between section 21 National Assistance Act 1948 and section 117 MHA 1983.
- The court refused to read the term "resident" in section 117 to mean "ordinarily resident", a term used in the National Assistance Act 1948 that implied a degree of voluntary placement.
- Section 117 of the MHA is a free-standing duty and cannot read across from other statutes into it.

# *(Cornwall Council) v SSH* [2015] UKSC 46

- Supreme Court case dealing with NAA 1948 and CA 1989.
- Not a case dealing with s.117 aftercare in MHA.
- Facts: P = 18. P had severe LD and lacked capacity to decide where to live. Until 4 lived with parents in **Wiltshire**. From age 4-18, lived with foster parents in **South Gloucestershire** but maintained contact with parents who lived in **Cornwall**. At 18 moved to care home in Somerset area.

**Key questions: Which LA responsible for care? Where was P ordinarily resident before placement to care home?**



# *(Cornwall Council) v SSH* [2015] UKSC 46

1. **High Court** = Cornwall (where parents lived and often visited them)
2. **Court of Appeal** = South Glos (as where lived for long time with foster parents)
3. **Supreme Court** = Wiltshire for fiscal and administrative purposes

**Decision made on policy grounds – South Glos fitted language of statute but encouraged OOA placements.**

# Care and Support Statutory Guidance

19.63 The duty on local authorities to commission or provide mental health after-care **rests with the local authority for the area in which the person concerned was ordinarily resident immediately before they were detained** under the 1983 Act, even if the person becomes ordinarily resident in another area after leaving hospital.

19.64 Although any change in the patient's ordinary residence after discharge will affect the local authority responsible for their social care services, it will not affect the local authority responsible for commissioning the patient's section 117 after-care. **Under section 117 of the 1983 Act, as amended by the Care Act 2014, if a person is ordinarily resident in local authority area (A) immediately before detention under the 1983 Act, and moves on discharge to local authority area (B) and moves again to local authority area (C), local authority (A) will remain responsible for providing or commissioning their after-care. However, if the patient, having become ordinarily resident after discharge in local authority area (B) or (C), is subsequently detained in hospital for treatment again, the local authority in whose area the person was ordinarily resident immediately before their subsequent admission (local authority (B) or (C)) will be responsible for their after-care when they are discharged from hospital**

*R (Worcestershire County Council) v Secretary of State for Health and Social Care* [2021] EWCA Civ 1957

**FACTS:**

- JG living in Worcestershire
- Detained under section 3 of the MHA 1983
- On discharge JG received accommodation in Swindon funded by Worcestershire CCG (placed into Swindon by Worcestershire)
- JG re-detained under section 3

**Key question: which LA is responsible for section 117 aftercare on discharge?**

# *Worcestershire* – History of Proceedings

- SoS 1<sup>st</sup> decision = Swindon (in line with guidance)
- SoS 2<sup>nd</sup> decision = Worcestershire (SoS declared guidance flawed)
- Judicially Reviewed by Swindon
- High Court: SoS put forward 3 arguments why Worcestershire
  - (i) Cornwall case – fiscal and administrative purposes
  - (ii) Section 117 requires you to look to OR before first detention
  - (iii) Section 117 duty runs until have consulted decision to dischargeAll dismissed by Judge

# *Worcestershire – Court of Appeal*

The SoS put forward 2 grounds of appeal:

1. The High Court had wrongly decided that JG was ordinarily resident in Swindon.
2. The High Court was wrong to determine that Worcestershire's duty to provide aftercare services ceased by operation of the law at the moment JG was released from her second period of detention

Court dealt with ground 2 first then 1.

# Worcestershire – Court of Appeal

## Judgment

- Focus on Section 117(2) that duty continues to run until authorities satisfied no longer need for aftercare

*“The duty rested with Worcestershire until it came to an end either on the facts or as a matter of law. There is nothing in s.117 that could permit this court to conclude that, absent any decision by Worcestershire under Section 117(2), the fact JG had become ordinarily resident in Swindon immediately prior to the second period of detention somehow gave rise to a competition, and switched the relevant duty from Worcestershire to Swindon.”*

- Described as the common sense approach as ensures continuity of care and care planning.

# Worcestershire – Supreme Court

Worcestershire County Council put forward two grounds of appeal:

- a) the duty to provide section 117 aftercare services for JG ended upon her being discharged from her second qualifying detention under the MHA 1983; or in the alternative
- b) the section 117 aftercare duty ended when JG became re-detained under a qualifying detention under the MHA 1983.

The SoS opposed these grounds and brought a cross-appeal and argued that the fiscal and administrative policy considerations set out in the *Cornwall* case should be read across to section 117 aftercare. This would mean that JG was not ordinarily resident in Swindon immediately prior to her second qualifying detention under the MHA 1983 – put simply, Worcestershire would retain responsibility as the placing authority

# Worcestershire – Supreme Court

- The Supreme Court held that the duty under section 117(2) of the MHA 1983 is to provide section 117 aftercare services “*for any person to whom this section applies.*” The Supreme Court concluded that this duty would cease when:
  - a) the responsible bodies made a decision that the person no longer had a need for section 117 aftercare; **and/or**
  - b) when the person ceases to be a person to whom section 117(2) of the MHA 1983 applies.
- Where a person becomes re-detained under a qualifying section of the MHA 1983 they no longer fall within the categories of persons falling within the scope of section 117(2) and consequently cease to be person to whom this section applies.
- In a nutshell, the Supreme Court held that the duty to provide section 117 aftercare automatically ceases if and when the person is re-detained under a qualifying provision of the MHA 1983 or where the responsible bodies make a decision that the individual no longer has a need for section 117 aftercare.



# Worcestershire – Supreme Court

## What about ordinary residence?

The Supreme Court went on to consider the SoS cross-appeal. This ground of appeal was rejected for the following reasons –

- a) the *Cornwall* case concerned the deeming provisions of the NAA 1948, CA 1989 and CA 2014 and there are no deeming provisions in the MHA 1983;
- b) the *Hertfordshire* case confirmed that section 117 aftercare is a standalone duty and so the deeming provisions cannot be read across to the MHA 1983; and
- c) the amendments to the MHA 1983 in 2014 did no more than change the test from one of residence to ordinary residence.

Therefore ordinary residence under the MHA 1983 should be given its ordinary meaning as set out in *Shah*.

# *Worcestershire – Supreme Court*

## **Ordinary residence (continued)**

When considering the application of the *Shah* test, the Supreme Court held that where a person lacks capacity then an adopted test needs to be applied and the state of mind of the decision maker needed to be considered instead.

This suggests that where a best interest decision regarding residence has been validly made, the placement will have been ‘adopted voluntarily’ for the purpose of the *Shah* test.

# Worcestershire – What to Take Away

- Local authority responsibility will come to an end if a person who is eligible / in receipt of section 117 aftercare is re-detained under a qualifying detention of the MHA 1983 **or** if the responsible bodies for section 117 aftercare make a decision that a person no longer has a need for section 117 aftercare.
- Ordinary residence should be given its ordinary meaning as set out in *Shah*. Where a P lacks capacity, the person will be deemed to have adopted their placement voluntarily where there is a valid best interest decision.
- So all in all, local authority responsibility is less stickier than what it was but we anticipate that a number of local authorities may now seek to transfer their section 117 responsibility to another authority.

# Case Study

- James suffers from Bi-Polar Disorder and grew up in Cornwall. When James turned 18 he went to university in Exeter, Devon although he spent his summer holidays at home. Whilst at university, James' mental health declined and he was detained under section 3 of the Mental Health Act 1983 in 2021.
- James was discharged from the Mental Health Act later that year with a package of section 117 aftercare.
- James graduated from university and moved to Bristol for work in September 2022.
- Shortly after moving to Bristol, James was re-detained under the Mental Health Act 1983.
- **Where was James ordinarily resident before his first detention?**
- **Would the responsible LA for section 117 aftercare be different following James' second detention?**

# Responsible Commissioner Disputes

# Commissioner Disputes – Section 117 Responsibility

- Key Principles:
  - A patient's care should never be prejudiced as a result of a commissioner dispute
    - Interim funding should be agreed
    - Agreement as to who arranges the services potential for human rights claims if a discharge is delayed due to section 117 services not being arranged in a timely manner
  - Prompt steps should be taken to initiate an agreed dispute process

# Local Authority Disputes 1

- If there is a dispute about where a person was ordinarily resident, S117(4) requires:
  - LA's to resolve the dispute in line with Section 40 of the Care Act 2014.
- Under section 40 of the Care Act 2014, any dispute concerning where an adult is ordinarily resident is to be determined by the Secretary of State. However, before a dispute is referred to the Secretary of State, specific steps must be taken by the lead authority.
- Care and Support (Disputes Between Local Authorities) Regulations 2014 – made under powers conferred by Section 40(4) Care Act 2014. Set out the procedures to be followed when disputes arise in respect of a person's ordinary residence (including S117).

## Local Authority Disputes 2 – Responsibility for meeting Needs whilst a dispute is resolved

- The Dispute Regulations make it clear that local authorities must not allow the existence of a dispute to adversely affect meeting the needs of the adult concerned.
- LA meeting needs on the date the dispute arises must continue to meet needs until the dispute is resolved.
- If no LA meeting needs:
  - LA in whose area the adult is living
  - If the adult needing care is not living in the area of any LA, the LA in whose area that adult is present



# Local Authority Disputes 3 – Steps to be taken prior to a referral of a dispute

- Identify the lead authority:
  - the lead authority is the local authority which (a) is meeting the needs of the adult to whom the dispute relates at the date on which the dispute arises; or (b) if no local authority is meeting those needs at that date, is required to do so in accordance with regulation 2(3) of the Dispute Regulations
- Lead Authority responsibilities:
  - Identify all authorities concerned in the dispute and co-ordinate discussions in an attempt to resolve the dispute
  - co-ordinate the discharge, by the authorities, of their duties under this regulation
  - take steps to obtain from the other authorities information which may be relevant to the determination of the dispute
  - disclose that information to the other authorities
  - disclose to the other authorities any information the lead authority itself holds that
- Each of the authorities must:
  - engage in a constructive dialogue with the other authorities, with a view to bringing about the speedy resolution of the dispute
  - comply, without delay, with any reasonable request for relevant information made by the lead authority
  - keep the other authorities informed of any developments which appear to it to be relevant to the determination of the dispute may help to resolve the dispute.

# Local Authority Disputes 3 – Referral to Secretary of State

- Lead Authority to refer the dispute to the SoS if not resolved within 4 months of the date on which it arose
- Referral to contain a Statement of Facts (agreed by all authorities) which contains specified information and copies of all correspondence between the authorities relating to the dispute.
- Submissions usually then required within 14 days.

# Impact of Worcestershire

- Previous stay on new determinations on referrals that relate to S117 pending Worcestershire
- Advice was still to refer dispute within 4 months - DHSC would consider on case by case basis and decide how to treat the referral
- Stay has now been lifted (since October 2023).

# Health Responsibility for Section 117 Aftercare

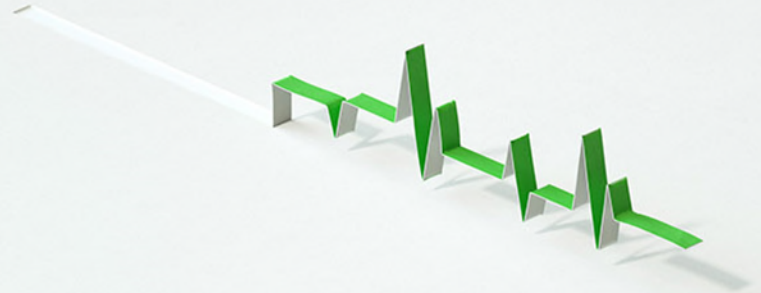
By Ruth Atkinson-Wilks



# Overview of Session

- Legal framework for establishing the responsible health commissioner
- Effect of Worcestershire on health responsibility
- Worked case study
- Persons registered with Homeless Health Care Teams
- Persons with NRPF

# Establishing the responsible health commissioner (ICB) for s.117 aftercare



# Legal Framework – Before

- Responsibility set out in s.117(3) MHA
- Section 117(3) states the ICB responsible for aftercare services is the ICB where P was ordinarily resident immediately prior to detention, or, if no ordinary residence can be discerned, the ICB where the person was resident, or where they are sent on discharge.

# Legal Framework – Now

[The National Health Service \(Integrated Care Boards: Responsibilities\) Regulations 2022 \(legislation.gov.uk\)](#)

- Into force on 1 July 2022
- Set out new rules as to how the responsible health commissioner for section 117 aftercare is to be determined.
- Override statutory position in s.117 MHA so forget everything that went before (mostly!)



# Core Responsibility in the 2022 Regulations

- 2022 Regulations refer to an ICB having 'core responsibility' for people
- Not defined in the 2022 Regulations
- Rules are contained in Who Pays? Guidance issued by NHS England

**An ICB has core responsibility for people who are registered with a GP practice that is associated with that ICB, and for people who are not so registered, but who are usually resident in the ICB's geographic area.**

- Core responsibility means that the ICB is responsible both for commissioning and paying for relevant services.

# Temporary GP registration?

- Who Pays guidance is clear that

*“Where an individual is registered with a GP practice which is associated with ICB A, but has then been accepted as a temporary resident by a GP practice which is associated with ICB B, the individual becomes the core responsibility of ICB B for that period of temporary residence.”*

So core responsibility will follow a temporary GP registration for the period of that registration.

# Three groups of patient cohort

<b>Category 1</b>	Individuals who were discharged from section 117 aftercare before 1 July 2022 or individuals who are detained for the first time on or after 1 July 2022
<b>Category 2</b>	Patients detained under a qualifying provision of the MHA 1983 on or before 1 July 2022 (i.e. the application to detain the patient was made before 1 July 2022 and the patient remains in hospital as at 1 July 2022)
<b>Category 3</b>	Patients who (a) are eligible / in receipt of section 117 aftercare on or before 1 July 2022 following a previous detention under the MHA 1983 and have not been formally discharged from section 117 aftercare and (b) patients who are in receipt of section 117 aftercare as at 1 July 2022 and who are then detained again after 1 July 2022.

## **General Rule for Category 1: discharged from s.117 aftercare before 1 July 2022 or detained for the first time on or after 1 July 2022**

Reg. 7(2): s.117 responsibility will fall to ICB that has responsibility for the inpatient placement.

### Which ICB has inpatient placement responsibility?

Reg. 6(3): ICB with core responsibility at time relevant application for detention was made

**s.117 responsibility falls to ICB where registered with a GP at date of application for detention (or if not registered, ICB where usually resident)**

## Category 1 Example

*Fred was detained under Section 3 MHA between January 2013 and March 2015. Upon leaving hospital he received s.117 aftercare until August 2018, when his s.117 aftercare was discharged. On 4 January 2023, Fred's mental health begins to deteriorate and an application is made for his detention under Section 3. He is now ready for discharge and the LA and ICB are undertaking a joint s.117 assessment.*

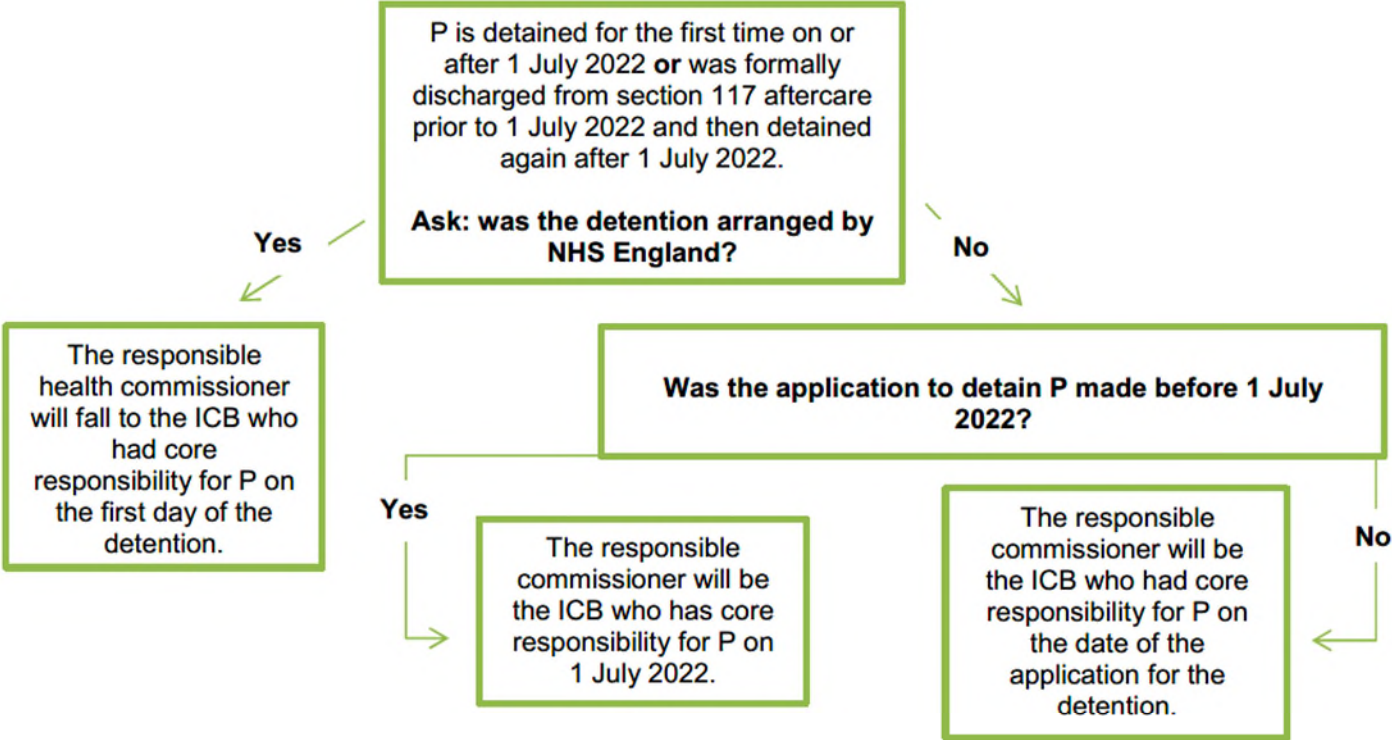
*Fred has always lived in area of ICB B but is registered with a GP in ICB A. Which ICB is responsible for his s.117 aftercare?*

- Fred falls within category 1 – he is newly eligible for s.117 aftercare as he had been discharged from aftercare before 1 July 2022 and subsequently detained after 1 July 2022.
- **RULE: s.117 responsibility falls to ICB where registered with a GP at date of application for detention (or if not registered, ICB where usually resident)**
- Fred was registered with a GP in ICB A on 4 January 2023 (date application made) therefore ICB A is responsible for his s.117 aftercare.
- Note ICB A are also responsible for the inpatient placement

## Category 1: Important Things to Note

- If detained for first time on 1 July 2022 but application for detention made before 1 July 2022 responsibility for the inpatient placement (and section 117 aftercare) will be the ICB who has core responsibility for the patient on 1 July 2022.
- If relevant detention arranged by NHS England, s.117 responsibility falls to ICB with core responsibility for patient on **first day** of that detention (Reg 7(5))

# Category 1 Flowchart



## **General Rule for Category 2: detained before 1 July 2022 and the patient remains in hospital as at 1 July 2022**

Reg. 7(2): s.117 responsibility will fall to ICB that has responsibility for the inpatient placement.

Which ICB has inpatient placement responsibility?

Reg. 6(2): ICB with core responsibility at 1 July 2022

**s.117 responsibility falls to ICB where registered with a GP on 1 July 2022 (or if not registered, ICB where usually resident)**



## Category 2 Example

*Lucine was detained under Section 3 MHA on 3 March 2022. At the time of her detention, Lucine was registered with a GP in the area of CCG C. On 5 June 2022 Lucine was transferred under Section 3 to a hospital in CCG D and registered with a GP there on the same day. Lucine is now ready for discharge and s.117 discharge planning is taking place. Which ICB is responsible for his s.117 aftercare?*

- Lucine falls within category 2 – she was detained prior to 1 July 2022 and remained detained on 1 July 2022.
- **RULE: s.117 responsibility will fall to the ICB where the patient was registered with a GP on 1 July 2022 (or if not registered, ICB where usually resident)**
- Lucine was registered with a GP in CCG D on 1 July 2022 therefore ICB D is responsible for her s.117 aftercare.
- Note ICB D would have assumed responsibility for the inpatient placement on 1 July 2022.

## Category 2: Important Things to Note

- When was application made? Category 2 applies also if detained on 1 July 2022 but application for detention made before 1 July 2022
- If relevant detention arranged by NHS England, s.117 responsibility falls to ICB with core responsibility for patient from the date of **discharge** from that detention (Reg 7(4))
- If the person was detained or in receipt of aftercare on 1 September 2020...

**BEWARE OF THE WHO PAYS GUIDANCE  
TRANSITIONAL ARRANGEMENTS**

## Category 2: Who Pays Transitional Arrangements

Position on 1 September 2020	Transitional arrangement
<b>P is in receipt of section 117 funding in part or wholly by a CCG (as it was then)</b>	The CCG (and its successor ICB) funding section 117 aftercare at 1 September 2020 retains responsibility until P is formally discharged from section 117 aftercare.
<b>P is detained in hospital funded by a CCG (as it was then)</b>	The CCG (and its successor ICB) funding the detention on 1 September 2020 will be responsible for funding the full period of detention, section 117 aftercare and any subsequent detentions or voluntary admissions until P is formally discharged from section 117 aftercare.
<b>P is detained in hospital funded by NHS England</b>	<p>The originating CCG (and its successor ICB) will be financially responsible for section 117 aftercare and any further detentions in a CCG / ICB commissioned hospital until P is formally discharged from section 117 aftercare.</p> <p>*originating CCG for purpose of transitional provisions is determined by where a person was GP registered at the time of their qualifying MHA detention.</p>

## Category 2: Who Pays Transitional Arrangements

### What does this mean?

- Financial and commissioning responsibility continues to be split for those persons falling within the transitional arrangements (i.e. those detained / receiving aftercare on 1 September 2020)
- Financial responsibility will sit with the CCG / ICB identified by the Who Pays Guidance until the patient is formally discharged from section 117 aftercare
- Commissioning responsibility will follow the Regulations

## Category 2 Example where Transitional Provisions Apply

*Mo has been detained under Section 3 MHA since 7 April 2020. This inpatient stay was funded by CCG A as at the time of his detention he was registered with a GP in CCG A. In October 2021, Mo transfers hospitals and is registered with a GP in CCG B. Mo is now ready for discharge and will be receiving a package of s.117 aftercare in the community. Which ICB is responsible for his s.117 aftercare?*

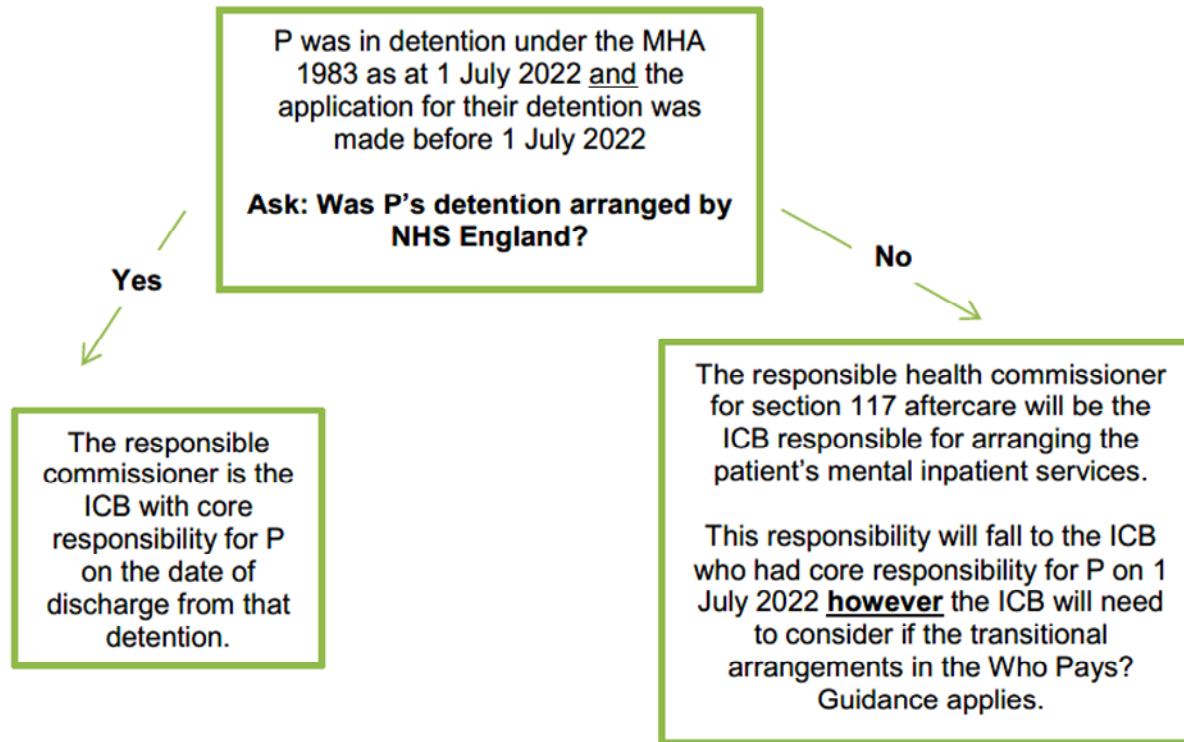
Mo falls within category 2 – he was detained prior to 1 July 2022 and remained detained on 1 July 2022.

- **RULE: s.117 responsibility will fall to the ICB where the patient was registered with a GP on 1 July 2022 (or if not registered, ICB where usually resident)**
- Mo was registered with a GP in ICB B on 1 July 2022 therefore, under the Regs, ICB B is responsible for his s.117 aftercare. ICB B has commissioning responsibility

### **BUT**

- Transitional Provisions apply – Mo was detained under Section 3 MHA on 1 September 2020 therefore the CCG (and its successor ICB) funding the detention on 1 September 2020 will be responsible for funding the full period of detention, s.117 aftercare and any subsequent detentions or voluntary admissions until P is formally discharged from s.117 aftercare.
- ICB A was funding the inpatient placement on 1 September 2020 so ICB A remains financially responsible for funding Mo's inpatient placement and s.117 aftercare (until Mo is discharged from s.117).

## Category 2 Flowchart



## **General Rule for Category 3: (i) in receipt of or eligible for s.117 aftercare on 1 July 2022 (but not detained) or as (i) but re-detained after 1 July 2022**

- If in receipt of or eligible for s.117 aftercare on 1 July 2022 (but not detained)

**Reg 7(3): ongoing s.117 responsibility will fall to ICB where registered with a GP on 1 July 2022 (or if not registered, ICB where usually resident)**

- If in receipt of or eligible for s.117 aftercare on 1 July 2022 (but not detained) and then re-detained after 1 July 2022
  - Reg. 7(2): s.117 responsibility will fall to ICB that has responsibility for the inpatient placement.
  - Reg 6(4): Responsible health commissioner for new inpatient detention will be the ICB that had core responsibility on 1 July 2022

**Inpatient responsibility for the new detention and s.117 responsibility on discharge falls to ICB where registered with a GP on 1 July 2022 (or if not registered, ICB where usually resident)**

## Category 2 Example

*Alina was detained under Section 3 MHA between 3 December 2020 and 1 November 2021. Upon discharge she was provided with a s.117 package of care in the community funded by CCG X. On 1 June 2022 she registers with a GP in ICB Y. She has not been discharged from her s.117 aftercare. On 17 July 2023 she is detained again under Section 3 MHA. Which ICB is responsible for her inpatient placement and s.117 aftercare upon discharge?*

- Alina falls within category 3 – she was in receipt of s.117 aftercare on 1 July 2022.
  - **RULE: s.117 responsibility falls to ICB where registered with a GP on 1 July 2022 (or if not registered, ICB where usually resident)**
- Alina was registered with a GP in ICB Y on 1 July 2022 therefore ICB Y technically became responsible for her s.117 package on 1 July 2022.
- ICB Y is also responsible for her new inpatient placement and s.117 aftercare.



## Category 3: Important Things to Note

- If the person was detained or in receipt of aftercare on 1 September 2020...

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TRANSITIONAL ARRANGEMENTS**

## Category 3 Example: Applying the Transitional Provisions

*George has been receiving a package of s.117 aftercare in a supported living placement since 1 January 2018 funded by ICB F. He has moved placements several times which has led to him being registered with different GP's. Between 1 January 2018 and 1 December 2020 he was registered with a GP in CCG F. Between 1 December 2020 and 4 July 2022, he was registered with a GP in CCG/ICB G. Since 4 July 2022 he has been registered with a GP in ICB H. Last month he was re-detained under Section 3 MHA. Which ICB is responsible for his inpatient placement and s.117 aftercare?*

George falls within category 3 – he was in receipt of s.117 aftercare on 1 July 2022

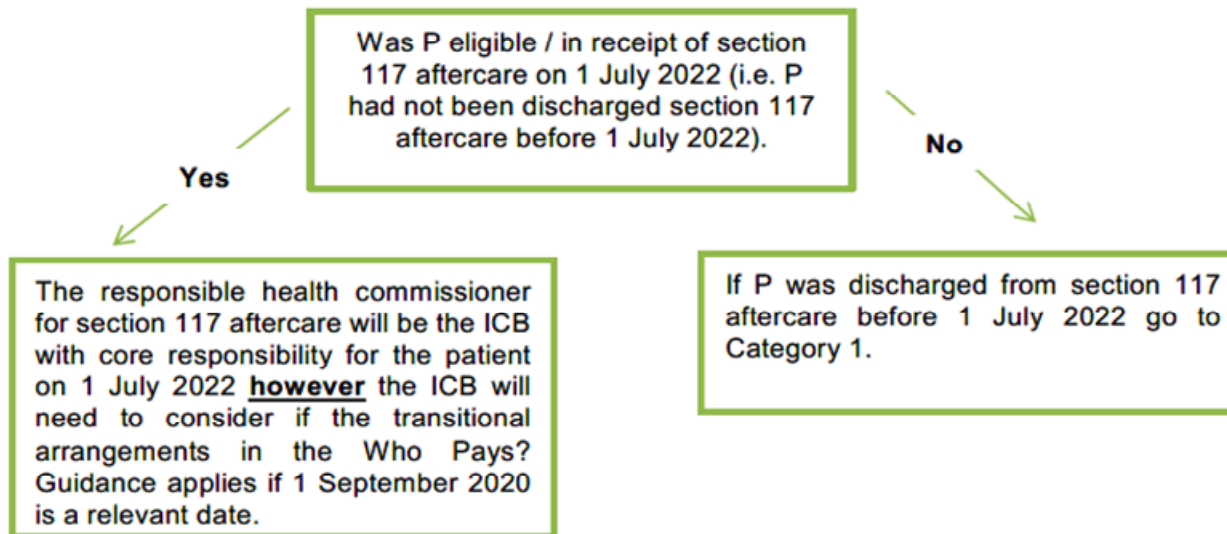
**RULE: s.117 responsibility falls to ICB where registered with a GP on 1 July 2022 (or if not registered, ICB where usually resident)**

- George was registered with a GP in ICB G on 1 July 2022 therefore, under the Regs, ICB G is responsible for his inpatient placement and s.117 aftercare. ICB G has commissioning responsibility

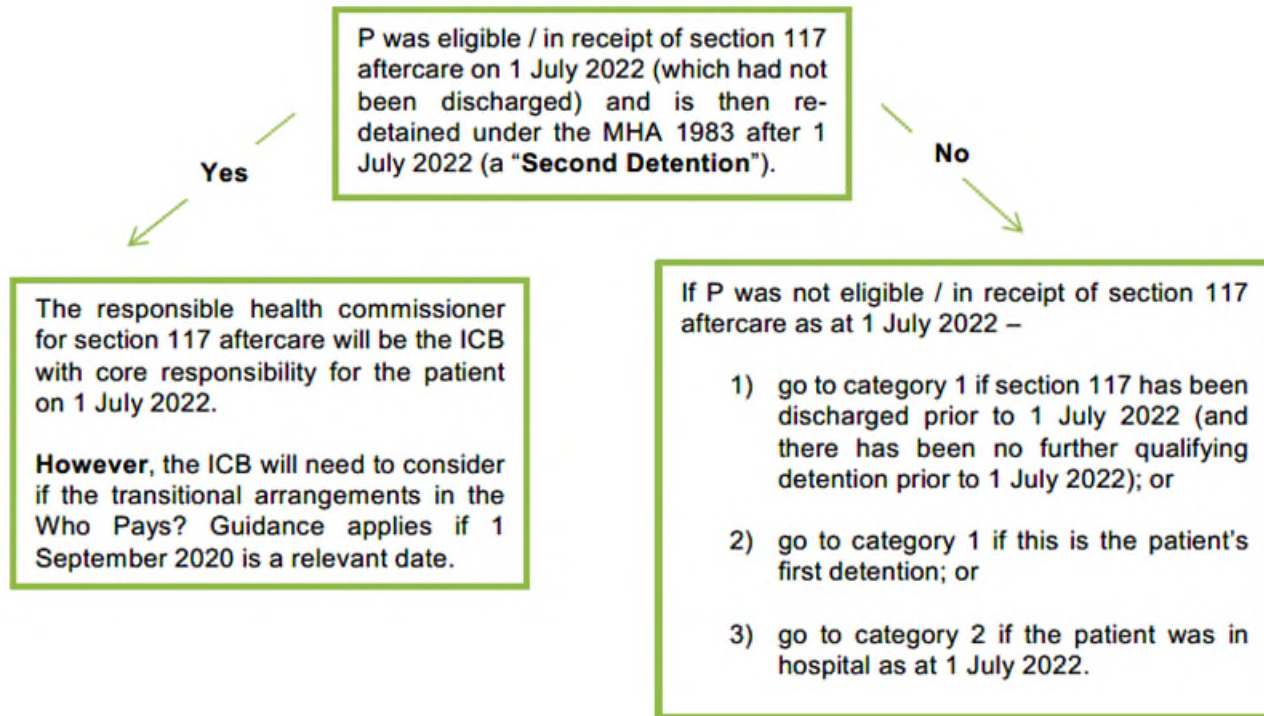
### **BUT**

- Transitional Provisions apply – George was in receipt of s.117 on 1 September 2020 therefore the the CCG (and its successor ICB) funding s.117 aftercare at 1 September 2020 retains responsibility until George is formally discharged from section 117 aftercare.
- ICB F was funding the inpatient placement on 1 September 2020 so ICB F remains financially responsible for funding George's inpatient placement and s.117 aftercare (until George is discharged from s.117).

## Category 3 Flowchart



## Category 3 Flowchart



# Key Questions

1. Was P in detention under the MHA on 1 July 2022 and detention started before 1 July 2022?

If yes Category 2. If no go to Q2.

2. Was P's first detention under the MHA on or after 1 July 2022?

If yes, Category 1, if no, go to Q3?

3. Was P in receipt of / eligible for s.117 aftercare on 1 July 2022 following a previous detention?

If yes, Category 3. If no, no responsibility to consider.

	Inpatient responsibility for MH bed	s.117 responsibility	NHS England	Transitional Provisions Apply for Funding Responsibility?
<b>Category 1</b>	ICB where registered with a GP when application for detention made	ICB where registered with a GP when application for detention made	If relevant detention arranged by NHS England, s.117 responsibility falls to ICB with core responsibility for patient on <u>first day</u> of that detention	No
<b>Category 2</b>	ICB where registered with a GP on 1 July 2022 (or if not a GP on 1 July 2022 (or if registered, ICB where usually resident)	ICB where registered with a GP on 1 July 2022 (or if not registered, ICB where usually resident)	If relevant detention arranged by NHS England, s.117 responsibility falls to ICB with core responsibility for patient from the date of <u>discharge</u> from that detention	Yes if person was detained or in receipt of s.117 aftercare on 1 September 2020
<b>Category 3</b>	ICB where registered with a GP on 1 July 2022 (or if not a GP on 1 July 2022 (or if registered, ICB where usually resident)	ICB where registered with a GP on 1 July 2022 (or if not registered, ICB where usually resident). Note if re-detained, will remain with this ICB	If new detention arranged by NHS England, s.117 responsibility falls to ICB with core responsibility for patient on <u>first day</u> of that detention?	Yes if person was detained or in receipt of s.117 aftercare on 1 September 2020

# Point of clarification

- *The effect of the regulations for category 2 and category 3 patients does mean that responsibility for section 117 aftercare may have shifted to another ICB on 1 July 2022 by operation of law. Therefore, if there are patients placed in the ICB's area who became GP registered with a practice associated with the ICB on 1 July 2022, the ICB may become responsible for section 117 aftercare for those patients.*
- *It should be noted that these rules only impact patients eligible for section 117 aftercare and there are different rules / exceptions which may apply to patients in receipt of NHS funding, for example CHC, which may mean that the placing ICB retains responsibility.*

# What about Worcestershire?





# Local Authority Responsibility

- The *Worcestershire* case has recently been determined by the Supreme Court
- Local authority responsibility for section 117 aftercare will reset with re-detention (under a qualifying provision) and will be determined by where the person was “ordinarily resident” immediately before the most recent detention.
- Appears SC decision means health and social care position is no longer aligned.
- OR does a second detention also bring health responsibility to an end?
- NHS England Guidance recently published confirms that a second detention does not bring an end to the s.117 duty of the originating ICB.

# The effect of the Worcestershire decision on section 117 aftercare duty

- In the case of the ICB Responsibilities Regulations, the continuing obligation of the originating ICB derives from the regulations, not section 117(3) itself. In particular, regulations 5 and 7 have the effect that if an ICB has core responsibility for a patient individual when a “relevant application” is made for detention, then it retains responsibility for commissioning mental health services during detention and aftercare even if it would otherwise not be responsible (eg because the patient had moved out of area). A relevant application is an application made either before or after an “exclusion period” beginning with detention and ending with a person’s “next discharge from aftercare services”. **So, unlike the local authority position in Worcestershire, a second detention made before the person is actively discharged from after care does not bring to end the responsibility of the originating ICB.**
- Similarly, where under the transitional provisions in regulation 6, an ICB had core responsibility for a person who was detained or in aftercare on 1 July 2022, the responsibility for mental health services continues during any second or subsequent detention and related aftercare, and is not brought to end by a second or subsequent detention, only by an active discharge from aftercare.

# Homelessness and Responsibility for Aftercare



# Establishing responsibility when a person is homeless

- Local Authority responsibility depends on ordinary residence
- Health responsibility depends on core responsibility (GP registration)
- Persons who are homeless may be registered with a homeless healthcare team as opposed to a GP practice.
- Rule 10.2 of Who Pays applies
- Depends on whether the homeless healthcare team is linked with an ICB.
- Will need to check up to date “epracur” file at [GP and GP practice related data - NHS Digital](#)
- If homeless healthcare team is not linked with an ICB and not registered with a GP, will depend on “usual residence.”

# Example

- Adele was born and raised in Birmingham. She had two admissions in Birmingham (s2 and informal).
- Adele gets into trouble with the police and moves to Leeds to avoid arrest
- Adele registers with a homeless healthcare team in Leeds and stays in homeless hostel
- Adele is shortly arrested and admitted to Leeds MH bed from prison on s47 in 2021
- On discharge in 2023, Adele leaves Leeds and continues to reside in Birmingham.
- Adele is re-admitted into Birmingham bed – Birmingham want to re-charge Leeds.

# Working Out

- LA Responsibility – Ordinary Residence
  - Worcestershire reset with second detention = Birmingham
- Health Responsibility – Category 2 as detained on 1 July 2022.
  - Where registered with GP on 1 July 2022 or if not registered, where usually resident.
  - Was Leeds health care team a GP linked to ICB? If yes, Leeds will retain responsibility and recharge appropriate. If not, was Adele registered with a GP elsewhere? If not, usual residence applies (which would depend on Adele's perception of where she was living – fact she was living in hostel does not prevent her from being usually resident in Leeds).

# Case Studies



# A stepwise approach

1. Chronology is key
  - List all previous detention / discharge dates and types of section
  - List any changes in GP registration (obtain spine)
  
2. Local Authority Responsibility
  
3. Health Responsibility for s.117 aftercare
  - Which category is person in?
  - Apply rule for category
  - Be wary of detentions involving NHS England
  - Do transitional provisions apply?



# CASE STUDY 1

- Maria suffers from Autism and Bi-Polar Disorder. She has a long history of mental health detentions.
- Between 2016 and 2018, Maria was living as homeless in the London area. Maria was seen on two occasions by the homeless healthcare team in London. Maria was not registered with a GP.
- In May 2018, Maria was detained under the MHA in Liverpool. After 3 months, she was discharged from hospital to a supported living placement in Liverpool with a package of aftercare. She was registered with a local GP in Liverpool.
- In July 2021, Maria stopped taking her medication and her mental health deteriorated. She was detained under section 3 of the Mental Health Act at an ICB commissioned mental health unit in Liverpool but was soon transferred under section to a hospital in Manchester. She was registered with a GP in Manchester in August 2021.
- Maria is now ready for discharge and s.117 planning is taking place.

# CASE STUDY 2

- You work at **Brighton ICB**. You receive a call from your counterpart at the local authority who informs you that they have been made aware of a vulnerable adult named Ted. On receiving more information you learn the following:-
- Ted has schizophrenia and PTSD and was detained under section 3 in July 2020 (aged 19) in London where he was living with his mother.
- Ted was discharged to a supported living placement under DOLS with a package of s.117 aftercare in Kent in May 2021. Ted registered with a local GP in Kent.
- The placement quickly broke down and in August 2021, Ted was re-detained under section 3 to a hospital in Kent. Ted remained in hospital until June 2022 when he was discharged to a supported living placement in Brighton with a s.117 package of care
- Ted's mental health improved in late 2022 and his package of aftercare ceased but it was never formally discharged.
- In May 2023, Ted moved to Blackpool with his boyfriend. Ted registered with a local GP.
- In the last week, he experienced worsening mental health and came to the attention of the local authority in Blackpool who undertook a Care Act assessment. In gathering information for this assessment they realised that Ted was eligible for section 117 aftercare and they have contacted you for your view.

# Thank you

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The information in this presentation is general in nature and is not intended to apply to specific circumstances.  
It should not therefore be regarded as constituting legal advice.