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1. Lord Darzi's Polyclinics

It is not for solicitors to comment on whether polyclinics will bring the benefits for patients envisaged by their proponents in a cost effective way. However, it seems that they now have an "unstoppable momentum" (*Pulse*, 5 April 2008) and are likely to go ahead despite objections from GPs. In fact, plans have already been presented for the first polyclinic in Camden before the closure of the public consultation process, and there is even talk of London polyclinics providing a routine 24-hour service (*GP* 28 March 2008).

From the legal perspective, polyclinics will involve highly technical and complex contractual arrangements. Lockharts is well-placed to advise on such arrangements given our extensive experience of health service contracting. We have prepared and are constantly updating an in-depth analysis of the contractual issues involved in polyclinics, and are happy to advise practitioners embarking on such arrangements and LMCs who will inevitably be at the forefront of these developments.

We can also advise on tendering (see also the article below) and on how to structure provider organisations so as to most effectively implement plans. Additionally, we would be happy to advise on the proposed funding arrangements which appear to be coming forward. Whilst there is a substantial access fund of £250,000,000, this may well have the effect of reducing funding which is currently available for other GP services.

For advice on this your first point of contact would be Andrew Lockhart-Miramis. We also set out below a topical note on tendering which fits in with possible Darzi applications.

2. Tendering

Since the reforms to the regulatory framework for public procurement were announced we have received numerous approaches for advice and information on the tendering process.

The introduction of APMS contracts, with their more relaxed provider conditions, has meant that GPs will often be competing with commercial companies and social enterprises for primary medical services contracts. By compiling a business-like proposal local GPs can greatly enhance their bid and build on the strong position that their local knowledge and experience can provide.

Tendering situations

Tenders may be invited by a PCT in any of the following situations:

- when a sole practitioner retires;
- where a practice is failing resulting in termination of their provider contract;
- when there is an acrimonious dissolution of a practice;
- where extra capacity is required for a specific population; and
- where specific services are required for particular conditions.

EU procurement rules

European Union procurement rules require certain public contracts to be put out to tender. The Public Contracts Regulations 2006 ('the Regulations') put these rules into practice in England and Wales. The Regulations apply to public contracts over a certain value (currently £90,319) and set out a detailed process for procurement. The Regulations have only limited application in the case of contracts for health services, but PCTs are obliged to treat potential providers equally and to act in a transparent way when seeking bids.

Although the detailed process in the Regulations does not apply in full to healthcare contracts, PCTs often opt to follow the process in full so as to avoid falling foul of the requirement to act transparently and fairly. In general terms, the process is likely to involve:

1. Advertisement of the contract;
2. Pre-qualification questionnaire (PQQ)
3. Invitation to tender to those who pass the PQQ stage;
4. Presentations and interviews;
5. Evaluation & decision; and
6. Post-tender negotiations.

You will need to form a bid management team including at least one GP and a practice manager to oversee the process. Before embarking on the process you should carry out an analysis of your strengths and weaknesses and consider ways of overcoming the latter in order to put yourselves in a stronger bidding position. If weaknesses or obstacles outweigh strengths and likely benefits, this might not be the best project for you, or the best time to be taking on new challenges.

When putting together your proposal, be sure to prepare a business plan which, *inter alia*, should address the financial viability of the project. Focus on your "unique selling points" – the things that you can do better than your competitors - such as local knowledge and demonstrated achievement of performance standards.

One of the most crucial aspects of the process if taking on an existing practice will be a due diligence investigation to identify any "skeletons in the closet". Amongst other things, you need to know about the condition of the premises and

equipment, any outstanding complaints or breaches of statutory requirements and any pending difficulties with staff.

For advice and further information on any of the matters covered above please contact Alison Oliver.

3. Lockharts' Advice to LMCs on Imposed Contract Variations in Core Hours

Earlier this year Leicestershire and Rutland LMC sought our advice about a PCT attempt to impose new arrangements on practices for access during core hours. We are informed that the PCT withdrew their attempt to impose these arrangements after the LMC informed them that Lockharts had advised that this was likely to be in breach of contract and the relevant regulations.

We understand that a number of LMCs have approached Leicestershire and Rutland LMC asking them to share Lockharts' advice. We do not believe that this is appropriate as the advice was given in respect of the specific facts of the circumstances facing Leicestershire and Rutland LMC at that time and in the context of a contractual and fiduciary relationship between Lockharts and the LMC.

We are aware that PCTs are increasingly seeking to impose changes on practices. Some of these attempts are lawful and enforceable and some are not. The extent to which practices are able to resist such changes depends on the nature of the contract, the precise changes which the PCT is seeking to impose and, to some extent, the relative strength of the negotiating position of the practices in the circumstances.

We are happy to provide advice on a case by case basis to practitioners or LMCs regarding PCT attempts to change contractual arrangements in respect of core hours or other matters.

For advice on this please contact Alison Oliver in the first place.

4. Health Service Body status

Whether you practice under a GMS contract or a PMS agreement you may very well *not* have a contract at law for the services you are providing. Many practitioners elected to have Health Service Body status when they entered their

new contracts. By choosing this status the GMS contract/PMS agreement that was entered into was in fact an NHS contract and not a legal contract.

Where there is a dispute over a contractual term, those with an NHS contract are unable to refer the dispute to Court for determination but must refer the matter to the NHS Litigation Authority's Family Health Services Appeal Unit (the "Authority"). This is the body appointed by the Secretary of State to carry out his function of dispute resolution.

If a Primary Care Trust (PCT) withholds money from a practice which it is due to pay under the contract, those practices that did not choose to have Health Service Body status can choose whether to seek a remedy before the Courts or before the Authority. Those with Health Service Body status can only refer the matter to the Authority.

Disputes before the Authority are generally quicker and cheaper than proceedings before the Court, and the judgments reached are private (i.e. determinations have identifying names and details deleted before publication). Therefore, in most circumstances, it would be preferable for a practice to refer a dispute to the Authority whether or not their agreement amounts to an NHS Contract.

There are, however, potential drawbacks to a practice not having the option of seeking a remedy before the Courts. Two drawbacks, which have recently been of relevance to enquiries considered at Lockharts, have related to interest payments and legal costs.

These enquiries highlight the fact that normal contractual liabilities and rights are excluded from NHS contracts. Under section 4 of the National Health Service and Community Care Act 1990, and now section 9 of the National Health Service Act 2006, NHS Contracts "*shall not be regarded for any purpose as giving rise to contractual rights or liabilities*".

The Authority has made determinations to the effect that it is not a County Court and it will not therefore award interest on overdue payments. Where disputes between practitioners and PCTs are protracted, the practitioner may, on finally being awarded any overdue sum, lose out financially. In an ordinary contract case before the Court a claimant can rely on the Court's powers to award interest or on the statutory right to interest implied into all

qualifying contracts by the Late Payments of Commercial Debts (Interest) Act 1998. By electing not to be a Health Service Body, the terms of this Act may be read into PMS agreements and GMS contracts. However, by remaining a Health Service Body this Act and, potentially, other implied terms are excluded from practitioners' contracts.

Practices which are most likely to succeed before the Authority are those who have sought and received legal advice on their claims. However, the Authority is unable to award costs and so both the winning and losing parties must pay their own legal costs. Health Service Bodies with a strong claim are thus denied the opportunity of issuing their claim in Court and recovering the majority of their costs from the other party. Practitioners with a weak case who are under a non-NHS contract may, however, be advised to elect to refer the dispute to the Authority because of the cost protection this forum affords.

Ultimately, it is in the interests of practitioners to be able to select the venue for the resolution of their dispute, and so to have a greater range of possible tactics at their disposal. This option is denied to those with Health Service Body status.

The differences for a practice in being a Health Service Body or not for the purpose of their PMS agreement or GMS contract become apparent during disputes. As a Health Service Body a contractor loses the use of various options and potential litigation tactics whereas non-NHS contractors retain both the option of Court and the option of referring matters to the Authority.

Under both the PMS and GMS 2004 regulations a practice can require the PCT to either designate it as a Health Service Body or not on its election "at any time". All other NHS contracts entered into before the regulations came into force continue as NHS contracts. Although every practice should consider its own position carefully, the benefit of practices retaining their Health Service Body status with regard to their GMS contract or PMS agreement is unclear.

For advice on Health Service Body status or other matters relating to NHS contracts and regulations please contact Michael Rourke.

5. Unpaid Superannuation Contributions

Lockharts' representation of PMS clients with claims against their PCTs for unpaid employer's superannuation contributions continues apace. Some fifteen claims have been lodged at the NHS Litigation Authority and a further twenty two are due to be filed during the course of the next week.

Counsel was briefed in September and returned with an Advice which considered in detail the relevant financial clauses of the Lockharts Model PMS Agreement and raised strong arguments in support of practices' appeals against unpaid contributions.

Some partners in PMS practices have estimated that the collective unpaid employer's contributions on the new income that became available from April 2004 (i.e. on the QOF, LES and DES components of their and their partners' NHS profits) total as much as £30,000 a year and a determination could lead to restitution of such unpaid contributions.

For advice and information on superannuation claims please contact either Neha Shah or Michael Barrett.

6. The New Extended Hours DES

In a poll recently conducted by the GPC, GPs have voted in overwhelming majority for what they described as the least worst option proposed by the government for the new GP contract. The most significant aspect affecting GMS practices, and probably PMS practices, is the new Directed Enhanced Services (DES) designed to increase patients' access to primary care outside of normal working hours.

The arrangements for extending practices' opening hours have not yet been finalised but it is anticipated that in England the DES will include the following features. Participation will be voluntary and those practices that do participate will receive £2.95 per registered patient. Participating practices will require a GP to provide 30 minutes consultation time per week per 1,000 registered patients, outside of core hours. The timing of the extended opening will depend upon local needs, but will be offered in 1.5-hour blocks after 6.30pm or on Saturday morning; an hour prior to 8.00am may also be agreed with PCTs. The core hours under GMS

will remain unchanged and out-of-hours remains the responsibility of PCTs. Practices that are not open during all core hours do not have to make these up before introducing extended hours, and practices already providing GP consultations outside core hours can count these towards the DES. Payment will be on a quarterly basis in arrears. The 2007/2008 Choice and Booking and Access DESs will come to an end.

Practices will need to give serious consideration to deciding whether or not to participate in the DES and how best to meet their patients' access needs. A major issue for participating practices will be how to effect necessary changes in employees' working hours.

For advice on employment matters or other related concerns please contact us at csd@lockharts.co.uk.

7. Abolition of Patients Forums

The Local Involvement Network Regulations 2008 have effect from 1 April 2008 and make minor amendments to the NHS (Personal Medical Services Agreements) Regulations 2004.

These amendments concern the replacement of Patients Forums with local involvement networks. If you would like advice on these amendments, on Patient Forums or on Personal Medical Services please contact Mark Jarvis.

8. Data Protection Offences

The Data Protection Act 1998 ('the Act') sets out how "data controllers" (organisations that process individuals' personal data) should handle that data through collection, storage, destruction or alteration of records. Data controllers that are found to be in breach of the Act face the possibility of criminal prosecution and liability for fines. Therefore, organisations should remain aware of their obligations under the Act and ensure that they have taken appropriate measures to avoid the possibility of prosecution and penalties.

Whilst most businesses and organisations that keep databases of names and other details will come under the definition of data controller within the terms of the Act, there has been much concern as to what constitutes 'personal data'. In autumn last year the Information Commissioner released new guidance on the definition of

'personal data' under the Act following the Durant judgment in the Court of Appeal. Data which can be used to identify an individual may constitute personal data, even where such identification may prove difficult.

The guidance also urges organisations to review their decisions as to whether data is personal data or not, as changing circumstances may have changed the status of the information. Offences under the Act include:

- failure to register as a data controller
- failure to keep the Commissioner updated
- failure to comply with certain 'notices'.

If you would like advice on your obligations and potential liabilities under the Data Protection Act and how best to manage compliance, please contact Lockharts at csd@lockharts.co.uk in the first instance.

Firm News

We are pleased to announce that Michael Barrett has been promoted to the position of Associate Solicitor with effect from 1st April 2008.

Michael practises in Corporate, Commercial, Intellectual Property and NHS Regulatory work, and recently passed his final foundation level examination to part qualify as a Trade Mark Attorney.

Previous Issues

If you would like to receive previous issues of the Lockharts Newsletter please contact Nicholas Fry at csd@lockharts.co.uk.

Distribution of our Newsletters

We prepare newsletters for practitioners at approximately monthly intervals and occasional newsletters for LMCs. LMCs are welcome to distribute these to their constituents in their entirety.

Alternatively, if LMCs wish to circulate only part of our newsletters, we are happy for them to do so provided that the following acknowledgement and disclaimer are printed immediately below the relevant extract:

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If you have any questions about this, please contact Andrew Lockhart-Miramis.

Cessation

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Lockharts Solicitors
Tavistock House South
Tavistock Square
London
WC1H 9LS

Tel: **+44 (0)20 7383 7111**
Fax: **+44(0)20 7383 7117**
Email: csd@lockharts.co.uk
Web: www.lockharts.co.uk



'... Lockharts leap frogs the lower tiers to the top, following market recommendation... Having acted for over 1,500 GP practices, the firm was pivotal in the formation of and structure of GP contracts, and regularly advises medical committees in London and across the country ... a team that "definitely knows its onions."'

Chambers UK, A Client's Guide to the Legal Profession 2008

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