

2. NHS Policy vs UK Law Assessment

How to identify, question and challenge an NHS policy when higher law or patient-specific legal duties may conflict with it

Law and Policy in Medicine toolkit | Version 1.0 | 27 September 2026

Scope and status. This document focuses on NHS care in England, while also using UK-wide/Great Britain professional, medicines and employment-law sources where applicable. Health-service law differs in Scotland, Wales and Northern Ireland. This is a researched legal-information and assessment tool, not individual legal advice and not a substitute for urgent clinical care.

Important wording. “Law prevails over policy” is correct, but “negating” an NHS policy is not normally a unilateral act by a patient or clinician. The safer legal process is to identify the policy’s authority, test it against higher duties, request an exception/reconsideration where available, document the conflict, escalate it, and if necessary use complaints, regulatory enforcement or judicial review.

1. Working hierarchy for an NHS decision

Priority / source	How to treat it
1. Act of Parliament / applicable retained or assimilated law	Binding. Policy must operate within it.
2. Regulations / binding statutory directions	Binding within their legal scope.
3. Binding court authority	Controls interpretation and public-law standards.
4. Statutory duties and statutory guidance	Decision-maker must comply with duties and, where the statute says so, have regard to guidance.
5. GMC / professional regulator standards	Doctors remain personally professionally accountable even when working under organisational policy.
6. NICE recommendations with statutory funding effect	Commissioners must comply where the Standing Rules make the recommendation relevant.
7. NICE clinical guideline	Strong clinical guidance; not itself a universal statutory command and does not remove patient-specific professional judgment.
8. National NHS policy / service specification / formulary	Operationally important but must remain within law and statutory duties.
9. ICB/trust/practice policy	Lowest layer in this hierarchy; must be lawfully made, rational, fair, equality-compliant and applied consistently with individual legal rights.

2. Twelve-step Policy-Law Audit

- 1. Identify the exact decision.** Write down what was refused, restricted, delayed or required, by whom, and the date.
- 2. Obtain the exact policy.** Get the title, version, approval date, review date and section relied upon. Do not audit a summary or hearsay description.
- 3. Identify the policy-maker.** GP practice, trust, ICB, NHS England, NICE, DHSC or another body.
- 4. Identify the legal power.** Ask: under which Act, regulation, direction or contract is this policy made or applied?
- 5. Classify the rule.** Is it legislation, statutory direction, technology-appraisal funding duty, clinical guideline, commissioning rule, formulary, local procedure or usual practice?
- 6. Identify the patient right/duty affected.** Examples: person-centred care, safe care, consent, Equality Act adjustment, rational funding decisions, legal patient choice.
- 7. Test individual clinical discretion.** Does the policy preserve clinician discretion, exceptions, referral, shared care or individual funding? If so, was that route actually considered?
- 8. Test reasons and evidence.** What evidence/rationale supports the policy? Standing Rules require relevant bodies to have decision arrangements and to give written reasons in specified funding situations.
- 9. Test equality and accessibility.** Could the provision, criterion or practice place a disabled person at a substantial disadvantage? Were reasonable adjustments considered?
- 10. Test public-law legality.** Was the decision within legal power, based on relevant considerations, rational, consistent and procedurally fair?
- 11. Test safety.** Would following the policy compromise patient safety/care? If so, clinician raising-concerns duties may apply.
- 12. Choose the remedy.** Clinical reconsideration, alternative clinician, referral, statutory patient choice, IFR, complaint, commissioner review, PHSO, CQC intelligence/enforcement, ICO issue, or legal advice/judicial review depending on the defect.

3. Key legal tests

Question	Evidence / legal significance
Is the policy actually law?	Ask for the statutory provision. "NHS policy" and "NICE guideline" should not be described as legislation unless there is a separate legal duty giving them that effect.
Does it unlawfully remove individual consideration?	A blanket rule can be vulnerable if the statutory scheme requires individual determination or if the policy's distinctions are irrational. Rogers is a leading NHS example.
Is the funding decision reasoned?	Standing Rules regs 34-36 require arrangements for healthcare-intervention decisions and, in specified cases, written policy reasons and reasons for refusal.
Does NICE require funding?	The NHS Constitution gives a right to NICE-recommended drugs/treatments when clinically appropriate where the relevant recommendation has the required funding status.

Does NICE merely guide clinical care?	NICE clinical guidelines generally state they do not override the clinician's responsibility to make patient-specific decisions.
Does it obstruct a legal choice right?	NHS England states referral-management systems should not obstruct legal patient-choice rights.
Does it discriminate or fail to adjust?	Equality Act 2010 ss20/29 can require changes to a provision, criterion or practice where reasonable to avoid substantial disadvantage.
Is the process reasonable and fair?	The NHS Constitution Handbook confirms NHS England, ICBs and NHS trusts/foundation trusts are subject to administrative-law duties of statutory compliance, reasonableness and procedural fairness.

4. What happened in Rogers - why it matters

R (Rogers) v Swindon NHS PCT [2006] EWCA Civ 392 shows that an NHS funding policy can itself be unlawful. The Court of Appeal held the PCT's Herceptin policy irrational because, once the PCT had decided cost was irrelevant and accepted funding could occur in exceptional cases, it could not rationally identify clinical/personal distinctions between otherwise eligible patients. The court quashed the decision but did not itself order the treatment; the PCT had to reconsider under a lawful policy.

Lesson. A successful legal challenge to a policy does not automatically mean the requested treatment must be supplied. It can mean the decision must be remade lawfully.

5. Questions to put to an NHS body

- ☐ Please identify the exact policy, version and paragraph relied upon.
- ☐ Please identify the statutory or contractual authority under which this policy is applied.
- ☐ Is this restriction required by legislation, a binding direction, a NICE technology-appraisal funding requirement, commissioning policy, local formulary, clinical guideline, or local practice?
- ☐ Does the policy permit individual clinical discretion, exceptions, referral, shared care or an Individual Funding Request? If yes, please explain whether each was considered.
- ☐ Please provide the clinical and/or financial evidence and reasons supporting the policy.
- ☐ If this is a funding refusal, please provide the written reasons required by the Standing Rules where applicable.
- ☐ Please explain how Regulation 9 (person-centred care), Regulation 12 (safe care), Equality Act duties and the NHS Constitution were considered.
- ☐ If the clinician believes another treatment is clinically appropriate but cannot provide it under this policy, what lawful route exists for specialist assessment or commissioning?
- ☐ Please identify the review, appeal, complaint or exception route and any time limit.

6. Policy-Law Assessment Sheet

Field	Assessment / evidence
Decision being challenged	

Date / clinician / organisation	
Policy title and version	
Exact clause relied upon	
Policy-maker	
Claimed legal authority	
Higher legal right/duty potentially affected	
Clinical discretion/exception in policy	
Reason given for refusal	
Equality/reasonable adjustment issue	
Patient-choice/referral issue	
Safety issue	
Written reasons requested/received	
Next escalation route and deadline	

Authorities and references

Primary legislation and official/regulatory sources are preferred. Links were checked for this version on 27 September 2026.

- [1] [Handbook to the NHS Constitution for England](#) — States NHS bodies must act consistently with statutory duties, reasonably and procedurally fairly.
- [2] [NHS Constitution for England](#) — Rights to appropriate care, NICE-recommended treatment when clinically appropriate, rational funding decisions, consent and involvement.
- [3] [Health Act 2009, s 2](#) — Duty for specified NHS bodies/providers to have regard to the NHS Constitution.
- [4] [Standing Rules Regulations 2012, Part 7](#) — Regulations 34-36 on drug/treatment funding decisions, reasons and published arrangements.
- [5] [R \(Rogers\) v Swindon NHS PCT \[2006\] EWCA Civ 392](#) — Example of an irrational NHS treatment-funding policy being unlawful.
- [6] [NICE Guidelines Manual - Introduction](#) — Clinical guidelines do not override individual professional judgment.
- [7] [Equality Act 2010](#) — Sections 20 and 29 are central to reasonable adjustments and services.
- [8] [Health and Social Care Act 2008 \(Regulated Activities\) Regulations 2014](#) — Person-centred, safe care and governance legal standards.
- [9] [NHS England Patient Choice Guidance](#) — Legal referral-choice rights and duties; interface services should not obstruct them.
- [10] [GMC Raising and acting on concerns](#) — Duty to raise concerns about systems/policies compromising care or safety.
- [11] [Employment Rights Act 1996, s 47B](#) — Protected-disclosure detriment protection where legal conditions are met.