NHS Constitution: New rights? New responsibilities ?

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3 September 2008

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Outline

- NHS Constitution
- Access to treatment
- Current legal framework
- Constitution framework
- (Legal) implications
- “All a bit tricky…”

- Clinician’s perspective
- Funding perspective

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Background

- Darzi report – NHS at 60
- Budget 1996/7 - £33bn
- Budget 2008/9 - £95bn
- Infinite demand – question of resource allocation
  - Local autonomy / "postcode lottery"
- "Rationing" – NICE (1999)
- Constitution as "contract" of rights and responsibilities
- Consultation open till 17 October 2008

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Current Legal Framework

- NHS Act 2006
- s1 – the SoS must …
- s2 – the SoS may …
- s3 – the SoS must provide … as he considers appropriate …
- s8 – SoS can direct NHS bodies …
- s20 – SHA's power to direct PCTs
- S26 / 63 – Trust's duties to act "effectively, efficiently and economically…"
- Sched 3, part 3 para 20(2) – PCT to report annually on "effective, efficient and economical…" performance
- Sched 5 para 2 – Trust's duty to balance the books

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Effect – patient rights ?

- "Target duties"
- Hincks (1979)
- Walker (1992)
- B v Cambridge (1995)
  - Laws J: "*where the question is whether the life of a 10 year old child might be saved by however slim a chance, the responsible authority must do more than toll the bell of tight resources*"
  - CA: "*Difficult and agonising decisions have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of patients. That is not a judgment which the court can make*"

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Decision making

- Judicial review
- Irrationality – Wednesbury unreasonableness (1947)
- Procedural irregularity
- Rogers v Swindon PCT (2006) CA
  - PCT funding policy was irrational as no criteria to distinguish exceptional cases
- NB – Issue is the decision making process:
  - "*… we cannot and should not order the PCT to fund the treatment. As we see it, it is now a matter for the PCT to reconsider its policy and to formulate a lawful policy upon which to base decisions in particular cases, including that of the appellant, in the future*"

Constitution

- 8 page document (review every 10 years)
- 48 page Handbook (review every 3 years)
- Legislation - January 2009 ?
- Rights / Pledges / Responsibilities
  - Access to health services
  - Quality of care and environment
  - Nationally approved treatments and drugs
  - Respect, consent and confidentiality
  - Informed choice
  - Involvement in your own healthcare
  - Complaint and redress

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(Legal) implications

- ???
  - What will it say ?
  - What will it mean ?
  - How will it be used ?
- ???
  - No comment

- "*to be meaningful it must have bite – with means for enforcement and redress, not just warm words or aspirations*"

BUT

- "*There was no appetite for a 'lawyers' charter', and concern that we should avoid fuelling litigation*"

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Best guess ?

- Consumerism – increasing expectations / demands / complaints / claims ?
- Greater scrutiny of decision making process
  - PCTs / Trusts
  - NICE
- PCTs and Trusts obliged to take Constitution pledges & principles into account (and justify departure from them)
- Increased spending on NICE approved drugs (? £100m pa)
- Slippage (the law of unintended consequences)
  - New rights created inadvertently

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“A bit tricky …”

- Media
- Political pressure
- Relations with other reforms
  - Darzi
  - Redress scheme
  - Top Ups (co-payments) – Prof Richards review
  - Individual budgets / direct payments

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The NHS constitution: new rights, new responsibilities?

An Oncology perspective

Dr Vanessa Potter

Consultant Medical Oncologist,
Nottingham University Hospital.

The NHS constitution

- Principles that guide the NHS
  - Equal access for all.
- Patients rights and NHS pledges
  - NHS will strive to make decisions clear and transparent.
  - NHS will strive to identify and share best practice in quality of care and treatments.
  - The right to NICE recommended treatments.
  - The right to expect local decisions about the funding of drugs to be made rationally.
  - Informed choice.
- Patients responsibilities
- Staff rights
- Staff responsibilities

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Postcode prescribing or equal access for all?

- 1.2 million people living with cancer.
- Average network spend on cancer £7.5m / year (mental health £14.6 m / CHD £12.2m).
- Cancer drugs account for less than 15% of that budget. Only 5% of all UK drug costs.
- But huge variation in spending:
  - Greater Manchester cancer network spend 10.3% on drugs, Lancashire and S. Cumbria only 4.8%.
- Does public play the a role in decision making?
  - Cancerbackup – 76% felt cancer should be a national priority compares with 41% CHD.

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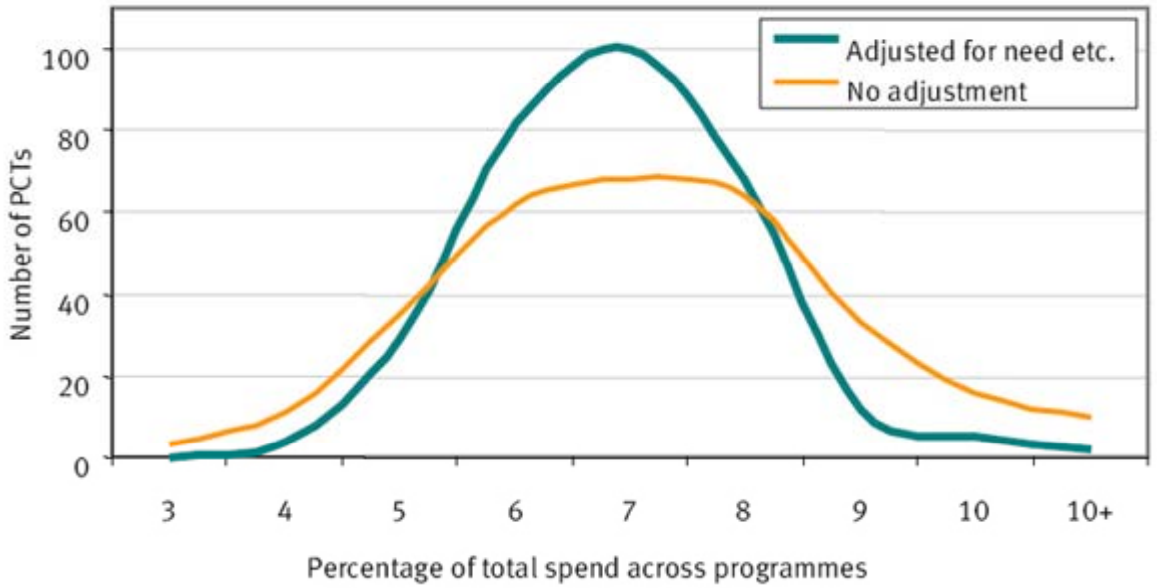
Postcode prescribing or equal access for all?

- Spending varies enormously between PCTs



- Daventry and Northamptonshire £132 per person, Heart of Birmingham £35.

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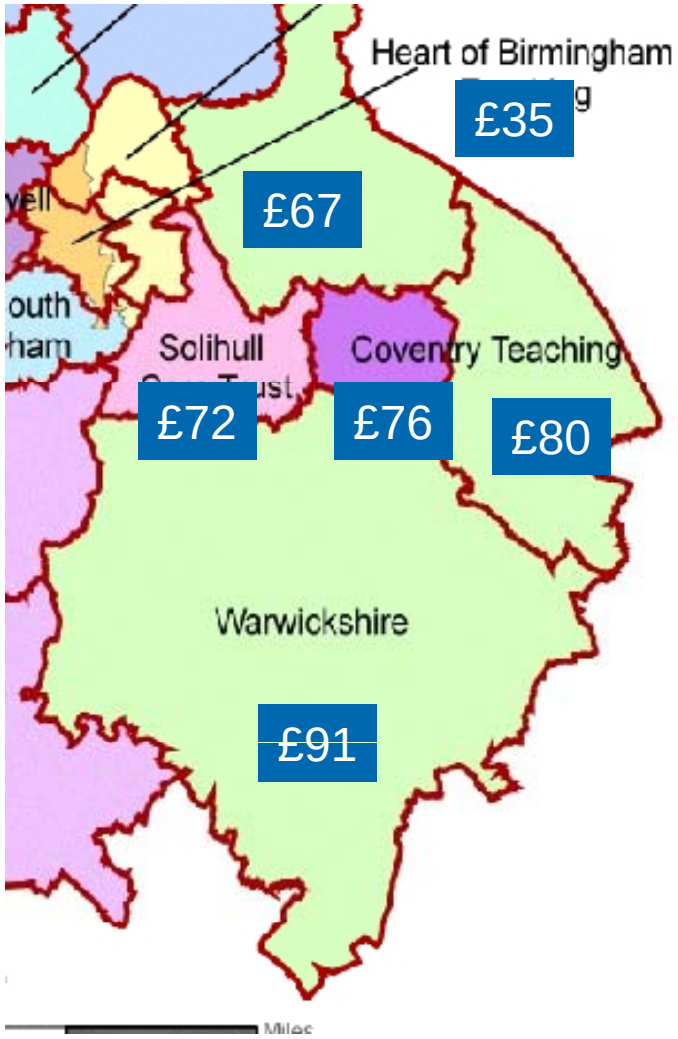
- Can you expect the same standard of care in Inner City Birmingham as in South Warwickshire?



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National Institute of Clinical Excellence (NICE)

- Remit to review efficacy and cost-effectiveness of new drugs.

- From an Oncologist's point of view:
  - Takes too long to evaluate drugs.
    - e.g Erlotinib
    - Timelines of Scottish Medicines Consortium
  - What happens to access to new drugs prior to NICE review.
  - The effects of lobbying.
  - Is the QUALY a valid assessment of cost effectiveness in metastatic cancer.

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Does this slow access to new drugs contribute to outcomes?

- New drug uptake in the USA and most of Europe is quicker than in the UK.
- Survival rates in the US and Western Europe are better.

	Breast cancer	Colorectal cancer
USA	83.9%	60.2%
France	79.8%	61.5%
NL	77.6%	54.5%
Spain	77.7%	54.7%
UK	69.8%	44.7%

- Other factors affect outcomes.

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Informed choice

- Where do patients get their information?
- Do doctors discuss all treatment options even those not available within NHS?
  - 103 myeloma specialists, 1:4 avoided discussing such drugs.
  - 274 Australian oncologists – 28–41% would not discuss high cost drugs.
- Co-funding
  - YouGov survey of 1800 people – 95% felt this was equitable.

New rights, new responsibilities?

- How do we ensure equity of healthcare across the UK?
- Who makes the decisions regarding priorities within regions – is there really public influence and transparency?
- How does the NHS continue to improve treatments and outcomes in cancer with its finite budget?

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Clive Richards

"As troubled as you believe the NHS to be...please behold the mess that a less ambitious nation could have chosen"

Donald Berwick July 2008

British Medical Journal 30 August 08

Three headlines

- **Professors call for review of way cancer drugs in NHS are rationed**
- **Palliative care in Scotland is too focused on cancer, says national report**
- **Poor economy means more Americans have trouble paying medical bills**

Rationing health care

Weale A,*BMJ* 1998;316:410

The basic principle of the NHS is simply that

- comprehensive, high quality medical care should
- be available to all citizens on the basis of professionally judged medical need
- without financial barriers to access.

"an inconsistent triad"

Tuesday, April 15, 2008 6:52 PM

An Arm, A Leg And A Life

Co-payments Soar For Drugs With High Prices

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British Medical Journal 30 August 08

- **Number of items dispensed in Wales rose by 5% after prescriptions became free**

- Since 90% were already free, a 5% total increase is equivalent to 50% increase in uptake of those that were previously paid for

Man who lost 20 stone refused op

BBC Wales Thursday 28 August

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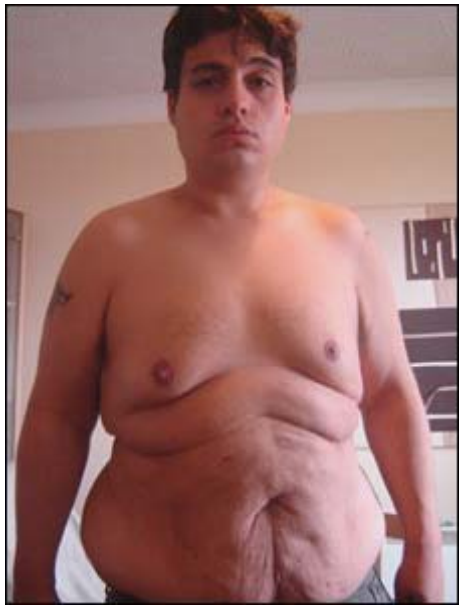

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Draft NHS Constitution

- Key principles
- Rights
- Responsibilities
- Commitment to staff and their responsibilities
- Values