PrescQIPP
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Right to Choose – Frequently Asked Questions (FAQs)

1. What is Right to Choose (RTC)?

If a GP needs to refer an NHS patient for a physical or mental health condition, in most cases patients have the legal right to choose the hospital, service or team they would like to go to for elective care. The GP firstly has to decide if it is clinically appropriate to make a referral. Further information regarding right to choose is available at https://www.nhs.uk/using-the-nhs/about-the-nhs/your-choices-in-the-nhs/

2. Where can patients go for their first appointment as an outpatient?

Patients are entitled to choose any provider, including private or independent providers in England, that holds a relevant NHS commissioning contract for the services they require and is considered clinically appropriate by their referrer.

3. When do the legal rights to choice apply?

The legal rights to choice of provider and team only apply when the:

- Patient has an NHS elective referral for a first outpatient appointment
- Patient is referred by a GP, Dentist or Optometrist. Patients cannot self-refer.
- Referral is clinically appropriate (as determined by the referrer)
- Provider service and team are led by a consultant (physical and mental health) or a mental healthcare professional (mental health only)
- Provider has a commissioning contract with any ICB or NHS England for the required service.

4. When do the rights to choice not apply?

Right to choose does not apply to patients:

- Who have self-referred
- Already receiving care following an elective referral for the same condition
- Referred to a service that is commissioned by a local authority (not part of a joint commissioning arrangement) or delivered through primary care
- Accessing urgent or emergency (crisis) care
- Serving as a member of the armed forces
- A prisoner, detained in hospital under Mental Health Act 1983 or a secure service.

5. Does the ICB need to have its own contract with the Private Provider?

No. If the choice criteria are met and a service is commissioned anywhere in England under an NHS commissioning contract (and no other exceptions to the legal right to choice of provider and team apply to the referral), then the legal right to choose applies, regardless of whether the responsible commissioner directly contracts the chosen service/provider or provides similar services locally. However, under RTC, the private provider is only allowed to provide the service which has been commissioned by the NHS under the terms of the original NHS contract.

6. Does RTC only apply to secondary care services?

The rules are not place based, so a referral to secondary services can include those services provided in the community (where other conditions to the legal right apply).

7. Does RTC only apply to physical health conditions?

No, the right to choice applies to both physical and mental health care once a patient has chosen a provider, that provider will normally treat the patient for their entire episode or spell of care, unless the patient's diagnosis changes significantly or care is transferred back to primary care. Assessment services, such as adult autism spectrum disorder (ASD) and attention deficit hyperactivity disorder (ADHD) assessment services are within the scope of the legal right to choose.

8. Is prior approval from the patient's responsible ICB required prior to referral?

No prior commissioner approval is required for referrals where the patient has exercised choice of provider under their legal rights. However, GPs are expected to comply with any ICB commissioning policies and only refer in line with these, and will need to understand exactly what Clinical service the patient will receive before they refer into the service. Where initiatives such as Clinical Assessment Services or Single point of Access (SPA) are put in place, these should not obstruct the patient's legal rights. In these circumstances choice should be offered at the most appropriate point in the pathway prior to an elective referral.

9. Can patients self-refer under RTC?

No patients cannot self-refer to a private provider under RTC.

10. Who can refer patients to a Right to choose provider?

A patient can be referred by a GP, Dentist or Optometrist. These categories of healthcare professionals are listed in the NHS Responsibilities and Standing Rules Part 8 as those who are legally able to refer patients under right to choose. For mental health services, this would be limited to the patient's GP.

11. Can Pharmacists refer patients under right to choose rules?

The legislation does not include Pharmacists and therefore Pharmacists cannot refer patients under RTC themselves, however if the patient is registered with a GP at the practice or PCN where the Pharmacist is working, they may be able to refer patients on behalf of their GP, according to locally agreed referral protocols and processes. However, in this instance the patient's GP would remain the responsible referrer and must ensure that any such referrals on their behalf are clinically appropriate.

12. What should be considered before referring a patient to a private provider under RTC?

If the referrer is satisfied that the patient meets the criteria for referral for the indication under investigation and the private provider:

- Is listed as an option on the NHS e-Referral service (e-RS) and therefore holds an NHS standard contract for the services required
- The request is clinically appropriate and
- You know what service will be provided by the private provider.

Then the patient should be referred to the private provider.

13. Who is responsible for determining that any RTC referral is clinically appropriate?

The referrer (GP, Dentist or Optometrist) determines whether a referral is clinically appropriate. There may be several considerations which go into this assessment, for example a patient's comorbidities, whether the patient is suitable for an online assessment or requires a face to face assessment, pathways of care, length of local waiting lists, ongoing prescribing responsibilities etc. and any local commissioning policies.

14. **Does RTC apply to treatment as well?**

No – RTC does not apply to choice of treatment. However, once a patient has been referred under right to choose to a private provider and accepted as a patient, the patient must be treated in accordance with the agreed terms and pathway as specified in the original contract holding ICB (host ICB) contract.

15. **Does the GP need to accept any request for shared care from the private provider for RTC patients?**

No – the GP retains the right to not agree to shared care if they feel the request is not clinically appropriate, or if they do not feel clinically competent to do so.

Both the provider and the patient's GP should ensure requests for shared care are in accordance with the GMC Good Prescribing Practice principles.

If the GP is uncertain about their competence to take responsibility for the patient's continuing care, they should ask for further information or advice from the clinician who is sharing care responsibilities, or from another experienced colleague. If they are still not satisfied and unwilling to accept responsibility for the prescribing under shared care, then the GP should explain this to the specialist clinician and to the patient, including the implications.

Appropriate arrangements for continuing care should be agreed between the patient, their GP and the private provider. Non - agreement in relation to ongoing care arrangements is likely to need discussion and escalation to the patient's local ICB commissioner for resolution. The private or independent provider should continue to supply and oversee the patients care until agreement in relation to ongoing or shared care with other stakeholders has been reached.

16. **Are the clinical thresholds for referral and diagnosis lower for private or independent provider referrals under RTC?**

No – the clinical thresholds for referral and diagnosis should be same regardless of the provider being used. For ADHD and attention deficit disorder (ADD) current NICE clinical criteria for diagnosis and referral can be found in the appropriate NICE Clinical Knowledge Summary and some ICBs may have local commissioning policies/referral thresholds in place. If you have concerns that clinical thresholds being utilised by the provider are not in accordance with national guidance, then this would need to be discussed with the contract holding or host commissioner. Primary care prescriber/referrers should contact their local ICB teams in the first instance.

17. **Can RTC private providers with an NHS commissioning contract prescribe medicines and treatments outside of established NICE Guidance?**

If the indication and clinical pathway is likely to require ongoing treatment then this should be considered and agreed as part of the initial contract negotiations and included in the contract. The NHS Standard Contract conditions and particulars should stipulate that any treatment should be in accordance with national guidance (i.e. NICE guidance) where applicable.

Treatment outside of national guidance should only be considered by exception and approval sought by the provider from the responsible ICB, prior to the treatment being initiated, unless this has been specifically agreed as part of the original contract terms.

18. **Should treatment recommendations from RTC private providers adhere to local guidance and policies such as local formularies?**

Ideally the clinical pathway in the host ICB contract should include the type and need of ongoing care, including details of the allowed medicinal products and devices and associated terms. The provider must adhere to the terms of this contract for all the patients who are referred to them regardless of patient's responsible ICB.

19. **If a patient has been receiving treatment from a private provider as a paying patient (personally or insurance funded) can they transfer their treatment back to the NHS under RTC?**

If a patient commences treatment privately, provided the patient's clinical circumstances are within those defined in the ICB's commissioning policy, the patient is entitled to NHS services on exactly the same basis of clinical need as any other patient and can transfer and return to NHS funded treatment at any stage. However, in accordance with Department of Health and Social Care guidance, they should not gain an advantage or disadvantage over other patients who have been waiting to be seen on the NHS. Patients choosing to return to NHS care will need to be referred to an NHS provider trust and may need to wait to be seen if that service is oversubscribed.

If a patient has commenced treatment privately for a drug or other medical intervention that the ICB routinely agrees to fund, it is not always possible to enter into shared-care arrangements with a private provider for on-going GP/NHS prescribing where it is necessary for patients to continue to be seen by the specialist private provider for as long as treatment is required. This is either due to the contracted agreements within the originator contract or because the Primary Care referrer is not able to agree to shared care with the patient's chosen private provider on clinical grounds. In these circumstances the patient may need to transfer back into a NHS Provider Foundation Trust. The private or independent provider should continue to supply and oversee the patients care until agreement in relation to ongoing or shared care with other stakeholders has been reached.

20. **Who is responsible for continuing to check that a private provider is still competent?**

Independent Healthcare providers are regulated and inspected by the Care Quality Commission (CQC), where they provide services which CQC regulate, in the same way as NHS Providers. Further details are available on the CQC website. In addition, the host commissioner is responsible for overall contract monitoring and the non-contract activity (NCA) commissioner for the implied contract when referrals are made via this route.

21. **Who is responsible for monitoring the contract and ensuring that the contracted service is meeting the needs of the patients and the ICS?**

The host ICB is responsible for ensuring that the private provider is providing the contracted services in accordance with the terms of the contract and to agreed quality standards. Any NCA commissioner must ensure that there is an appropriate NHS contract in place with the provider and monitor the non contract activity for their system. If the NCA commissioner is concerned about the agreed terms or the quality and appropriateness of the service being provided, they should contact the host commissioner to discuss their concerns in the first instance.

22. **The ICB has received an invoice from a RTC private provider for which it does not have a direct contract, requesting payment. What initial checks should be done?**

Where a commissioner receives an invoice for the first time from a provider for which it does not have a written contract, they should check the basis on which that invoice is being submitted before making any payment in respect of that invoice. The commissioner needs to check that the provider does indeed hold an NHS Standard Contract with another NHS commissioner, which properly entitles it to provide those specific services to the original commissioner's patients on a NCA basis. A provider wishing to provide services on an NCA basis must, on request, share with the NCA commissioner full details of the written, signed contract/contracts it holds with another commissioner/other commissioners and on which it is relying in order to undertake NCA.

23. **Can a private provider obtain a contract with an ICB in one location and then open a separate facility and provide services under RTC from that new location as well?**

No – the commissioned service must be provided to patients from the location as specified in the original host contract. However, by their very nature, virtual assessment and treatment services can be provided to any geographical location across England and therefore the original contract can lawfully be applied on a RTC basis to patients from anywhere in England if they are referred correctly.

24. **Can an ICB establish its own NHS contract with the private provider?**

Yes – an ICB can establish their own contract with the relevant provider. Having a written contract will always be more robust and clearer than having an implied contract on an NCA basis. There will be less scope for misunderstanding and dispute with a written contract in place. Written contracts, using the NHS Standard Contract format, should be put in place by commissioners with a provider in all cases where there are established flows of patient activity with a material financial value.

25. **The RTC option is currently being applied to ADHD and ADD pathways, could patients seek referral under RTC for other indications and clinical pathways?**

Yes. Right to choose can be applied to any indication or clinical pathway, where the relevant criteria are met.

26. **How many choices should a patient be offered under RTC?**

NHSE guidance recommends that all referrers should try and shortlist on average five choices to from which the patient may choose, where this is practicable, clinically appriopriate and preferred by the patient.

27. **If the patient's chosen provider is not listed on the e-RS – can they still be referred to this provider?**

Yes- but it would be sensible to check the accreditation and suitability of this provider in the first instance. Contact your local ICB for support regarding this.

28. **Can patients change provider once they have been referred?**

Yes – patients who have waited longer than 40 weeks for a first outpatient appointment can opt to switch providers. There are two mechanisms for this, the digital mutual aid system (DMAS), where the provider can identify eligible patients and offer to try and move them on to the waiting list of a different provider, or patient initiated digital mutual aid system (PIDMAS) which allows the patient to register an interest to switch to a different provider.