NHS Constitution: New rights? New responsibilities?

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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
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
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
Effect - patient rights?

- “Target duties”
- Hincks (1979)
- Walker (1992)
  - 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”
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
(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”
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
“A bit tricky ...”

- Media
- Political pressure
- Relations with other reforms
  - Darzi
  - Redress scheme
  - Top Ups (co-payments) - Prof Richards review
  - Individual budgets / direct payments
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**
Postcode prescribing or equal access for all?

- 1.2 million people living with cancer.
- Average network spend on cancer £7.5m / year (mental health £14.6m / 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.
Postcode prescribing or equal access for all?

- Spending varies enormously between PCTs

- Daventry and Northamptonshire £132 per person, Heart of Birmingham £35.
Can you expect the same standard of care in Inner City Birmingham as in South Warwickshire?
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.
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.

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<th>Breast cancer</th>
<th>Colorectal cancer</th>
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<tr>
<td>USA</td>
<td>83.9%</td>
<td>60.2%</td>
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<td>UK</td>
<td>69.8%</td>
<td>44.7%</td>
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- Other factors affect outcomes.
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?
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
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

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”
An Arm, A Leg And A Life

Co-payments Soar For Drugs With High Prices
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
Draft NHS Constitution

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