LANDMARK CHAMBERS

NHS Legal Framework Masterclass

Patient Choice

Wednesday 17 September

Welcome and Introduction

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Your speakers for today

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Welcome and Introduction

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Common Issues

Charles Bishop

An Outline of Patient Choice

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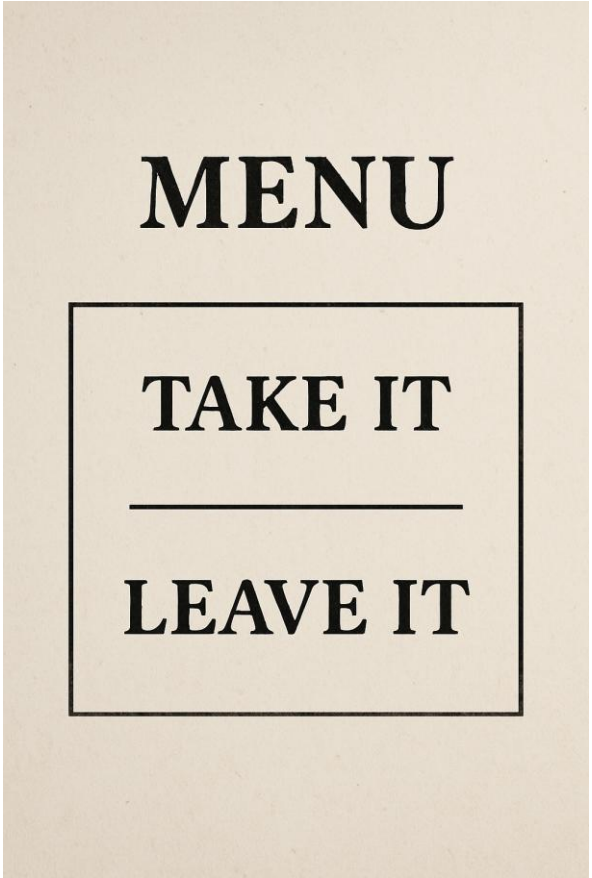
An Outline of Patient Choice

Charles Bishop

What is “patient choice”?

- A set of legal rights?
- An NHS slogan?
- A political ambition?



Limitations of patient choice

- No right to expand to non-commissioned services or services which are otherwise not available, e.g. prohibited medicines (think puberty blockers).
- Little application in emergency situations (but see Martha's Rule).
- For secondary care, the rights are generally triggered by a referral from a GP (but see proposals in the 10 Year Plan).
- No corresponding shifting of costs to NHS Trusts and Foundation Trusts, creating problems in practice for NHS bodies.

General patient choice duties

- NHSE and ICBs are under general duties to, in the exercise of their functions, act with a view to enabling patients to make choices with respect to aspects of health services provided to them: ss. ss. 13I and 14Z37 NHSA 2006.

Primary care

- NHS Constitution: Right to choose GP practice and be accepted by it unless there are reasonable grounds to refuse. Right to express a preference for using a particular doctor within GP practice and for the practice to try to comply.
- BUT: not a directly enforceable right – essentially a form of procedural duty.
- NHSE is prohibited from restricting the ability of a person to apply for inclusion in the list of a GP practice or expressing a preference for a particular practice of a particular performance or class of performer: reg. 42A of the National Health Service Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) Regulations 2012.

Primary care

- Contractual duties: the National Health Service (General Medical Services Contracts) Regulations 2015 imposes requirements which are contained in the standard GMS contract operated by NHS England. BUT not enforceable by patients themselves because of Contracts (Rights of Third Parties) Act 1999. Therefore have to consider other options such as JR, EA 2010 and complaints: see NHS Law and Practice paras 19.112-19.19.126!
- Patients can apply to join the list of any GP practice that has an open list. A GP practice can only refuse an application if there are “reasonable grounds for doing so which do not relate to the applicant's age, appearance, disability or medical condition, gender or gender reassignment, marriage or civil partnership, pregnancy or maternity, race, religion or belief, sexual orientation or social class”. Residence is specified as a reasonable ground.
- Obligations to comply with patient preferences as to practitioner (subject to various reasonableness restrictions).

Secondary care: the broad picture

- NHS constitution: Right to receive care and treatment that is appropriate to you, meets your needs and reflects your preferences.
- DHSC NHS Choices Framework – what choices are available to you in your NHS care: guidance which seeks to set out statutory picture.
- NHS England formal guidance on patient choice: guidance which seeks to set out statutory picture.
- RSR Regulations 2012 parts 8 and 9: the main source of legally enforceable patient choice rights, derived from s. 6E of the NHSA 2006.

The RSR Regulations at a glance

Two stages when choice may arise:

1. Initial referral by referring clinician (usually GP).
2. Waiting time breached.

Initial referrals: Part 8, regs. 38 - 41

In essence, patients have a legal right to choose the secondary care provider to whom they are referred by their NHS GP, dentist or optometrist where the clinician decides that the patient requires an “elective referral”.

- Requires a referral, but can be for any service to be provided unless specifically excluded.
- Does not apply to referrals “immediately required”.
- Applies to “interface services” – see Leon’s presentation on referral hubs.
- Applies only to referrals to service providers with a commissioning contract with an ICB or NHSE.

Waiting time breaches: Part 9, regs. 44 - 49

The general principle (subject to exceptions): where a patient is referred for secondary care and treatment is either not commenced within 18 weeks or will not be commenced within 18 weeks, reg. 48(1) imposes a duty on the commissioning body (i.e. the ICB or NHSE) to take all reasonable steps to ensure that the person is offered an appointment with an alternative provider.

- Less of a “choice” – duty is on NHSE/ICB to find alternative (but that may involve offering a choice of alternatives).
- Wider pool of providers available – no requirement to hold a contract with an ICB.

Rarely exercised in practice!

Choosing NHS-funded treatment abroad

- "Planned Treatment Scheme" (S2 funding route) is a discretionary NHS England funding scheme for planned state-provided healthcare treatment in an EU country or Switzerland, Norway, Iceland or Liechtenstein, operated pursuant to the power in s. 6 NHSA 2006 to commission NHS services outside England.
- Criteria set out at https://www.nhs.uk/using-the-nhs/healthcare-abroad/going-abroad-for-treatment/planned-treatment-s2-funding-route/.
- Includes "the NHS must confirm that it cannot provide the specified, or equivalent, treatment(s), in a medically acceptable timeframe, for your condition or diagnosis (referred to as undue delay). The relevant NHS commissioner is contacted by the European Cross Border Healthcare (ECBH) team to provide this information."

Choosing a second opinion: Martha's Rule

- No legal right for the NHS to fund a secondary opinion from that adopted by the clinical team in place.
- However, following a successful campaign, the NHS is now rolling out "Martha's Rule" to every acute hospital in England.
- Three limbs to Martha's Rule – but no legislative footing:

1. Patients will be asked, at least daily, about how they are feeling, and if they are getting better or worse, and this information will be acted on in a structured way.

2. All staff will be able, at any time, to ask for a review from a different team if they are concerned that a patient is deteriorating, and they are not being responded to.

3. This escalation route will also always be available to patients themselves, their families and carers and advertised across the hospital.

The future: 10 Year Health Plan and patient choice

- Plan for a new “Choice Charter” with five new mechanisms:
- 1. NHS funding flows will be “increasingly sensitive to patient voice, choice and feedback”
- 2. Expansion of personal health budgets
- 3. Expansion of the NHS App to include “My Choices”
- 4. Expansion of self-referral
- 5. Greater provision of information over elective treatment choice

When patients access care, they should have at least as much choice over who provides it as in any other part of their lives. In the past 20 years, the trend has been towards far more consumer choice, but the NHS has clung onto ‘one size fits all’. My Choices will give every patient the ability to make a meaningful choice.

It will help patients find everything from the nearest pharmacy to the best outcome scores for heart surgery from providers across the country. By providing a range of data on those providers, whether that is the shortest wait, the best outcomes, the best patient satisfaction scores or is the closest to home, patients will be able to pick based on their preferences. In turn, this will inspire providers to respond to patient choice, raise their game, and design services based on what patients truly value.

My Choices will be transformative for equity. We know, including from our engagement, that ‘one size fits all’ misses the distinct needs of women, people from ethnic minority backgrounds or people who live in more rural communities, among many others. Meaningful choice will be how we strengthen their voice, and the NHS’ ability to truly deliver care based on need.

Common Issues

Leon Glenister

Four issues

1. Can a patient demand treatment the clinician does not offer?
2. Can a patient demand a treatment not offered by their ICB, that is offered by another ICB?
3. Can a patient enforce their right to choose in Court?
4. What are the legal issues with referral hubs?

Can a patient demand treatment the clinician does not offer?

- A clinician cannot be compelled to provide a service which they do not consider is clinically advised
- In general: *R (Burke) v GMC* [2006] QB 273, paragraph 50
- Patient's right to autonomy does not assist: *R (JJ) v Spectrum CIC* [2023] EWCA Civ 885
- May seek a second opinion: *Burke*.

Can a patient demand a treatment not offered by their ICB, that is offered by another ICB?

- How important is this additional wording?

> "Regulation 39
>
> (2) Subject to regulations 40 and 41, the choices specified for the purposes of this paragraph are the choice—
>
> (a) in respect of a first outpatient appointment with a consultant or a member of a consultant's team, inclusive of any subsequent treatment required as a result of that elective referral, of—
>
> (i) any clinically appropriate health service provider with whom any commissioning body has a qualifying contract"

Can a patient demand a treatment not offered by their ICB, that is offered by another ICB?

- Postcode rationing issue vs ICB budgetary policies
- Could position impact e.g. referrals for IVF treatment?
- Possible double payments where there is a block contract

Can a patient enforce their right to choose in Court?

- Regulation 39(1): duty on relevant body to “make arrangements”
- Target duty or individual duty? See *R (AA) v NHS Commissioning Board* [2023] EWCA Civ 902
- NHS England power to investigate breaches of patient choice requirements: section 6F NHS Act 2006.

What are the legal issues with referral hubs?

- Legislative basis as an “interface service”, which can make an “elective referral”: regulation 38
- Relevance of GP’s duty to act in best interest of patient where they consider patient requires a particular referral
- Need to implement patient choice provisions within referral hub procedure – including by reference to providers contracted with other ICBs: regulation 39(2).

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Q&A

Thank you

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