The purpose and effect of the NHS Constitution

Contents of this chapter:

The abbreviations used in this chapter are:

CCG	Clinical Commissioning Group
CQC	Care Quality Commission
GP	General Practitioner
Handbook to the NHS Constitution	The Handbook
NHS Act	National Health Service Act 2006 (as amended by the Health and Social Care Act 2012)
NHS Constitution	The Constitution
NHS England	National Health Service Commissioning Board
NICE	National Institute for Health and Care Excellence
Secretary of State	Secretary of State for Health
2009 Act	Health Act 2009
2012 Act	Health and Social Care Act 2012
2014 Regulations	Health and Social Care Act 2008 (Regulated Activities) Regulations 2014

1. Introduction.

1.1. It is rare for a day to go by without one newspaper or another commenting that an NHS body is breaching the NHS Constitution. Such comments are particularly prevalent in the context of some of the more controversial health issues, notably referral to treatment, A&E waiting times or access to certain medical treatments or drugs. Journalists regularly pray in aid on patients' rights in the Constitution, such as the "*right to access certain services commissioned by NHS bodies within maximum waiting times*".[1]

1.2. The NHS Constitution, while certainly well-intentioned in its aims, is a widely misunderstood, underused, and in a sense misleading document. For those who are aware of this document (and the evidence suggests that there is still a woeful percentage of patients and, more worryingly, staff who do not know that it exists[2]), its exact legal status, as well as the source and applicability of the legal rights and responsibilities set out in it, can be obscure. Moreover, while the NHS Constitution seeks to simplify and explain existing legal rights and scenarios for the benefit of patients and staff, at times it oversimplifies the underlying web of inter-connecting rules, regulations and statutory obligations that the various NHS bodies are subject to.[3]

1.3. The purpose of this chapter is to explain exactly what the NHS Constitution is, what legal status it has, and how legal practitioners, patients and those working in the NHS may seek to use or rely on it.

2. What is the NHS Constitution?

[1] The NHS Constitution can be found in PDF form here: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/480482/NHS_Constitution_WEB.pdf

[2] See the latest *Report on the effect of the NHS constitution,* available in PDF form here: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/440171/2904073_Report_on_the_NHS_Accessible_v0.1.pdf

[3] For an exposition of how one scenario in healthcare could engender multiple legal consequences and liabilities, please see Chapter 1, "An Introduction to the Legal Structures of the NHS".

2.1. The NHS Constitution is a document published by the Secretary of State that applies to the NHS in England. The Secretary of State is required to publish an NHS Constitution as a result of section 1 of Chapter 1 of Part 1 of the Health Act 2009. The most recent version of the Constitution was published on 27 July 2015.

2.2. The NHS Constitution was developed as part of the NHS Next Stage Review led by Lord Darzi and was first published on 21 January 2009. The key legislation that underpins the Constitution, Chapter 1 of Part 1 of the Health Act 2009, was brought into force almost a year later on 19 January 2010. The Constitution was the result of extensive consultation and engagement with key stakeholders. The underlying purpose for creating the Constitution was to bring about cultural change in the NHS; to move away from the idea of rival interests or a transactional relationship between staff and patients.[4]

2.3. The NHS Constitution describes itself as follows:

> "The NHS is founded on a common set of principles and values that bind together the communities and people it serves – patients and public – and the staff who work for it.
>
> This Constitution establishes the principles and values of the NHS in England. It sets out rights to which patients, public and staff are entitled, and pledges which the NHS is committed to achieve, together with responsibilities, which the public, patients and staff owe to one another to ensure that the NHS operates fairly and effectively.
>
> The Secretary of State for Health, all NHS bodies, private and voluntary sector providers supplying NHS services, and local authorities in the exercise of their public health functions are required by law to take account of this Constitution in their decisions and actions.
>
> References in this document to the NHS and NHS services include local authority public health services, but references to NHS bodies do not include local authorities.

[4] See the parliamentary debate here: https://publications.parliament.uk/pa/cm200809/cmpublic/health/090616/am/90616s06.htm

> Where there are differences of detail these are explained in the Handbook to the Constitution."

2.4. The NHS Constitution can be described as a "framework" document for the NHS. In four chapters it sets outs:

- the principles that guide the NHS;
- the values of the NHS;
- the rights of patients and members of the public using the NHS;
- pledges the NHS makes to its patients;
- patients' responsibilities;
- the rights of NHS staff;
- pledges the NHS makes to its staff; and
- staff responsibilities.

2.5. It is accompanied by the Handbook to the NHS Constitution ("**the Handbook**"), the most recent version of which was also published on 27 July 2015[5]. The Handbook effectively provides an explanation or rationale for everything contained within the Constitution.

2.6. The Constitution states:

> "The Constitution will be renewed every 10 years, with the involvement of the public, patients and staff. It is accompanied by the Handbook to the NHS Constitution, to be renewed at least every three years, setting out current guidance on the rights,

[5] The Handbook can be found in PDF form here: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/474450/NHS_Constitution_Handbook_v2.pdf

> pledges, duties and responsibilities established by the Constitution. These requirements for renewal are legally binding. They guarantee that the principles and values which underpin the NHS are subject to regular review and recommitment; and that any government which seeks to alter the principles or values of the NHS, or the rights, pledges, duties and responsibilities set out in this Constitution, will have to engage in a full and transparent debate with the public, patients and staff."

2.7. It is important to note at the outset that the NHS Constitution is not legally enforceable *per se*. Rather, the NHS Constitution is best described as a declaratory document. The intention behind the creation of the document was that it would bring together and set out, in one easy-to-understand format, a combination of law, aspirations for the NHS and public commitments, as well as lay down the broad principles of the NHS. The Constitution merely declares what the pre-existing law affecting the NHS is. It does not, and was not intended to, make law or create new rights or obligations.

2.8. This does not mean, however, that the Constitution has no legal teeth. The Secretary of State for Health, all NHS bodies, private and voluntary sector providers supplying NHS services, and local authorities in the exercise of their public health functions are required by law to "have regard to" the Constitution in their decisions and actions. There are also additional duties on NHS England and CCGS to promote the Constitution and to promote awareness of it. The nature of these duties will be explored in this chapter.

2.9. When the Labour government introduced the NHS Constitution, it did not want the document to create any additional litigation for an already stretched NHS. As we will see in this chapter, that has broadly been the journey the Constitution has taken. To the present day, there have been very few cases to even reference it, and still the legal duties and the framework that underpin the Constitution have not been a source of much dispute.

3. What does the NHS Constitution contain?

3.1. The first chapter of the NHS Constitution is entitled, "Principles that guide the NHS". This section contains seven key principles, which are intended to "*… guide the NHS in all it does".* These principles are the foundation of the Constitution and can only be amended pursuant to regulations. The accompanying text in the Constitution gives further detail to the principles, which are as follows:

- *The NHS provides a comprehensive service[6], available to all*
- *Access to NHS services is based on clinical need, not an individual's ability to pay*
- *The NHS aspires to the highest standards of excellence and professionalism*
- *The patient will be at the heart of everything the NHS does*
- *The NHS works across organisational boundaries and in partnership with other organisations in the interest of patients, local communities and the wider population*
- *The NHS is committed to providing best value for taxpayers' money and the most effective, fair and sustainable use of finite resources*
- *The NHS is accountable to the public, communities and patients that it serves.*

3.2. The second chapter of the Constitution contains the "NHS Values", which are expressed to "*provide common ground for co-operation to achieve shared aspirations,*

[6] The NHS does not in reality provide a comprehensive health service. The Secretary of State and NHS England have a duty to promote a comprehensive health service but, as the Court of Appeal recognised in *Coughlan,* as demand for NHS services will always outstrip resources, a comprehensive health service may never in fact be provided.

at all levels of the NHS." Again the accompanying text in the Constitution explains the background to the values. They are as follows:

- *Working together for patients*
- *Respect and dignity*
- *Commitment to quality of care*
- *Compassion*
- *Improving lives*
- *Everyone counts*

3.3. Neither the principles nor the values have any direct legal consequence in and of themselves, although it is clear that they are largely influenced by the legal frame-work that the NHS operates within.

3.4. Chapter 3a of the Constitution is entitled, "*Patients and the public – your rights and NHS pledges to you*". This part of the NHS Constitution is arguably the most widely known about. The introductory paragraphs state:

> "Everyone who uses the NHS should understand what legal rights they have. For this reason, important legal rights are summarised in this Constitution and explained in more detail in the Handbook to the NHS Constitution, which also explains what you can do if you think you have not received what is rightfully yours. This summary does not alter your legal rights.
>
> The Constitution also contains pledges that the NHS is committed to achieve. Pledges go above and beyond legal rights. This means that pledges are not legally binding but represent a commitment by the NHS to provide comprehensive high quality services."

3.5. The chapter sets out a long list of legal "rights" of NHS patients, and pledges or public commitments, pertaining to various areas including:

- *access to health services;*
- *quality of care and environment;*
- *nationally approved treatments, drugs and programmes;*
- *respect, consent and confidentiality;*
- *informed choice; involvement in your healthcare and in the NHS; and*
- *complaint and redress.*

3.6. It is beyond the scope of this chapter to analyse every single one of the "rights" set out in the Constitution, but some of the more frequently quoted rights are:

> "You have the right to receive NHS services free of charge, apart from certain limited exceptions sanctioned by Parliament.
> …
> You have the right to drugs and treatments that have been recommended by NICE for use in the NHS, if your doctor says they are clinically appropriate for you.
> ….
> You have the right to access certain services commissioned by NHS bodies within maximum waiting times, or for the NHS to take all reasonable steps to offer you a range of suitable alternative providers if this is not possible. The waiting times are described in the Handbook to the NHS Constitution."

3.7. The word "rights" in this context is to some extent a misnomer. Many of the rights in the Constitution are more accurately analysed as summations of multiple legal obliga-

tions, which stem from a range of legal sources. These sources include public law duties, the law of negligence, the criminal law, and various regulations. It is therefore advisable that one goes to the Handbook to the Constitution to better understand the rights. The Handbook sets out for each right: (i) what it means for patients and (ii) what the source(s) of the right is or are.

3.8. For example, the "*right to expect NHS bodies to monitor, and make efforts to improve continuously, the quality of healthcare they commission or provide. This includes improvements to the safety, effectiveness and experience of services"* is not a recognised legal right. As the Handbook sets out, this right derives from a number of disparate sources:

- Under section 13D of the NHS Act, NHS England is under a duty to exercise its functions effectively, efficiently and economically;
- Under section 13E of the NHS Act, NHS England is under a duty as to the improvement in quality of services provided to individuals;
- Under section 14S of the NHS Act, clinical commissioning groups (CCGs) are under a duty to assist and support NHS England in discharging its duty under section 13E so far as relating to securing continuous improvement in quality of primary medical services;
- Under section 14R of the NHS Act, CCGs are under a similar duty to NHS England as to improvement in quality of services provided to individuals;
- Under section 1A of the NHS Act, the Secretary of State is likewise under a similar duty as to improvement in quality of services provided to individuals;
- In discharging these duties (under section 1A, and under section 13E), the Secretary of State and NHS England must have regard to any quality standards prepared by NICE under section 234 of the Health and Social Care Act 2012;
- The law of negligence imposes a duty of care on providers of healthcare. This is a duty to take reasonable care and skill in the provision of treatment or other healthcare. For a health professional, what constitutes "reasonable care and skill'" will be determined by reference to professional practice. In the case of an

NHS body or private organisation, it must take reasonable care to ensure a safe system of healthcare – using appropriately qualified and experienced staff;

- Individual health professionals are also governed by the standards set under the professional regulatory regime that applies to their profession;
- Under the Health and Social Care Act 2008 persons who carry on regulated activities in England, including NHS, private and voluntary providers, have to register with the CQC and meet a set of essential requirements of safety and quality;
- This right is also based on the new fundamental standards which sets out the required level of quality and safety providers must meet fit and proper persons employed as set out in regulations 12, and 19, of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014. The CQC's role is to improve care by regulating and inspecting services. The CQC ensures that only persons carrying out the regulated activity who have made a legal declaration that they meet the essential fundamental standards are allowed to provide care. The CQC actively works as part of the wider system to detect and address failing organisations, sharing its findings with other regulators, including Monitor, and the commissioners of services.

3.9. The "fundamental standards" in the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 form the basis of several of the rights in the NHS Constitution.[7] The Care Quality Commission ("**the CQC**") is able to take enforcement action against providers that do not meet these standards. Failure to meet the fundamental standards can, in some circumstances, have consequences under the criminal law. For example, Regulation 12 provides for the fundamental standard relating to safe care and treatment and is one of the sources of the right set out above. The 2014 Regulations prescribe that a registered person commits an offence if the they fail to comply with the requirements of the Regulation and such failure results in:

"(a) avoidable harm (whether of a physical or psychological nature) to a service user,

(b) a service user being exposed to a significant risk of such harm occurring, or

[7] Other examples are the "*right to be protected from abuse and neglect, and care and treatment that is degrading*" and the "*right to receive suitable and nutritious food and hydration to sustain good health and well-being*".

> (c) in a case of theft, misuse or misappropriation of money or property, any loss by a service user of the money or property concerned"

The CQC may prosecute such providers. The 2014 Regulations provide for different levels of penalties and methods of enforcement.

3.10. What this brief analysis of just one of the rights in the Constitution demonstrates is as follows - although expressed as a "right", it will invariably not be possible for a person who feels that their care has fallen short to go to court and cite their "*right to expect NHS bodies to monitor, and make efforts to improve continuously, the quality of healthcare they commission or provide*." Moreover, where an individual may be able to claim in a negligence action that an NHS provider has not taken reasonable care or skill in the provision of their treatment or care, it is only the CQC that can enforce the fundamental standards. Thus the first step for every person seeking to rely on a right in the Constitution should be to go to the Handbook. To better understand the source(s) of that right, it would also be wise to seek legal advice since one factual scenario may involve a multitude of legal obligations and liabilities.

3.11. Chapter 3b of the Constitution is entitled, "Patients and the public - your responsibilities". The introductory paragraph states, "*The NHS belongs to all of us. There are things that we can all do for ourselves and for one another to help it work effectively, and to ensure resources are used responsibly*". Patients are asked to do the following things:

> "Please recognise that you can make a significant contribution to your own, and your family's, good health and wellbeing, and take personal responsibility for it.
> Please register with a GP practice – the main point of access to NHS care as commissioned by NHS bodies.
>
> Please treat NHS staff and other patients with respect and recognise that violence, or the causing of nuisance or disturbance on NHS premises, could result in prosecution. You should recognise that abusive and violent behaviour could result in you being refused access to NHS services.

> Please provide accurate information about your health, condition and status.
> Please keep appointments, or cancel within reasonable time. Receiving treatment within the maximum waiting times may be compromised unless you do.
>
> Please follow the course of treatment which you have agreed, and talk to your clinician if you find this difficult.
>
> Please participate in important public health programmes such as vaccination.
> Please ensure that those closest to you are aware of your wishes about organ donation.
>
> Please give feedback – both positive and negative – about your experiences and the treatment and care you have received, including any adverse reactions you may have had. You can often provide feedback anonymously and giving feedback will not affect adversely your care or how you are treated. If a family member or someone you are a carer for is a patient and unable to provide feedback, you are encouraged to give feedback about their experiences on their behalf. Feedback will help to improve NHS services for all."

3.12. Except where the Constitution makes clear that violence towards staff and other patients, or causing a nuisance or disturbance on NHS premises, could have criminal consequences, it is doubtful whether a failure by a patient to comply with any of the "responsibilities" imposed in this section could have legal consequences for them. In reality, this section of the Constitution reflects the modern aspiration for a more collaborative relationship between clinicians and the NHS with patients. In a period where the NHS is increasingly pressed for resources, it encourages patients to take more responsibility for their health needs.

3.13. Chapter 4a of the Constitution is entitled, "Staff - your rights and pledges to you". It is outside the scope of this book to analyse the vast employment and discrimination law framework relevant to staff working in the NHS. These rights are set out not in the Constitution itself but in the Handbook. However, the Constitution makes clear that:

> "These rights are there to help ensure that staff:

- have a good working environment with flexible working opportunities, consistent with the needs of patients and with the way that people live their lives;
- have a fair pay and contract framework;
- can be involved and represented in the workplace;
- have healthy and safe working conditions and an environment free from harassment, bullying or violence;
- are treated fairly, equally and free from discrimination;
- can in certain circumstances take a complaint about their employer to an Employment Tribunal; and
- can raise any concern with their employer, whether it is about safety, malpractice or other risk, in the public interest."

3.14. Like Chapter 3a of the Constitution concerning patients' rights, Chapter 4a also makes a number of pledges or public commitments to staff in relation to their employment conditions and working environment.

3.15. Finally, Chapter 4b of the Constitution is entitled, "Staff - your responsibilities". Unlike Chapter 3b concerning patient responsibilities, this section does summarise pre-existing legal duties on staff within the NHS. Again the sources of these responsibilities are diverse. They include: the Employment Rights Act 1996, the Health and Safety at Work Act 1974, the Equality Act 2010, the Human Rights Act 1998 and the Data Protection Act 1998, just to name a few. Chapter 4b also includes "*expectations that reflect how staff should play their part in ensuring the success of the NHS and delivering high quality care*".

4. The Secretary of State's procedural duties concerning the NHS Constitution.

4.1. The Health Act 2009 referred to the NHS Constitution which had been published in January 2009 and required the Secretary of State to ensure that the NHS continued to have a Constitution, as well as a Handbook to support the Constitution. Whilst it

listed the NHS bodies which were required to have regard to the Constitution, curiously the Secretary of State was not originally required to have regard to his own Constitution when discharging his functions as Secretary of State. The Secretary of State only came under a duty to have regard to the NHS Constitution under the Health and Social Care Act 2012.

4.2. Section 1 of the 2009 Act gives legal status to the NHS Constitution and the Handbook:

> "(1) In this Chapter the "NHS Constitution" means—
>
> (a) the document entitled "The NHS Constitution" published by the Secretary of State on 21 January 2009, or
>
> (b) any revised version of that document published under section 3 or 4.
>
> (2) In this Chapter the "Handbook" means—
>
> (a) the document entitled "The Handbook to the NHS Constitution" published by the Secretary of State on 21 January 2009, or
>
> (b) any revised version of that document published under section 5."

4.3. Section 2 of the 2009 Act creates a duty for a defined list of NHS bodies and providers of NHS services to "have regard" to the Constitution. This duty is discussed fully in the following section.

4.4. Section 3 of the 2009 Act relates to the availability and review of the Constitution. It creates a duty on the Secretary of State to review the Constitution every ten years and sets out consultation requirements in the event of such a review. It also prohibits amendment of the seven "guiding principles" in the Constitution (defined in subsection (7)) without the making of regulations. It provides as follows:

"(1) The Secretary of State must ensure that the NHS Constitution continues to be available to patients, staff and members of the public.

(2) At least once in any period of 10 years the Secretary of State must carry out a review of the NHS Constitution (referred to in this Chapter as a "10 year review").

(3) The following must be consulted about the NHS Constitution on a 10 year review—

(a) patients and bodies or other persons representing patients,

(b) staff and bodies or other persons representing staff,

(c) carers,

[...]

(e) members of the public,

(f) the bodies and persons listed in section 2(2) , (4) and (5), and

(g) such other persons as the Secretary of State considers appropriate.

(4) The first 10 year review must be completed not later than 5 July 2018.

(5) The guiding principles may not be revised as a result of a 10 year review, except in accordance with regulations made by the Secretary of State setting out the revision to be made.

(6) The Secretary of State must publish the NHS Constitution after any revision made as a result of a 10 year review."

4.5. Section 4 of the 2009 Act relates to the Secretary of State's powers to make revisions to the Constitution other than a 10 year review. It contains similar provisions to section 3 regarding consultation requirements and the guiding principles. It provides as follows:

"(1) This section applies to any revision of the NHS Constitution made other than as a result of a 10 year review (including any such revision which revises the guiding principles).

(2) Before any revision the Secretary of State must undertake appropriate consultation about the proposed revision.

(3) The persons consulted must include such patients, staff, members of the public and other persons as appear to the Secretary of State to be affected by the proposed revision.

(4) The guiding principles may not be revised, except in accordance with regulations made by the Secretary of State setting out the revision to be made.

(5) The Secretary of State must publish the NHS Constitution after any revision."

4.6. Section 5 of the 2009 Act relates to the availability, review and revision of the Handbook. Unlike the Constitution, it creates an obligation to review the Handbook every *three* years. This reflects the fact that the Handbook contains the legal sources of much of the information in the Constitution. The underlying framework regularly changes, meaning the Handbook requires fairly frequent revision. The latest Handbook was published on 27 July 2015. Section 5 of the 2009 Act provides as follows:

"(1) The Secretary of State must ensure that the Handbook continues to be available to patients, staff and members of the public.

(2) At least once in any period of 3 years the Secretary of State must carry out a review of the Handbook.

(3) The first review must be completed not later than 5 July 2012.

(4) The Secretary of State must publish the Handbook after any revision (whether made as a result of a review under this section or otherwise)."

4.7. Section 6 of the 2009 Act imposes a duty on the Secretary of State to publish a report every three years on the effect of the Constitution. It provides as follows:

"(1) The Secretary of State must publish a report every 3 years on how the NHS Constitution has affected patients, staff, carers and members of the public, since the last report was produced under this subsection.

(2) The first report must be published not later than 5 July 2012.

(3) The Secretary of State must lay before Parliament a copy of each report under subsection (1)."

4.8. The most recent report, published on 1 July 2015, makes fairly woeful reading in terms of patient awareness of the Constitution.[8] However, the report is more positive about staff awareness and attitude towards the Constitution. The Executive Summary states:

> "It is clear that patients and NHS staff believe it is important that the NHS has a Constitution; and indeed, there is evidence that the higher the awareness, the greater the support. Yet public awareness of the NHS Constitution remains low, and has even dropped since the 2012 research, from 27% to 24%.There remains little evidence that patients are using the NHS Constitution as a means of exercising their rights.
> Staff awareness of the NHS Constitution is significantly higher than the first report in 2012, rising from 54% to 69%. Furthermore there is a statistically significant increase in the understanding of the NHS Constitution amongst staff. Increasingly, NHS staff feel that the NHS Constitution is beneficial to patients, particularly in allowing them to understand their entitlements. Finally, 81% NHS staff believe that it is important that the NHS has a Constitution."

4.9. Finally, section 7 of the 2009 Act creates a power for the Secretary of State to make regulations pursuant to section 3 or 4.

5. The duty to have regard to the NHS Constitution

5.1. Section 2 of the 2009 Act imposes a duty on a number of bodies "*to have regard to the NHS Constitution*" in performing their health service functions. It provides:

> "(1) Each of the bodies listed in subsection (2) must, in performing its health service functions, have regard to the NHS Constitution.

[8] The report is available here: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/440171/2904073_Report_on_the_NHS_Accessible_v0.1.pdf

(2) The bodies are—

(c) National Health Service trusts;

(ca) the National Health Service Commissioning Board;

(cb) clinical commissioning groups;

(cc) local authorities (within the meaning of section 2B of the National Health Service Act 2006);

(d) Special Health Authorities;

(da) the National Institute for Health and Care Excellence;

(db) the Health and Social Care Information Centre;

(e) NHS foundation trusts;

(f) Monitor;

(g) the Care Quality Commission;

(h) Health Education England."

5.2. Subsection (3) provides that "*in subsection (1) a "health service function" means any function under an enactment which is a function concerned with, or connected to, the provision, commissioning or regulation of health services.*" Subsection (7) provides for the purposes of Chapter 1 of the 2009 Act that "*"health services" means health services provided in England for the purposes of the health service continued under section 1(1) of the National Health Service Act 2006*".

5.3. As well as the NHS bodies listed in section 2(2) of the 2009 Act, any person (for example a private provider or voluntary organisation) who provides health services under a contract, agreement or other arrangement, or any person who makes arrangements

under a sub-contract for another person to provide or assist in providing those services, or any person who is providing or assisting in providing health services under a sub-contract, must also have regard to the NHS Constitution. The duty is therefore far-reaching and applies to any provider who holds a contract with an NHS commissioner or who operates as a sub-contractor to an NHS provider. Subsections (4)-(6) provide:

"(4) Each person who—

(za) provides health services under arrangements made by the National Health Service Commissioning Board or a clinical commissioning group under or by virtue of section 3, 3A, 3B or 4 of, or Schedule 1 to, the National Health Service Act 2006,

(a) provides health services under a contract, agreement or arrangements made under or by virtue of an enactment listed in subsection (6),

(b) provides or assists in providing health services under arrangements under section 12(1) of the National Health Service Act 2006, or

(c) provides health services under arrangements made by a local authority for the purposes of its functions under or by virtue of section 2B or 6C(1) of, or Schedule 1 to, that Act,

must, in doing so, have regard to the NHS Constitution.

(5) Each person who—

(a) in pursuance of a contract, agreement or arrangements as mentioned in subsection (4)(za), (a), (b) or (c) , makes arrangements ("sub-contracting arrangements") for another person to provide or assist in providing health services , or

(b) provides or assists in providing health services under sub-contracting arrangements,

must, in doing so, have regard to the NHS Constitution.

(6) The enactments referred to in subsection (4)(a) are the following provisions of the National Health Service Act 2006—

(a) section 83(2)(b) (arrangements made by PCTs for provision of primary medical services);

(b) section 84(1) (general medical services contracts);

(c) section 92 (other arrangements for the provision of primary medical services);

(d) section 100(1) (general dental services contracts);

(e) section 107(1) (other arrangements for the provision of primary dental services);

(f) section 117(1) (general ophthalmic services contracts);

(g) section 126(1) (pharmaceutical services);

(h) section 127(1) (additional pharmaceutical services);

(i) Schedule 12 (local pharmaceutical services schemes)."

5.4. The Secretary of State was conspicuously absent from the list of bodies subject to the duty under section 2 of the 2009 Act. The Secretary of State was made subject to the same duty to have regard to the NHS Constitution when section 1B was inserted into the NHS Act by the Health and Social Care Act 2012. Section 1B of the NHS Act provides:

"(1) In exercising functions in relation to the health service, the Secretary of State must have regard to the NHS Constitution.

(2) In this Act, "NHS Constitution" has the same meaning as in Chapter 1 of Part 1 of the Health Act 2009 (see section 1 of that Act)."

5.5. The legal effect of the NHS Constitution thus stems predominantly from this "have regard" duty. However, a duty to "have regard" to the NHS Constitution is not a duty to "comply" with it. It will not necessarily be unlawful in and of itself for the Secretary

of State or one of the bodies subject to the section 2 duty to act in a way that contravenes or breaches the NHS Constitution. The "have regard" duty is a duty which bites on the procedure used by an NHS body for making decisions. Any NHS body which is subject to the duty must have understood and very carefully considered the relevant provisions of the NHS Constitution whenever it is making decisions or exercising NHS functions. However a decision maker who properly considers the NHS Constitution could nonetheless depart from the rights set out in the NHS Constitution if there are good and justifiable reasons to do so.

5.6. The duty to have regard to the NHS Constitution was aptly characterised by Green J in *R (Justice for Health) Ltd v Secretary of State for Health* [2016] EWHC 2338 (Admin)[9] as a "target duty". Having referred to a number of the general duties on the Secretary of State under section 1 of the NHS Act[10], he said:

> "88. The duties referred to above are loosely termed "target duties" because although cast in mandatory terms they lay down broad objectives to be achieved and impose upon the Minister the obligation to act in a way which is eg "designed to achieve" or "secure" the objective (section 1(1)) or to act "with a view to securing" the objective (section 1A(1)) or to "have regard to" the objective (section 1B(1)). They are target duties in the sense that (a) they do not specify a particular or precisely defined end result as opposed to a broad aim or object and (b) their mandatory nature is diluted by the fact that they do not compel the achievement of that end result instead requiring the Secretary of State only to factor those objectives into consideration."

5.7. The claimants had relied on the section 1B duty on the Secretary of State to the effect that he should have had regard to chapter 4a of the Constitution, which sets out the rights of and commitments to staff. It followed that the Secretary of State was to have regard to such employment-related matters when seeking to achieve his target duties and exercise his statutory powers and functions relevant to the new junior

[9] A challenge by a group of junior doctors to the manner in which a new set of terms and conditions of employment were to be rolled out across the NHS (the junior doctors' contract).
[10] On which please see the separate chapter on the powers and duties of the Secretary of State for Health.

doctors' contract. While, as is increasingly common, the judge included the "have regard" duty in part of the judgment setting out the general legal framework to the dispute, nothing in the case turned on the section 1B duty.

5.8. The nature of a "have regard" duty was also considered by Collins J in *R (the Pharmaceutical Services Negotiating Committee) v Secretary of State for Health* [2017] EWHC 1147 (Admin) in the context of the duty on the Secretary of State under section 1C of the NHS Act to "*have regard to the need to reduce inequalities between the people of England with respect to the benefits that they can obtain from the health service*".[11] Considering whether there was any substantive difference between a duty to "have regard" and one to "have due regard", he said:

> "…I am equally wholly unpersauded that there is in reality any material difference between the obligations to have regard and to have due regard. Merely to have regard in the sense that the existence of the statutory requirements is recognised is never likely to suffice, albeit much will turn on the nature of the matters to which regard must be had. In s.1C it is a specific need to reduce inequalities so that the defendant is obliged to show that that need is recognised and that what is proposed does not in his view at the very least cause an increase in such inequalities."

5.9. The Court of Appeal also considered the Secretary of State's duty under section 1B of the NHS Act to have regard to the Constitution in *R (Tracey) v Cambridge University Hospitals NHS Trust* [2014] EWCA Civ 822. The Claimant argued that the Secretary of State's failure to issue a national Do Not Attempt Cardio-pulmonary Resuscitation ("DNACPR") policy, was not only a violation of article 8 of the European Convention on Human Rights but constituted a breach of the duty under section 1B of the NHS Act. The Claimant relied on the part of the NHS Constitution that said:

> "You have the right to be involved in discussions and decisions about your health and care, including your end of life care, and to be given information to enable you to do this. Where appropriate this right includes your family and carers."

[11] On which please see the separate chapter on the powers and duties of the Secretary of State for Health. This case is due to be heard in the Court of Appeal in 2018.

Instead of issuing such a national policy, the Department of Health had in a Health Service Circular published in 2000 commended a joint statement from the British Medical Association, Resuscitation Council (UK) and the Royal College of Nursing Decisions, *Relating to Cardiopulmonary Resuscitation (1999),* as an appropriate basis for trusts to form their own local resuscitation policies.

5.10. Dismissing the Claimant's argument, Lord Dyson MR said:

> "83. I cannot accept the submission that the Secretary of State is in breach of section 1B(1) of the 2006 Act in failing to issue a national DNACPR policy. The obligation is to "have regard" to the constitution. The constitution does not prescribe the means by which its objective of patient involvement is to be achieved. The decision to commend the joint statement was sufficient to discharge the statutory obligation."

5.11. In practice, how can those subject to the "have regard" duty comply with it? Put broadly, decision-makers should ensure that their decision-making process, including a consideration of the relevant part of the Constitution and any reasons for acting in a way contrary to the Constitution, is clearly recorded. It would be advisable, although it is not a statutory requirement, for any decision-maker to also consider the Handbook, which gives important background and detail to the information and guidance set out in the Constitution. Further possible steps include:

- having a regular item on the agenda of board meetings to consider how the body is performing against the Constitution;

- assessing existing policies and activities such as annual reports, or staff or patient surveys, to ensure that they are in line with the Constitution;

- looking for opportunities to build the Constitution into any policy making; and

- checking against the Constitution before publishing any new policy or document of the body.

6. Additional duties on NHS England, CCGs and other NHS Bodies in relation to the NHS Constitution.

6.1. In addition to the "have regard" duty under section 2 of the 2009 Act, some NHS bodies are under additional duties in relation to the NHS Constitution.

6.2. Under section 13C of the NHS Act, NHS England is under a duty as to the promotion of the Constitution. Section 13C is a dual-pronged duty and provides:

> "(1) The Board[12] must, in the exercise of its functions—
>
> (a) act with a view to securing that health services are provided in a way which promotes the NHS Constitution, and
>
> (b) promote awareness of the NHS Constitution among patients, staff and members of the public."

6.3. CCGs are subject to an identical duty under section 14P of the NHS Act, which provides:

> "(1) Each clinical commissioning group must, in the exercise of its functions—
>
> (a) act with a view to securing that health services are provided in a way which promotes the NHS Constitution, and
>
> (b) promote awareness of the NHS Constitution among patients, staff and members of the public."

6.4. Additionally, under section 99(4) of the Care Act 2014, Health Education England ("**HEE**") is required to "*exercise its functions with a view to securing that education*

[12] "The Board" refers to NHS England.

and training for health care workers is provided in a way which promotes the NHS Constitution". HEE is an executive non-departmental public body responsible for education, training and workforce development in the health sector.

6.5. As NHS England, CCGs and HEE are already subject to the section 2 "have regard" duty, it is difficult to envisage circumstances in which the above sections impose additional obligations on them. The wording of the first limb of the sections 13C and 14P duty, and of the section 99(4) duty, appears weak. Like the section 2 "have regard" duty, they can be categorised as "target duties". The statutory obligation is not to ensure that health services (or education and training) are provided in a way that complies with the NHS Constitution, nor even that they are provided in a way that promotes the NHS Constitution. The duty is to "*act with a view to securing*" the latter, so it is one further step removed.

6.6. The explanatory notes to the Health and Social Care Bill are equally vague:

> "183. Duty to promote NHS Constitution. New section 13C places a duty on the NHS Commissioning Board to promote and raise awareness of the NHS Constitution when exercising its functions. This is in addition to the duty on the NHS Commissioning Board under the Health Act 2009 (as amended by paragraph 167 of Schedule 5) to "have regard" to the NHS Constitution. The new duty means that when exercising all of its functions, the Board has to act with a view to securing that health services are provided in a way that promotes the NHS Constitution, is required to promote awareness of the NHS Constitution among patients, staff and members of the public. This means that not only must the Board act in accordance with the NHS Constitution but it should also ensure that people are made aware of their rights under it and that they contribute as far as possible to the advancement of its principles, rights, responsibilities and values, through its own actions and through facilitating the actions of stakeholders, partners and providers."[13]

[13] These notes refer to the Health and Social Care Bill as brought from the House of Commons on 8th September 2011 [HL Bill 92].

6.7. Given the weak nature of the promotion duties, it is doubtful that a court would be able to hold that a CCG or NHS England was in breach if it at least attempted to comply with the Constitution in the exercise of its functions. This does not mean, however, that the promotion duties have been entirely insignificant in litigation against NHS bodies. If one can identify a trend from the very few reported cases in which they are cited, it is that the duties to promote the NHS Constitution are being relied on as a sort of reinforcing factor by claimants in the context of claims based on breaches of more specific public law duties. For example, Green J in *National Aids Trust v NHS England* [2016] EWHC 2005 (Admin) at first instance cited NHS England's duty under section 13C of the NHS Act. He did so to support his conclusion that NHS England had misdirected itself in law when it concluded that it had no power to commission PrEP, an antiretroviral drug to be used on a preventative basis for those at high risk of contracting AIDS, on the basis that this was a "public health function" to be carried out by the Secretary of State or local authorities. At the heart of the case was the question about whose budget the cost of PrEP medication was to be paid from (the budget of NHS England or that of local authorities). Green J at §80 referred to the section 13C duty as a "reinforcing factor" and "purposive consideration" from the NHS Act that supported his conclusion. He said:

> "d) Under section 13C NHSA 2006 NHS England has a duty to act "with a view to securing that health services are provided in a way which promotes the NHS Constitution" which includes, at principle 1, that the service is "designed to improve, prevent, *diagnose and treat both physical and mental health conditions" and involves a "duty to promote equality through the services it provides". The Mandate (see paragraph [11] above) is to the same effect."*[14]

6.8. The section 14P duty on CCGs under the NHS Act was also referred to by the court as a reinforcing factor in construing the nature of the Defendant's public law duties in

[14] It should be noted that, while upholding his order, the Court of Appeal did not support Green J's analysis of section 1H of the NHS Act, in the context of which he called the section 13C duty a "reinforcing factor" (see Longmore LJ at §28-33, [2016] EWCA Civ 1100, [2017] 1 W.L.R. 1477). Green J's reference to section 13C, however, was not expressly disapproved.

the case of *R (Rose) v Thanet CCG* [2014] EWHC 1182 (Admin). This case was challenge to the Defendant's refusal of the Claimant's Individual Funding Request ("IFR") for oocyte cryopreservation, or freezing of her eggs, before she had chemotherapy and treatment for her severe form of Crohn's Disease, which would likely make her infertile. The Claimant argued that the fact that NICE had made a "strong" recommendation that oocyte cryopreservation should be offered to those in like cases to her was a relevant consideration bearing on the CCG's public law obligation, reflected in the NHS Constitution, to make rational decisions following a proper evaluation of the evidence. She relied on the following rights as set out in the Constitution:

> **"Nationally approved treatments, drugs and programmes:**
>
> You have the right to drugs and treatments that have been recommended by the National Institute for Health and Care Excellence ("NICE") for use in the NHS, if your doctor says they are clinically appropriate for you.
>
> You have the right to expect local decisions on funding of other drugs and treatments to be made rationally following a proper consideration of the evidence. If the local NHS decides not to fund a drug or treatment you and your doctor feel would be right for you, they will explain that decision to you."

6.9. The recommendation in question was a recommendation made under Regulation 5 of the National Institute for Health and Care Excellence (Constitution and Functions) and the Health and Social Care Information Centre (Functions) Regulations 2013 [2013 SI No 259] ("the NICE Regulations"). This was not a "technology appraisal recommendation" or "highly specialised technology appraisal recommendation", which CCGs must comply with in accordance with the statutory scheme. General recommendations under Regulation 5 are akin to advice or guidance.

6.10. In construing the exact nature of the Defendant's public law duty to make a rational funding decision, Jay J relied on the quoted passage in the NHS Constitution as a "reinforcing factor" in his conclusion that NICE recommendations under Regulation 5 have the status of public law relevant considerations (see §23). At §91, the Judge also

referred to the Constitution, stating that, "*in the present case the CCG's obligation under the NHS Constitution is to make rational funding decisions grounded on a proper appraisal of the evidence base".* However it is a principle of statutory construction that every section of an Act of Parliament must be given a meaning. Hence the sections in the 2012 Act must be construed in a way that adds to the legal duties on CCGs, NHS England and HEE over and above their duties under the 2009 Act, even if it is difficult to envisage the precise circumstances where that difference will lead to a different legal obligation on an NHS body.

6.11. Arguably the second limb of the duties under sections 13C and 14P has greater legal force. The duty is a direct duty to "*promote awareness of the NHS Constitution among patients, staff and members of the public*". It is plain to see why a duty to ensure awareness of the Constitution would place a near impossible burden on NHS England and CCGs. However, the wording of this duty is stronger than that of the first limb. It is suggested that NHS England and CCGs might comply with this duty by, for example: ensuring that the Constitution is available on their website or in paper or other formats on request; ensuring that those with whom they "make arrangements" to provide NHS services do the same; by monitoring whether those patients and staff for whom they are responsible are aware of the Constitution; and by ensuring that the objective of increasing awareness of the Constitution is built into their decision-making and policy creation wherever possible. Of course, CCGs and NHS England should also be aware of their duties under section 149 of the Equality Act 2010 ("the public sector equality duty") and ensure that they can provide copies of the Constitution in audio format, large-type format, braille, and foreign languages, for example.

7. Conclusion.

7.1. In practice, the NHS Constitution has not made great legal shockwaves and was never intended to do so; it is a declaratory document. It is increasingly used, though, by judges in the context of purposive constructions of NHS bodies' statutory and public law duties. Arguably the real strength of the Constitution is not legal but practical; it

provides in an easy-to-understand format a summary of relevant obligations owed by NHS commissioners and providers. This document may arm a patient or member of NHS staff with information in the face of a dispute or problem with their care. If, however, patients and (less so) staff continue to be unaware that it exists, as the latest report on the effect of the Constitution suggests, its potential as a useful tool for patients and staff will remain unfulfilled.

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