

Patient Choice Guidance

This Guidance outlines how Commissioners, Providers and Primary Care referrers can meet the statutory, contractual and policy obligations which enable patients' rights to choice, as set out in the NHS Constitution for England.

<https://www.england.nhs.uk/long-read/patient-choice-guidance/>

Publication

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Introduction

Background

The NHS is committed to giving patients greater choice and control over how they receive their healthcare, and is working hard to improve opportunities for patients to make informed choices about their care that best suit their needs and circumstances.

[The Health and Care Act 2022](#) (the 2022 Act) amended the [National Health Service Act 2006](#) (the 2006 Act) putting in place legislative changes that support this, including the creation of integrated care boards (ICBs) and integrated care systems (ICSs), and the introduction of the new [Provider Selection Regime](#) (the PSR).

In addition, NHS England has assumed responsibility for the regulation of ICBs in relation to patient choice*.

*Under the National Health Service Act 2006 ('the NHS Act 2006') and the Health and Social Care Act 2012 ('the 2012 Act'), as amended by the new Health and Care Act 2022 ('the 2022 Act'), NHS England has statutory accountability for oversight of both integrated care boards (ICBs) and providers of NHS services. NHS Improvement

(Monitor and the NHS Trust Development Authority) has been abolished and NHS England has assumed responsibility for the regulation of ICBs and NHS England in relation to patient choice.

Implementation of the changes introduced by the 2022 Act include revisions to the choice provisions in [Part 8 of the National Health Service Commissioning Board and Clinical Commissioning Groups \(Responsibilities and Standing Rules\) Regulations 2012](#) (the NHS Standing Rules. The obligations in the Standing Rules apply to ICBs and NHS England (as a commissioner).

For the purposes of this document, we refer to them as Commissioners.

The amendments to the NHS Standing Rules clarify:

- Rules in relation to patients' legal rights to choose their provider and team for in scope elective services.
- Obligations on commissioners in relation to the qualification of providers previously set out in [The National Health Service \(Procurement, Patient Choice and Competition\) Regulations 2013](#) which have been revoked following the introduction of the PSR.

The new Regulations continue to apply to physical, mental health, learning disabilities and autism services, but for simplicity use the terms physical and mental health and can be read here: [The National Health Service Commissioning Board and Clinical Commissioning Groups \(Responsibilities and Standing Rules\) \(Amendment\) \(No. 2\) Regulations 2023 \(legislation.gov.uk\)](#)

This guidance outlines how Commissioners, Providers and Primary Care referrers can meet the statutory, contractual and policy obligations which enable patients' rights to choice as set out in the [NHS Constitution for England](#) (published under section 14Z51 of the NHS Act 2006, as amended by the 2022 Act).

This guidance replaces existing publications produced by NHS England and NHS Improvement in relation to patient choice and aims to:

- Provide an overview of the choices available to patients in the NHS and the rules that underpin patients' rights.
- Enable consistency in the application of these rights.
- Explain how commissioners can fulfil their duties in relation to patient choice and meet their statutory obligations.
- Provide guidance on how NHS England will manage enquiries and complaints related to patient choice.

Specific guidance on how NHS England will exercise its enforcement powers in relation to patient choice is set out in [NHS England's Enforcement Guidance](#).

For any further information on this guidance and legal rights to choice please contact: england.choice@nhs.net.

Choice policy and context

[The NHS Constitution for England](#) sets out the principles and values of the NHS in England. As part of the pledges the NHS makes to patients and the public, [the Handbook to the NHS Constitution](#) describes in further details rights in relation to informed patient choice.

The Department of Health and Social Care's [NHS Choice Framework](#) explains the nationally determined choices (including legal rights) patients have on how and where they receive health and care services in the NHS in England.

Patients' legal rights to choice in mental health, learning disability and autism were introduced in 2014 as part of the drive to achieve parity with physical health and increase patients' direct control over their care.

In recent years NHS England has strengthened its commitment to patient choice. The [NHS Long Term Plan](#) directly refers to the legal rights to choice and establishes choice as one of the six components of the [Comprehensive Model of Personalised Care](#) (which is further set out in [Universal Personalised Care: Implementing the Comprehensive Model](#)).

Patient choice is also highlighted as a key consideration in elective care recovery within the [Delivery Plan for Tackling the COVID-19 Backlog of Elective Care](#) with specific areas for developments relating to choice announced in [May 2023](#).

NHS England leads on the policy development and operational delivery of patient choice. It provides advice and guidance to patients, the public, Commissioners, and providers (NHS and independent sector).

In addition, as NHS England has oversight responsibilities to make sure that providers and local health organisations offer patients the choices they are entitled to, it is also responsible for responding to and investigating complaints about patient choice.

Structure of this document

This Guidance has been designed as an interactive document so that readers can go immediately to the Sections that are most relevant to them by clicking on the tabs at the top of each page. The Sections within this Guidance document are:

- **For commissioners** – this section explains the regulations in relation to patient choice which commissioners must comply with.
- **For primary care referrers** – this section explains the responsibilities of GPs, Dentists and Optometrists to enable patients to exercise choice.

- **For elective care providers** – this section explains the specific responsibilities for elective care providers (both NHS and independent sector) to ensure legal rights to choice operate in line with Legislation.
- **NHS England’s role** – this section explains how NHS England will offer advice, respond to enquiries, and support compliance.

For Commissioners

The choice provisions in the [NHS Standing Rules](#) set out specific obligations on Commissioners to enable patients to choose aspects of their healthcare. This section of the guidance explains the requirements for commissioners to:

- Make arrangements so that patients are able to exercise choice.
- Give patients information to support their right to choice taking account of requirements in the [Accessible Information Standard](#).
- Ensure that the availability of choice is publicised and promoted to patients.

This Section also explains operational and contractual mechanisms to help commissioners facilitate choice and comply with their obligations to enable patients’ rights.

Duty to ensure patients are offered a choice of provider and team

Commissioners need to ensure where a patient requires a physical health elective referral for a first outpatient appointment and any subsequent treatment that is required, to a Consultant or a member of a consultant’s team, the patient can choose:

- Any clinically appropriate provider that holds a qualifying NHS Standard Contract with any ICB or NHS England, for the service which the patient needs as a result of the referral.
- Any clinically appropriate team led by a named consultant employed or engaged by that provider.

For mental health referrals, where a patient requires an elective referral, for a first outpatient appointment including any subsequent treatment if required, with a consultant or a health care professional or their team, the patient can choose:

- Any clinically appropriate provider that holds a qualifying NHS Standard Contract with any ICB or NHS England, for the service which the patient needs as a result of the referral.
- Any clinically appropriate team led by a named consultant or health care professional that is employed or engaged by that provider.

Elective referrals, to which the rights to choice of provider and teams applies, are those made by a GP, dentist or optometrist, including when a referral is first assessed by an interface service on their behalf.

For a provider to list its service as a choice for patients, it must hold at least one qualifying NHS Standard Contract with an ICB or NHS England.

A qualifying NHS Standard Contract is one which:

- Is signed and in effect before the date on which the referral is made.
- Is a commissioning contract for the service required because of the referral.
- Requires that service to be provided from the location specified in that contract or sets out the criteria specified in that contract which determine how a service will be accessible to patients (e.g., the service may be delivered remotely), and
- Is not a contract put in place solely to provide that service to a specified individual (e.g. a spot purchasing agreement).

The right to choice of provider and team applies at the point of referral for a first outpatient appointment and any subsequent treatment that may be required as a result of the referral unless the patient's diagnosis changes significantly or there are other clinical reasons to change provider.

The assessment of clinical appropriateness should be undertaken by the referring clinician before a referral is made.

The referrer is not required to make a referral to a provider or team if they do not believe this would be clinically appropriate.

Further information and considerations relating to clinical appropriateness are provided in the 'For primary care referrers' section of this guidance.

Approval by a commissioner in advance is not required for an elective referral where a patient exercises their legal right to choice, regardless of whether the commissioner has an

existing contractual relationship with the provider chosen. However, where a commissioner is not familiar with a chosen provider, the commissioner can take steps to understand whether the provider:

- Has a qualifying NHS Standard Contract under which it can accept referrals under the right to choice.
- Can provide the service required by the patient.

Where interface services such as Clinical Assessment Services (CAS), Single Point of Access (SPAs) and Referral Management Centres (RMCs) are put in place, these should not obstruct the patient's legal rights.

In these circumstances, when the legal rights to choice apply at point of referral, choice should be offered at the most appropriate point in the pathway prior to the first outpatient appointment and subsequent treatment.

Where it comes to a Commissioner's attention that a patient has not been offered a choice of provider or team at the point of referral, they are required to rectify this and ensure that a patient is offered these choices.

These rights are legal rights. Commissioners may also choose to enable choice for other types of elective referrals where these legal duties do not apply, for example for referrals to physical health services that are not led by a consultant.

In these circumstances, Commissioners should provide referring clinicians with information so they are able to explain to patients the options available for where they can go for a referral.

Legal duties to offer choice of healthcare provider and team do not apply in certain circumstances:

- **Services:** the obligation to offer choice does not apply to any service where it is necessary to provide urgent care, emergency and crisis care.

It also does not apply to cancer services subject to the Faster Diagnosis Standard, maternity services or services commissioned by local authorities (when not part of a joint arrangement with an NHS Commissioner).

The rights also do not apply to self-referrals or consultant to consultant referrals.

- **Patients:** the obligations to offer choice of provider and team do not apply to any person already receiving care and treatment for the condition they are being referred for (although it does apply for new episodes of care regardless of whether a patient has been seen for a condition previously).

They also do not apply when a patient is detained under the Mental Health Act 1983, detained or on temporary release from prison or serving as a member of the armed forces.

Commissioners can also help to ensure they meet their specific duties to ensure patients are offered a choice of provider and team by:

- Engaging with local primary care referrers to ensure they are aware of obligations to inform and enable patients' legal rights.
- Ensuring [commitments made as part of elective recovery efforts relating to choice](#) are met (i.e. ensuring patients are offered at least 5 choices of provider and utilising Manage Your Referral where appropriate).
- Working with Primary and Secondary Care to understand and unblock barriers to legal rights being exercised at the point of referral including amending pathways as required.

- Building choice into commissioning plans and monitoring referral patterns for potential opportunities and issues related to choice.
- Ensuring choice is included as part of contract monitoring exercises with providers.
- Publicising and promoting information about choice.

Duty to publicise and promote information about choice

Commissioners must ensure that the availability of choice is publicised and promoted to patients so they can exercise their rights in a meaningful way.

Commissioners can meet this obligation in a number of ways including:

- Ensuring information on commissioned services is publicised and provider entries on the NHS website are up to date (in line with providers' [NHS Standard Contract](#) obligations).
- Publishing a patient choice policy statement, which sets out information on:
 - The Commissioner's strategy or plan to offer patients choice and the opportunity to be more involved and take control in decisions about their care.
 - How patients can exercise their legal right to choice.
 - Services patients can choose, beyond the services where the legal right to choice of provider and team applies.
 - How to access further information and support.
 - Regularly engaging with patients, patient groups, and the public to increase awareness and take up of the options available.
 - Providing information on the legal rights to choice at the point of referral, through a range of media such as posters in GP surgeries and social media. Information should be presented in line with requirements in the [Accessible Information Standard](#).

Duty to offer an alternative provider and team: maximum waiting times

Patients have a right to access services within maximum waiting times.

If a patient's treatment has not, or will not start within these waiting times, then when notified the patient's responsible Commissioner has a duty to take all reasonable steps to offer suitable alternative providers.

This right applies where a patient who has been referred for elective care to a consultant led service has not or will not commence treatment within 18 weeks of the provider receiving the referral.

Commissioners are required to take all reasonable steps to ensure that the patient is offered an appointment with a clinically appropriate alternative provider with whom an

ICB NHS England has an NHS Standard Contract for the relevant service who can start their treatment more quickly.

If there is more than one suitable alternative provider, the patient should be offered a choice of appointment from the list of providers.

There are a number of exceptions to this duty which are set out in the NHS Choice Framework and [Referral to treatment consultant-led waiting times: rules suite](#).

Additional commitments regarding choice for patients for new and existing referrals have been made in the [Delivery Plan for Tackling the COVID-19 Backlog of Elective Care](#), and [Elective Recovery Taskforce: Implementation Plan](#). Commissioners should consider these when facilitating the duty to offer an alternative provider.

Right to choose – choice of GP Practice and Professional

Patients have a right to choose their GP Practice and to be registered by that Practice unless there are reasonable grounds for refusal.

The rules also give patients the right to express a preference for seeing a particular Doctor within their GP Practice and requires the practice to meet this request whenever possible. Commissioners should not restrict patients' ability to make these request.

More information about these rights can be found in the '[For Primary Care Referrers](#)' section of this guidance.

Patient Choice and the Qualification of Providers

To support patient choice, Commissioners must ensure that arrangements are in place for providers (public, independent or third sector organisations) to qualify for and secure NHS Standard Contracts for the provision of elective services where the legal rights to choice apply, or for other services where commissioners have otherwise decided to offer choice on an unrestricted basis.

The NHS Standing Rules clarify the obligations on Commissioners* to:

- Respond to expressions of interest from providers.
- Provide the material that a provider would need to consider whether it can meet the commissioning requirements (including service specification).
- Set out the qualifying criteria against which a commissioner will assess a provider to determine whether the provider can meet the requirements for the service in question.

*These provisions in the Standing Rules clarify the rules previously set out in Regulation 7 of the Procurement Patient Choice and Competition Regulations, which required commissioners to establish and apply transparent.

Expressions of interest

At any time, a provider can express an interest to deliver a service that the Commissioner currently commissions or has expressed an intention to commission. However, it is not for providers to determine what a commissioner should commission, rather that is for commissioners to decide.

Where a Commissioner commissions, or intends to commission, a service where the legal rights to choice apply, or has otherwise decided to offer choice on an unrestricted basis; any provider is entitled to submit an expression of interest and request relevant information to determine whether to make a request to be assessed.

Provision of information

Following an expression of interest from a provider, if the service is one that the commissioner already commissions or is intending to commission, the Commissioner should provide the relevant information to the interested provider as soon as is practicable.

In some instances, the Commissioner may need to undertake due diligence work to ensure that the specification for the service is up to date and reflects the commissioned pathway. In these instances, it may be that additional clinical input is required.

Where a service specification is not already established this should be developed and be shared with the provider alongside the local requirements and assessment process within 6 weeks of receipt of an expression of interest.

Where a service specification and commissioning pathway is well documented the information should be provided to an interested party sooner.

Commissioners should be transparent in relation to their local circumstances, processes, and communicate regularly with all providers who approach them.

Qualification of providers: criteria

Following the provision of any local terms and conditions the provider may request a commissioner to assess it against the following criteria:

- The provider must be registered with the CQC under Chapter 2 of Part 1 of the Health and Social Care Act 2008 in respect of any regulated activities which are relevant to the services to be provided.
- The provider must, unless exempt, hold a provider licence issued by NHS England under Chapter 3 of Part 3 to the Health and Social Care Act 2012.

- The provider must demonstrate to the satisfaction of the commissioner that it will be able to comply with the terms and conditions of the NHS Standard Contract, including locally determined supporting schedules, in respect of the services to be provided and in relation to the location from which those services will be offered.
- The provider must demonstrate that:
 - i. It is a member of an NHS Clinical Negligence Scheme under the National Health Service (Clinical Negligence Scheme) Regulations 2015(a) or the National Health Service (Clinical Negligence Scheme for General Practice) Regulations 2019(b); or
 - ii. It has undertaken to join such a scheme, or
 - iii. It has put in place equivalent alternative indemnity arrangements.

A provider may request a commissioner to assess it against the criteria for the purposes of:

- An award of an NHS Standard Contract where the provider does not have an existing NHS Standard Contract with the Commissioner, or
- The award of a further NHS Standard Contract where the provider already has an existing NHS Standard Contract with the Commissioner, but wishes to be assessed in relation to:
 - The provision of new services.
 - The provision of existing services from a new location.
 - A change in the criteria that determines how a service will be accessed.

Once the provider has submitted its request to be assessed against the qualification criteria and local requirements, in line with the local accreditation process, the regulations require that this assessment process is carried out within 6 weeks.

Where a provider can meet the qualifying criteria and demonstrate to the Commissioner's satisfaction that it can deliver the service required, the Commissioner must offer the provider an NHS Standard Contract or modification to an existing contract (see further information on modifications of contracts).

Once the Commissioner has determined that a provider meets the qualification criteria and should be offered a contract, the PSR direct award process B must be used to award the contract. Direct award process B should be used when all the following applies:

- The proposed contracting arrangements relate to healthcare services where patients are offered a choice of provider.
- The number of providers is not restricted by the relevant authority.

- The commissioner will offer contracts to all providers to whom an award can be made because they meet all requirements in relation to the provision of the healthcare services to patients.
- The commissioner has arrangements in place to enable providers to express an interest in providing the health care services.

Further information about the PSR direct award process B is available here:

- [NHS England » The Provider Selection Regime: draft statutory guidance](#)
- [The Health Care Services \(Provider Selection Regime\) Regulations 2023 \(legislation.gov.uk\)](#)

Modifications of Contracts

In relation to a request for a Contract to be modified, this request can be for:

- The provision of new services.
- The provision of existing services from a new location.
- A change in the criteria that determines how a service will be accessed.

Where a modification to a contract is required, for services where legal rights apply or the Commissioner is otherwise offering choice on an unrestricted basis, the request for modification should be assessed under the Qualification of Providers process described above.

If that modification is attributable to a decision of the Commissioner and the cumulative change in the lifetime value of the contract since it was entered into is £500,000 or more, the modification is still permitted, but the relevant authority must publish a transparency notice.

However, a modification is not permitted if the change makes the contract materially different in character.

Please see the [PSR Regulations](#) and [statutory guidance](#) for further information.

Steps to meet these obligations

Commissioners can help to ensure that they meet their duties relating to qualification of providers by:

- Keeping service specifications updated to reflect current requirements, so these can be easily given to providers when they request to be assessed under the qualification criteria.
- Having reactive processes in place to undertake qualification assessments.

- Having reactive governance processes in place to sign off the outcome of qualification assessments.

Where the legal rights to choice do not apply to a service, a Commissioner may decide to limit the number of providers patients can choose from. In these circumstances the decision-making processes specified in the [PSR guidance](#) should be followed.

For more information about how we would manage concerns raised with NHS England about the application of these choice provisions please see [NHS England and Patient Choice](#) section of this guidance and [NHS England's Enforcement Guidance](#).

Operational and contractual mechanisms

This section explains some of the operational and contractual mechanisms that may help commissioners facilitate choice and comply with their obligations to enable patients' rights.

NHS e-Referral Service

The NHS e-Referral Service (e-RS) is a national digital platform used to refer patients into elective care services. E-RS allows patients to choose and book their first outpatient hospital or clinic appointment and can be accessed in the GP surgery, Dentist, Optometrist, interface service, or online or by phone.

Specific guidance for Commissioners on how to use e-RS (including on commissioning services on it) can be found on the [NHS Digital website](#).

Commissioners and providers have specific responsibilities related to the publication of accurate and up-to-date service information and the making and acceptance of referrals for relevant services via e-RS set out in the [NHS Standard Contract Service Condition 6](#).

These actions help to safeguard legal rights to choice because if services, service providers and teams are listed on e-RS correctly this enables patients to explore and choose the provider that works best for them, when exercising their legal right to choice.

Non-contract activity

Non-contract activity (NCA) is a well-established concept within the NHS as a way to facilitate patient choice referrals. Detailed additional guidance on how it applies is set out in [NHS Standard Contract technical guidance](#).

NCA works on the basis of implied contracts: where no written contract exists between a patient's chosen provider and the patient's responsible Commissioner. A contract

between those parties will be implied where that Commissioner does not have an existing contract with the chosen provider.

The terms of the implied contract will be those of the existing NHS Standard Contract for the service required on which the provider is relying in order to be able to accept the patient choice referral. The Commissioner can and should manage the implied contract in the same way it would with any written contract to which it is a party.

Where NCA is undertaken and this relates to patients exercising legal rights 'to choice', no prior Commissioner approval is required, however contract/s being relied on should be shared with the patient's responsible Commissioner.

Circumstances when it is appropriate to undertake NCA rather than putting in place a written NHS Standard Contract with a provider are described in the NHS Standard Contract technical guidance. NCA should not be relied upon by providers or Commissioners for material and/or predictable patient flows; a written contract should be put in place instead.

For Primary Care referrers

Healthcare professionals working in Primary Care have a key role to play in helping meet the statutory and policy commitments which support patients to exercise greater choice and control over their healthcare. In this section we explain:

- How specific legal rights to choice apply to primary care.
- What healthcare professionals in primary care can do to support patients to take greater choice and control over their healthcare.
- What support is available to primary care professionals to ensure choice is facilitated.

Facilitating the right for people to choose their GP Practice

Patients have the legal right to choose their GP Practice.

GP Practices should ensure that existing and prospective patients can access information about their practice and services in a format which allows them to decide of whether to register there.

GP Practices should not refuse to add new patients to their list unless it is appropriate to do so in accordance with the rules (outlined below) or provisions within their GP contract.

Facilitating the right for patients to choose their GP or Nurse

Patients also have the legal right to choose a specific Clinician for their appointment.

As this is a legal right GP Practices should facilitate such patient preferences wherever possible.

When a GP Practice is not able to accept a patient onto its register or meet their request to see a specific doctor or nurse, they should explain the reasons for this to the patient.

Further information on these rights is included in sections 1 and 2 of the [NHS Choice Framework](#).

Legal Rights ‘to choice’ – elective referrals

GPs, Dentists, and Optometrists are responsible for determining whether an elective referral is clinically appropriate for a patient.

The ‘For Commissioners’ section of this guidance sets out when legal rights to choice of provider applies for elective referrals.

The following should be considered when making elective referrals where the legal right to choice applies:

- All referrers to ensure they shortlist on average 5 choices from which the patient may choose, where this is practicable, clinically appropriate, and preferred by the patient.
- Where they have access to appropriate technology, patients should be encouraged to use [Manage Your Referral](#) within e-RS or the NHS App to choose their provider.
- The legal rights do not extend to self-referrals or any referral other than from or on behalf of a GP, Dentist, or Optometrist. For these services, the legal rights to choice do not apply and any choices will be determined by what is available locally.
- The legal right to choice of provider and team can apply to services delivered in the community when other conditions for the legal right to apply are met.
- Patients can be referred to services outside of their local ICB geography when exercising their legal right to choice of provider and team if the service meets the criteria to be a choice for patients (described in the ‘For commissioners’ section of this guidance).
- Contracts for most services to which the legal right to choice of provider and team apply will specify specific location/s at which services must be delivered. Some services which are delivered remotely e.g., ASD and ADHD assessments, may also be subject to the legal right to choice of provider and team.

- Referrers are responsible for determining the clinical appropriateness of a referral. Determining clinical appropriateness involves 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 other relevant guidelines and specifications.
- Referrers may seek support from other clinicians and intelligence from Commissioners when deciding on the clinical appropriateness of a referral. Information on how to do this using the NHS e-Referral System is detailed below.
- The Commissioner's prior approval for the referral is not required where a patient has exercised their legal right to choice.
- Where initiatives such as Clinical Assessment Services (CAS), Single Point of Access (SPAs) and Referral Management Centres (RMCs) are put in place, these should not obstruct the patient's legal rights.

For example, some local mental health pathways include assessment services which are accessed to ascertain if a patient requires an elective referral. In these instances, the patient's legal right to choice should be provided at the appropriate point in the local pathway prior to accessing elective care.

- It will usually be the case that the same provider and team will treat the patient for their entire episode of care, prior to discharge back to the GP, unless the patient's diagnosis changes significantly or there are other clinical reasons to change provider and team.
- Prior to making a referral, referrers should consider ongoing care which may be required following an elective referral and explain how this will affect the patient e.g. how a service interacts with local pathways and requests for GPs to enter [Shared Care Protocols](#) for certain prescribed medications and how these will be handled.

Promoting Choice

GP Practices and other Primary Care providers should consider how they can support Commissioner obligations to publicise and promote choice, by helping their patients to find out more about the choices available to them.

Referrers may also help to promote choice by:

- Ensuring patients know about their legal rights to choice prior to or during their appointment.
- Providing information for linking to national resources on patient choice on their website.

- Signposting to areas of the NHS website and other tools (e.g. [My Planned Care](#)) that provide information for patients on services including information about the quality of care, waiting times, parking and travel.

Understanding what options are available can help patients to make decisions about where the right place is for them to receive the care and treatment they need.

During the Appointment

During an appointment, referrers should discuss all the options available to the patient including deciding on whether a referral would be clinically appropriate, and offering a choice of provider and team to the patient where legal rights apply or when legal rights do not apply explaining what choices are offered locally.

If a patient is ready to decide where they want to go for an outpatient appointment during their appointment, referrers should facilitate this through the e-RS system where possible (see Using e-RS section below).

Taking the following steps during an appointment can ensure patients can exercise their legal rights to choice:

- Discussing the patient's rights to choose the provider and team and when this applies.
- Working with the published National Institute for Health and Care Excellence (NICE) guidelines, and
- Discussing the patient's personal circumstances.
- Discussing the patient's continuity of care and how care already being received for co-morbidities may impact a new referral where this is relevant.
- Assessing whether providers offer evidence-based care which meets the patient's clinical needs and discussing this with the patient (including quality indicators and user feedback where this is available).
- Discussing any travel or accessibility considerations, including those which relate to online providers.
- Considering ongoing care which may be required following an elective referral prior to making this and explaining how this will affect the patient e.g. requests to GPs to enter Shared Care Protocols for certain prescribed medications and how these will be handled.

It may be that a patient needs more time to decide where they want to attend an outpatient appointment and wants to discuss the options with friends and family. The patient should be allowed the time they need to decide their choice of provider before a referral is made.

Using the e-Referral Service

e-RS is a useful tool in facilitating legal rights to choice of provider and team and to facilitate a choice conversation. GPs are [contractually required](#) to use e-RS for referrals to acute services.

Further information on making referrals through e-RS can be found on the [NHS Digital website](#).

The 'Advice and Guidance Toolkit' within e-RS supports referrers to assess the clinical appropriateness of potential referrals by providing support from other clinicians and specialists. Further information, on how to use the toolkit can be found on the [NHS Digital website](#).

e-RS functionality has been updated in March 2023 to create a single menu of service options. This will support referrers to see in one place, a wider variety of services.

GPs, dentists, and optometrists can also refer to services which are not listed on e-RS (as not all services are). Referrers and Commissioners should work together to facilitate referrals to clinically appropriate services even if they are not listed on e-RS.

If choice is not offered

If a patient does not feel that they have been offered a choice they should be able to talk to their GP (or other Primary Care referrer) in the first instance.

Primary care referrers should then help to facilitate any preferences the patient may express in relation to the legal rights to choice which apply.

If the patient still has questions or they do not think the problem has been solved, the [NHS Choice Framework](#) can help with what to do next. NHS England can also provide advice and guidance to patients and primary care staff on legal rights to choice (see Contact Us section for further details).

For providers of elective services

Providers of elective care have specific responsibilities to ensure legal rights to choice operate effectively. Requirements for [providers relating to patient choice are included in the NHS Standard Contract](#).

Service information

Under the terms of the NHS Standard Contract providers are required to describe and publish all acute GP Referred Services in the NHS e-Referral Service (e-RS) through a [Directory of Service](#). This allows referrers and patients to view relevant information on available services so that patients can make informed choices.

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

The NHS Standard Contract therefore requires providers of these services to make 'reasonable endeavours' to list their services. Local practice in this area can be discussed with the commissioner.

Further advice and guidance for providers on using e-RS has been made available here: [Providers – NHS Digital](#)

Advice and guidance

The NHS Standard Contract requires providers to give advice to GPs and other referrers on potential referrals, and on the care of service users more generally.

Advice and guidance is important in relation to legal rights to choice, as it can help referrers understand if a referral is clinically appropriate for their patient.

Guidance on how providers can provide advice and guidance through the e-RS system (when referrals are made through this platform), is available here: [Advice and guidance for consultants and provider clinical teams – NHS Digital](#)

Contracts for most services to which the legal right to choice

Accepting referrals

Providers who have an NHS Standard Contract with any ICB or NHS England for the service a patient requires must accept all clinically appropriate referrals for that service where legal rights to choice apply.

This includes referrals made by primary care clinicians of patients whose responsible commissioner is not a signatory to the NHS Standard Contract which the provider holds but who would instead operate on an NCA basis, as described above.

Once a provider has accepted a referral the patient can expect to be treated by that provider for their entire episode of care, until discharged back to the GP, unless their diagnosis changes significantly or there are other clinical reasons for not doing so.

For legal rights to choice of provider and team to apply a service must be deemed as clinically appropriate by the referrer. Where providers have concerns that a referral received may not be clinically appropriate, they should raise this with the referrer in the first instance.

Contractual and payment terms

When providers receive referrals due to patients exercising their legal rights to choice, and the patient's Commissioner does not have a current NHS Standard Contract for that service with the provider, the non-contract activity (NCA) approach may be adopted (see the For Commissioners section and [NHS Standard Contract Technical Guidance](#) for more information).

NCA works on the basis of implied contracts: where no written contract exists between a patient's chosen provider and the patient's responsible Commissioner, a contract between those parties will be implied.

The terms of the implied contract will be those of the existing NHS Standard Contract for the service required on which the provider is relying in order to be able to accept the patient choice referral.

The NHS Standard Contract Technical Guidance provides further information on how providers should interpret this.

The provider must comply with all the terms of the implied contract including reporting and contract meetings with respect to the Commissioner with whom NCA activity is undertaken as if the provider had a written NHS Standard Contract with the responsible commissioner.

The NHS Standard Contract Technical Guidance also makes clear that where providers are undertaking NCA (including when this relates to patients exercising legal rights to choice), the contract/s being relied on should be shared with the patient's responsible Commissioner.

It should be noted that for a provider to accept a referral on the basis of a patient exercising their legal rights to choice of provider, the provider must have a current signed NHS Standard Contract for the service and the location in question with at least one NHS Commissioner in England.

NHS England and patient choice

NHS England leads on the policy development and regulation of patient choice and can provide advice and guidance to patients, the public, commissioners and providers (NHS and independent sector). This involves meeting directly with stakeholders to provide general and specific advice, attending system and regional meetings, contributing to local and national guidance and advising on commissioning initiatives.

NHS England also has oversight responsibilities to make sure that providers and local health organisations offer patients the choices they are entitled to. It is also responsible for responding to and investigating complaints about patient choice.

NHS England can look at complaints and concerns about patient choice where it is suspected the legal rights to choice have not been understood or have not been enabled, or commissioners have otherwise not met their duties in relation to choice.

Concerns can be raised by patients and their representatives, providers, and other interested parties. NHS England collaborates with Commissioners and stakeholders to provide advice, understand barriers to patient choice and support compliance, as well as supporting patients to access services at the provider of their choice where they have a legal right to do so.

Where possible NHS England undertakes informal work working in partnership with Regional Teams and Commissioners to help resolve ongoing issues and provide advice about the patient choice obligations set out in legislation. This means complaints and concerns raised with us will be dealt with informally in the first instance.

Complaints about the non-qualification of providers

NHS England is committed to strengthening the oversight of patient choice. One element of this relates to complaints from providers about the qualification of providers by Commissioners. To support this a Choice Provider Qualification Complaints Panel (the Choice Panel) has been established to proactively review and support the timely resolution of these complaints.

Where a provider considers a Commissioner has not properly considered a request to be assessed against qualification criteria (as explained in the section Qualification of Providers above) and the provider has been unable to resolve the issue directly with the Commissioner, the provider can submit a complaint to NHS England using the pro-forma complaint form on the NHS England website [NHS England » Choice](#).

On receipt of the complaint pro-forma, a case manager from the National Choice Team will review the information provided and determine whether there is sufficient information to suggest a legitimate concern about the qualification of a provider.

If there is insufficient information to suggest a legitimate concern, the allocated case manager will contact the complainant explaining why the complaint will not be taken forward under the procedure. Where appropriate, the case manager will offer advice and support outside of the process in relation to the issues that have been raised and/or pass on the correspondence to the relevant team in NHS England.

Where it is determined there is sufficient information about a relevant concern the case manager will contact the complainant to:

- Explain NHS England's regulatory roles and responsibilities and approach to managing complaints.
- Establish background, facts, and a timeline of events.

- Obtain consent/necessary permissions to discuss the case with relevant third parties.
- Determine their preferred outcome/resolution.

The case Manager will attempt to support a resolution of the complaint between the provider and the commissioner within 25 working days of the complaint pro-forma being received.

If the complaint has not been resolved within this timeframe, the case manager will escalate the complaint to a senior responsible officer to seek clearance to either table the complaint at the next Choice Panel meeting or to dismiss the complaint, depending on the information obtained to date.

If the National Choice Team are unable to resolve the complaint, it will be escalated to the Choice Panel.

The Panel will meet regularly to undertake a comprehensive review of complaint/s received and provide advice and guidance on next steps to resolve the concerns raised.

The Choice Panel secretariat will communicate meeting outcome/s to the commissioner and provider; and action immediate next steps, within five working days.

References

- [National Health Service Act 2006](#)
- [Health and Care Act 2022](#)
- [The National Health Service Commissioning Board and Clinical Commissioning Groups \(Responsibilities and Standing Rules\) \(Amendment\) \(No. 2\) Regulations 2023](#)
- [The Health Care Services \(Provider Selection Regime\) Regulations 2023](#)
- [The National Health Service \(Procurement, Patient Choice and Competition\) \(No. 2\) Regulations 2013](#)
- [NHS Enforcement Guidance](#)
- [NHS Constitution for England](#)
- [Handbook to the NHS Constitution for England](#)
- [NHS Choice Framework](#)
- [NHS Long Term Plan](#)
- [Comprehensive model of personalised care](#)
- [Universal Personalised Care: Implementing the Comprehensive Model](#)

- [Delivery plan for tackling the COVID-19 backlog of elective care](#)
- [Patient Choice Letter, 25 May 2023](#)
- [Referral to treatment consultant-led waiting times: rules suite](#)
- [Elective recovery taskforce: implementation plan](#)
- [e-Referral Service, Commissioners](#)
- [NHS Standard Contract 2023/24 technical guidance:](#)
- [NHS Payment Scheme](#)
- [My Planned Care](#)
- [GP Contract:](#)
- [Referring a patient – NHS e-Referral Service](#)
- [About advice and guidance and points to consider](#)
- [NHS Standard Contract](#)
- [Directory of Services \(creating and maintaining services\) on the NHS e-Referral Service](#)
- [e-Referral Service, Providers](#)
- [NHS England, Choice](#)

Contact us

For any further information on this guidance and legal rights to choice please contact: england.choice@nhs.net

Queries in using the NHS Standard Contract may be sent to england.contractshelp@nhs.net

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