Interface between NHS and private treatment

Guidance from the Ethics Department
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Summary

Although some doctors feel unhappy about their patients switching between the NHS and private sector, this is not unethical as long as the patient – when rejoining the NHS – is treated in the same way as those receiving all of their care within the NHS. Doctors should not put pressure on patients to seek private treatment or use their NHS patient lists to initiate discussion about private practice. At all times doctors' primary concern should be for the safety and wellbeing of their patients.

A large numbers of patients opt to have some or all of their investigations and treatment privately. Some use private health insurance whilst others are willing to pay to be seen more quickly or for the added convenience or comfort of receiving their care in private facilities. In addition to increasing emphasis on patient choice within the NHS, it is also increasingly recognised that patients are entitled to choose whether to receive their treatment within the NHS or privately. In addition there has been a general blurring of the boundaries between NHS and private treatment, with patients switching freely between the two sectors. As a consequence of these developments, the BMA receives a large number of enquiries from doctors about the interaction between NHS and private treatment and how this should be managed at a practical level.

Concerns are sometimes expressed about real, or perceived, conflicts of interest when NHS patients ask their doctor about private treatment for example, or where doctors believe they are being asked to help patients to "jump the queue" for treatment. Many consultants are unsure about the limits of what they may tell patients about their private practice and how they may advertise their services. General practitioners frequently ask about their obligations to facilitate private treatment by making a private referral or sharing information with those providing the treatment. This guidance addresses the most common scenarios raised with the BMA. Consultant staff in the NHS should also familiarise themselves with the code of conduct for private practice in England,[1] Scotland [2] and Northern Ireland [3] and guidance on private practice within the new consultant contract for Wales.[4]

General principles

- Patients who are entitled to NHS funded treatment may opt into or out of NHS care at any stage.
- Patients who have had a private consultation for investigations and diagnosis may transfer to the NHS for any subsequent treatment. They should be placed directly onto the NHS waiting list at the same position as if their original consultation had been within the NHS.
- It would be inappropriate for consultants to pressure or encourage patients to transfer from NHS funded treatment to private care.
- Where clinically appropriate treatment is not funded by the NHS, patients should be informed of this in order to consider the options open to them, including the option of seeking the treatment privately.
- Consultants should not spend time during NHS consultations discussing private treatment with patients nor should they use their NHS patient lists to promote their private practice.

- All doctors have a duty to share information with others providing care and treatment for their patients, this includes NHS doctors providing information to private practitioners.

Issues for consultants

Can patients receive part of their treatment within the NHS and part privately?

Dilemmas can arise if patients choose to seek part of their treatment privately and part on the NHS. A common scenario is where a patient seeks private investigations in order to obtain an earlier diagnosis and then switches back to the NHS for any subsequent treatment. Provided patients are entitled to NHS treatment they may opt into or out of NHS care at any stage. Patients who seek private investigations may subsequently be placed directly onto the NHS waiting list at the same position as if that consultation had been undertaken within the NHS (assuming the treatment in question is provided by the NHS).[5] Patients do not need to have a further assessment within the NHS before receiving their treatment nor do they need to be referred back to their general practitioner. Some doctors are unhappy that patients who can afford to pay for private investigations are able to effectively jump the queue for treatment by reaching the waiting list earlier than those who wait for investigations and diagnosis on the NHS. Others argue that because some people seek their investigations privately, the NHS waiting list for investigations is reduced and therefore other patients are seen more quickly. There is undoubtedly an advantage to reaching the waiting list sooner but, nevertheless, NHS patients whose clinical need is greater may join the waiting list later but could still receive their treatment earlier if they are categorised as needing more urgent treatment.

May NHS consultants advise patients about the option of being seen privately?

When patients are referred to a consultant within the NHS it is not unusual for a doctor to provide a diagnosis and recommended care plan, but to advise that the waiting list for non-urgent treatment may be many months. Although some patients may subsequently opt for private treatment rather than waiting for treatment within the NHS, it is not appropriate for consultants to use their NHS patient lists to initiate discussion about their private practice. It is not acceptable, therefore, for doctors to suggest to patients, who are placed on a waiting list for NHS treatment that the treatment could be provided more quickly on a private basis. It is also inappropriate for consultants to raise the issue of private practice obliquely, for example by handing the patient a business card containing the address of both the NHS hospital and the doctor's private consulting rooms or adding the private clinic address to NHS letterhead. The codes of conduct for private practice in England, Scotland and Wales state explicitly that consultants should not, in the course of their NHS duties, initiate discussions about providing private services for NHS patients.[6]

The BMA believes an exception to this general rule is where treatment is available but is not funded within the NHS. In such circumstances, patients should generally be advised of this option in order to make an informed choice about treatment (see BMA guidance on the duty of candour).[7] It could be argued that the same principle should apply to patients being given the choice between NHS and private care. Arguably, patients should be given sufficient information – including the availability and price of private treatment – in order to decide whether to join the NHS waiting list or seek private treatment. It is possible, however, that this could put pressure on patients to seek private treatment, particularly where the patient is very sick and potentially vulnerable. There is also a fundamental difference between these two scenarios, which justifies treating them differently. Patients are generally aware of the availability of private treatment and so the option is always open to them to enquire. Where there is a new treatment available that is not provided on the NHS, patients cannot be expected to know about it. It is, therefore, appropriate to provide balanced and factual information about the treatment, although this too needs careful handling to ensure the patient or the family do not feel pressure to choose the private option.

How should consultants respond to questions from NHS patients about being treated privately?

With the limited exception given above, consultants should not spend time discussing private treatment with patients during NHS consultations. It would be inappropriate for them to pressure or encourage patients to transfer from NHS to private care but, in practice, patients

themselves frequently raise questions about the availability of private treatment. This can put doctors in a difficult position where they could be perceived as having a conflict of interest. It might be suggested, for example, that patients have been put under pressure to seek private treatment or that doctors are using their NHS consultations to promote their own private practice. In order to avoid this perception, there should be a clear separation between NHS and private treatment. Views about how consultants should handle such direct questions, however, differ. Some people believe that where patients raise the option of private treatment during a NHS consultation they should be directed back to their GP for a separate private referral. Where the patient expresses a clear preference to see the same doctor privately, however, insisting on a separate referral from the GP can seem to the patient to be unnecessarily bureaucratic as well as adding to the workload of GPs. There may, however, be some circumstances where a referral back to the GP is the most appropriate course of action, if, for example, something unexpected is discovered during the consultation and referral to a different consultant is needed.

It is for individual consultants to decide how to respond to patients' questions about private treatment within the terms agreed locally. Some consultants prefer not to discuss their private practice at all during NHS consultations and refer all enquiries to their private secretaries. Consultants may, however, briefly answer factual questions about the availability of private treatment and there is no requirement for the patient to be referred back to the GP (although the GP should be kept informed of any change to the patient's care plan). A consultant in this position should make a contemporaneous note on the medical record, and inform the patient's GP, that the patient has requested information about private treatment. Patients should be informed of the option of seeing a different doctor for private treatment and some patients may wish to discuss the options with their general practitioner before making a decision.

How should consultants respond to patient requests for a second opinion in the private sector?
Requests for second opinions should generally be complied with unless there are good reasons to justify a refusal. A second opinion will usually be provided within the NHS (see CCSC guidance on second opinions[8]). Some patients, however, may specifically request a further opinion on a private basis. This might be because they believe that further treatment options will be open to them that are not funded within the NHS or because they believe they will receive better quality care. Patients are entitled to seek a second opinion, on a private basis, and the treating NHS consultant should facilitate this where possible or liaise with the patient's general practitioner about arranging a private referral. The same general principles apply to private patients seeking a second opinion.

Can consultants involve NHS staff in the treatment of private patients?
NHS staff are sometimes asked to clerk in and look after private patients on the ward on behalf of consultants who are being paid privately for the treatment. The consultants' guidance on private practice is clear that consultants may not use NHS staff for the provision of private services without the agreement of their NHS employer.[9]

Issues for general practitioners
Can general practitioners raise the issue of private practice with NHS patients?
General practitioners have an important role as their patients' advocate and ensuring that patients have all necessary information about the treatment options open to them. This may include asking patients whether they wish to be referred within the NHS or privately and, if they request a private referral whether they have private medical insurance. This needs to be handled carefully to ensure the patient does not feel pressured to opt for private treatment.
Are NHS general practitioners obliged to issue a private referral at the patient's request?
Whether there is any obligation on a NHS general practitioner to issue a referral letter for a particular patient will depend on whether, in the view of the GP, the referral is clinically necessary. If specialist assessment or treatment is needed, the GP is obliged to refer the patient and, if the patient wishes to seek the treatment privately, a private referral should be made. The General Medical Council (GMC) states that "when you refer a patient, you should provide all relevant information about the patient's history and current condition".[10] Referrals

are usually made to a named consultant and some GPs have concerns about referring to a consultant they do not know, either at the request of the patient, or because the patient's medical insurance company has its own list of consultants. Such concerns should be explained to the patient. If the GP does not consider the treatment to be clinically necessary, then there is no obligation to refer; the patient may then seek treatment without a referral. The GMC no longer requires specialists to accept patients only with a referral, although the BMA believes this to be best practice in most cases.

All specialists are advised by the GMC that "if you provide treatment or advice for a patient, but are not the patient's general practitioner, you should tell the general practitioner the results of the investigations, the treatment provided and any other information necessary for the continuing care of the patient, unless the patient objects. … If you do not tell the patient's general practitioner, before or after providing treatment, you will be responsible for providing or arranging all necessary care until another doctor agrees to take over."[11]

Are NHS general practitioners obliged to provide patient information to private practitioners?
When patients self-refer to private practitioners, this is frequently followed by a request to the general practitioner for any information that might be relevant to the treatment in question. The exchange of information between those providing care for a patient, including liaison between NHS and private practitioners, is important. The GPs' primary concern should be for the interests and safety of their patients, with due regard to confidentiality. This requires good communication between colleagues, with the patient's consent, so that medical information can be exchanged on the basis of a clear "need to know" in connection with the care of the patient. This is in line with the GMC's guidance, which states that doctors must "keep colleagues well informed when sharing the care of patients".[12] NHS general practitioners should therefore provide relevant information on request about the patient's medical history or current condition to other doctors providing care, including doctors working in the private sector. If the GP is aware that treatment is being sought privately and has information that might affect the safety or outcome of the treatment, this should be shared, with the patient's consent. Failure to provide relevant information in this way could result in a complaint against the GP – either to the GMC or through the courts – if the patient is harmed as a result.

Can NHS general practitioners charge their patients for referral or information?
General practitioners may not charge their NHS patients for private referrals, nor may they charge for the provision of relevant information to other doctors providing care for the patient.

Are NHS general practitioners obliged to complete medical insurance claim forms for their patients?
There is no obligation on NHS general practitioners to complete medical insurance claim forms and, if they decide to do so, they may charge the patient. In most cases the doctor who has provided the treatment is in a better position to provide the information needed.

Should general practitioners issue NHS prescriptions for medication recommended during a private consultation with a consultant?
When patients seek specialist treatment privately, the private consultant may prescribe any necessary medication. Often, however, consultants recommend a particular medication and patients ask their GP to issue a NHS prescription rather than paying for it privately. Even though individuals opt for private treatment or assessment, they are still entitled to NHS services. If the GP considers that the medication recommended is clinically necessary, he or she would be required under the NHS terms of service to prescribe that medication within the NHS, even if the assessment from which the need was identified was undertaken in the private sector. The exception to this would be if the medication is specialised in nature and is not something general practitioners would generally prescribe. In these cases, it is for the individual GP to decide whether to accept clinical responsibility for the prescribing decision recommended by another doctor. (The same principles apply to requests to undertake diagnostic tests or other procedures within the NHS.) The issues raised are the same as those where a NHS consultant asks a GP to prescribe, and the existing procedures for shared care should be followed.[13] In all cases there should be proper communication between the consultant and the general practitioner about the diagnosis or other reason for the proposed

plan of management, including any proposed medication.

The obligation to prescribe does not arise if the medication recommended is not clinically necessary or if the medication is generally not provided within the NHS. A common enquiry to the BMA concerns fertility treatment, where patients seek IVF in the private sector and ask their GP to issue NHS prescriptions for the drugs. The decision about whether to comply with such requests in these cases, rests with the individual GP or commissioning body. In the past, these requests have caused some concern amongst GPs who felt they were being placed in the invidious position of either appearing unsupportive of their patients or accepting legal, financial and ethical responsibility for a course of medication which they had not initiated and which, in some cases, they may not consider to be clinically necessary. Where the product is of a very specialised nature, requiring ongoing monitoring, some GPs may feel they have insufficient expertise to accept responsibility for the prescription and so refuse such requests. Others initiate discussions with the relevant consultants to reach a position with which all parties are content. Other examples concern medications recommended by private consultants that are more expensive, but without good evidence that they are more effective, than those locally prescribed for the same condition within the NHS. In such circumstances, local prescribing advice from the Primary Care Trust may be followed by the NHS GP. This advice should be explained to the patient who will retain the option of purchasing the more expensive drug via the private consultant.

Many of the problems and concerns that arise in relation to prescribing shared between the private sector and the NHS could be avoided by improved communication between the parties concerned. In many cases patients are simply informed that their GP will prescribe the recommended medication rather than being advised to ask their GP or, more appropriately by the consultant communicating directly with the GP as in NHS referrals. This is not simply a matter of etiquette. If the GP does not feel able to accept clinical responsibility or, in the case of medication that is not clinically necessary, financial responsibility for the recommended medication, this could cause difficulties for the doctor–patient relationship. Those requesting GPs to take over prescribing should be sensitive to these points when discussing the matter with patients.

Can NHS general practitioners offer specialist treatments on a private basis?
Increasing numbers of general practitioners are able to provide specialist treatments, such as complementary therapies or minor surgery, in addition to their general practice. These treatments may be offered to private patients and advertised in the usual way (see below) but general practitioners may not charge patients of their NHS practice for these services.

What should general practitioners do if they believe a consultant is inappropriately directing patients towards private practice?
As with any suspicion of inappropriate behaviour, if a GP suspects that a consultant is using NHS time and patient lists to promote his or her private practice, or may be putting pressure on patients to switch to private treatment, he or she should first seek to establish the facts. This might involve seeking information from the patients involved about the way in which the option of private treatment was raised with them as well as discussing any worries either with other partners in the GP practice or other GPs in the locality and/or directly with the consultant concerned. If these steps do not resolve the suspicion the GP may need to invoke the established local procedures to investigate the concerns. Advice can be sought from BMA regional offices or from the medical defence organisations about how to take such matters forward.

Can patients seek private treatment abroad and claim the cost from the NHS?
Following a high profile case before the courts,[14] considerable media attention has been given to the possibility of patients seeking private treatment overseas and recouping the cost from the NHS. It is likely that this publicity will lead to an increase in the number of such enquiries to NHS doctors.

In October 2003 the High Court confirmed that where treatment cannot be provided “without undue delay” in the United Kingdom, patients have the right, under European Community law,

to seek treatment in another member state and receive reimbursement of the cost from the NHS.[15] The court confirmed that "undue delay" does not mean the same as being outside the Government's waiting list targets and, although relevant, waiting time targets are not determinative. In assessing what amounts to "undue delay" the Department of Health is required to have regard to all the circumstances of each specific case including the patient's medical condition and, where appropriate, the degree of pain and the nature and extent of the patient's disabilities.[16] In the particular case under consideration, Mr Justice Munby held that an "undue delay" was "very much less than [a] year" but "a period significantly (though probably not substantially) greater" than two to three months.[17] The government has been given permission to appeal against this judgment.

Doctors who are approached by patients who wish to seek treatment in another country, on the basis of "undue delay" in the UK, should advise them that they need to receive prior approval from the Department of Health by making an application using form E112. The form must be accompanied by an opinion from a NHS consultant in the UK and the local commissioning body. Patients considering such an application should be referred to the information available from the Department of Health.[18]

Can private general practitioners refer patients for NHS diagnostic services and treatment?
Provided patients are entitled to NHS treatment they may opt into or out of NHS care at any stage. Private general practitioners are entitled to make referrals to NHS facilities,[19] if that is the patient's wish, and the referral should be treated in the same way as if the referral came from within the NHS. Patients' need should be assessed to determine his or her place on the waiting list.

Advertising
How may private doctors advertise their services?
In the late 1990s the General Medical Council withdrew its restrictions on specialists advertising directly to the public. The same rules on advertising now apply to all doctors. These state that any information provided about medical services:

- must comply with the law and guidance issued by the Advertising Standards Authority
- must be factual and verifiable
- must not make unjustifiable claims about the quality of service
- must not offer guarantees of cures or exploit patients' vulnerability or lack of medical knowledge
- must not put pressure on people to use the service, for example by arousing ill-founded fear for their future health or by visiting or telephoning prospective patients.[20]

This guidance applies to all advertising irrespective of the medium used (including information provided on the internet). Provided the material fulfils these broad criteria, it would not breach the GMC's guidance. The BMA believes that, in addition, specialists should as a general rule make it clear to members of the public that they usually do not accept patients without a referral from a GP or other practitioner.

Private practitioners may also send factual information about the services they provide to general practitioners in the area.

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15. Ibid.
16. Ibid: para 143.
17. Ibid: para 174.
18. Department of Health. Getting treatment in countries in the European Economic Area. In: Department of Health. Health advice for travellers. London: DH, 2000. (This guidance was criticised in the court case referred to in the text for its lack of clarity and the Department of Health has stated its intention to revise the guidance.)
19. Department of Health and Social Security. Management of private practice in health service hospitals in England and Wales (“the Green Book”). London: DHSS1986: para 21. The BMA has been informed by the Scottish Executive that the same principle would apply in Scotland.
20. General Medical Council. Good medical practice. Op cit: paras 48-50.