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## 1. Continuation of the Extended Hours Access Scheme Directed Enhanced Service (DES)

The current Directions and Guidance for the Extended Hours Access Scheme DES are to be rolled forward with the only material change being that practices will have to indicate early in the financial year whether they are proposing to participate.

The Department of Health states that currently £161m is available in PCT baselines to commission extended hours under the DES or equivalent local arrangements. Ministers are keen to see all of that funding used to improve patient access in the extended opening period. Once PCTs know which practices are participating in providing extended opening, they can determine how best to use the balance of the available investment to

achieve comparable improvements in GP access.

A key priority is to seek to provide access to evening/weekend appointments for patients whose practices are not providing extended opening, for example by asking other practices to provide this service, or by commissioning out-of-hours providers to offer bookable appointment slots for routine care.

Alternatively, PCTs could seek to expand the extended hours at practices already providing extended opening, so that patients who already have access to extended opening get a wider choice of appointments; or a combination of these measures. The measures adopted will depend on what PCTs consider best meets local needs.

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## 2. The Future of Commissioning

The policy of the Conservative party in regard to Practice Based Commissioning is to devolve budgets to practices. If a practice fails to control their expenditure within budget, they could face having their contract terminated. Whether this is the contract for commissioning or their GMS contract is not currently clear. However, it has been made apparent that any overspend in the commissioning budget would not be taken from their GMS or PMS budget.

The GPC has stated that it is not against practices having devolved budgets where practices want this but it should be on an opt-in basis rather than being compulsory. Furthermore, failure to stay within budget should not result in the termination of a GMS or PMS contract.

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### 3. Scrapping Practice Boundaries

The Government's proposal to scrap practice boundaries within the next 12 months cannot have escaped the attention of any GP or practice. The plans come under the banner of greater flexibility and access for patients but have been met with concerns as to their feasibility and impact. The Conservatives have also signaled their broad support, meaning that a radical overhaul of how GPs operate within the community may be on the horizon regardless of the result of the forthcoming election.

The General Practitioners Committee is considering the proposals and will respond to any consultations. The propounded system's increase in flexibility and choice must be weighed against the perceived dangers of such a move which have been cited as the starvation of rural and suburban practices, potentially unworkable distances for home visits and the beginnings of a move toward 24/7 'medical supermarkets'.

The redevelopment of the current system may also have considerable cost implications and there will be major issues in areas such as prescribing, commissioning and premises. Practices will be paying particular attention to these developments over the next year.

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### 4. Revalidation

The Royal College of General Practitioners has published its first guide to the Credit-Based System for Continuing Professional Development ('CPD'). This is a mechanism for GPs to record their CPD based on the time spent on the activity and the impact it has on the doctor, his or her patients and the service.

At its most basic, each recorded hour spent on a CPD activity, which can include planning and reflecting, count as a credit. However, additional credits can be earned by demonstrating the impact of the learning.

The guide, which includes a section on what should and should not be claimed, can be downloaded at:

[www.rcgp.org.uk/practising\\_as\\_a\\_gp/professional\\_development/cpd\\_credits\\_scheme.aspx](http://www.rcgp.org.uk/practising_as_a_gp/professional_development/cpd_credits_scheme.aspx)

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### 5. Seniority – Current and Future Problems

With the final publication of the average superannuable income figures for 2004/2005 and 2005/2006, PCTs have begun the process of ensuring that the correct figures have been paid for Seniority Payments. This review may have a nasty surprise for some practices, especially those with a GMS contract. The Statement of Financial Entitlements ('SFE'), which details payments due to a GMS practice, requires that Seniority Payments are paid to the GP in respect of whom they are made; they are not general partnership income. The SFE also requires that PCTs make payments of Seniority based on estimated figures where the average adjusted superannuable income figures were not known. Although final figures for 2004/2005 and 2005/2006 have been published, for subsequent years there still remain only the interim figures (estimates).

PCTs are entitled to require repayment of overpaid Seniority by the practice which received it, rather than the partner that received it. If any partner who received overpayment is still a partner at the practice, or where the accounts remain to be agreed with a recently departed partner, then the current recovery of past overpayments could be appropriately dealt with in the accounts by the partnership accountants.

Where, however, there has been a change in the partners, or where a partner has died or moved abroad since receiving the payments, the current partners will face the unenviable position of having the overpaid sum deducted from their present income and having to recover this from the departed partner or his estate. The PCT is given the express right to claw this money back in this way in the SFE.

Current partners looking to recover these sums from departed partners, especially where such partners prove reluctant to reimburse the practice, should seek advice on how best to proceed.

Partnerships who believe there are particular reasons why they should not suffer these deductions, such as express representations by the PCT that no such reimbursements would be required, should also seek advice on their position.

In the case of PMS practices, the position as to what entitlement the PCT has to claw overpaid Seniority back will be governed by the PMS Agreement itself and such practices should, if unsure, seek legal advice.

Lockharts has advised hundreds of practices both with disputes arising from their contracts with their PCT and with disputes between partners. If practices have concerns about these issues, please contact [mbr@lockharts.co.uk](mailto:mbr@lockharts.co.uk).

Looking ahead to the uncertainties of future years, we suggest that all partnerships should seek amendments to their Partnership Deeds so as to ensure that, should such repayments be required in the future, this is covered appropriately in a Partnership Deed. In the first place, please contact [rap@lockharts.co.uk](mailto:rap@lockharts.co.uk).

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## 6. The Tax Health Plan

HM Revenue and Customs ('HMRC') are providing Medical Professionals the opportunity to put their tax affairs in order up to 05 April 2008.

The Tax Health Plan is an 'initiative' targeting Medical Professionals for them to come forward and disclose all undeclared liabilities by 31 March 2010 and make full payment of all outstanding liabilities (including penalties, interest and taxes) by 30 June 2010.

After 31 March 2010, HMRC say that they will begin to use information they have on Medical Professionals, i.e. payments from NHS Trusts, private hospitals and medical

insurers to review Medical Professionals' tax and income affairs. HMRC say that those who have not come forward within the notification period will, where they believe there is a mismatch between the tax payer's history and the information they have obtained, seek penalties of between 30% and 100% on all outstanding liabilities and will consider instigating criminal investigations.

The Tax Health Plan is an offer to pay a penalty of 10% on outstanding liabilities of £1,000 or more. Please note that a disclosure does not guarantee that HMRC will not carry out a criminal investigation.

In the first instance, you should contact your tax advisor or accountant to ensure your tax affairs up to 05 April 2008 are correct with HMRC. You should ensure that you have provided all relevant information to your tax advisor/accountant for them to be able to accurately calculate your tax liability.

Where appropriate, you should consider making a disclosure pursuant to the Tax Health Plan.

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## 7. PCTs Under Financial Pressure

The annual budget for the NHS is currently just over £100 billion and in the last few years there have been annual increases of around 5-7% to take account of inflation and growth. Of the annual budget, General Practice receives around 8% and GP prescribing costs account for a further 8%.

However, the recent financial crisis is having a serious impact and this will continue to be felt for many years. Over the next three years, it is likely that there will be a minimal increase if at all in funding. The NHS shortfall over the next three years is likely to be in the region of £15-£20 billion.

PCTs are now being asked to make a 10% saving each year for the next three years in an efficiency drive designed to ensure future financial stability. The common theme for PCTs in the future is therefore likely to be enormous financial pressure. If PCTs cannot

make these savings then the local health economy will be facing a very real financial disaster.

The myriad issues are obviously complex but some headline points may be drawn:

Prescribing - Despite evidence that local practices have been keeping a tighter check in previous years, this appears to be on the rise again.

Referrals - Hospitals continue to allege that GP referrals are increasing. The evidence supporting this is far from certain but naturally this is an area which requires monitoring.

Admissions - GPs are being blamed for the continuing rise in acute admissions during both in hours and out of hours periods but this is far from clear cut. Hospitals are primarily run on a system of out-patients and admissions and appear incapable of offering any alternative to keep patients out of hospital.

Ongoing Care - In the efficiency drive, PCTs are being urged to look at contracts held with general practice and ensure they are getting value for money. PCTs have relatively little choice in this area and it is an aspect of care that is growing faster than any other.

In order to assess value for money, PCTs are producing data to compare practices. Once compiled, this information will be shared with practices.

This comparison includes Expenditure on referrals, prescribing and acute and emergency care, income for GMS/PMS, income for Enhanced Services, income for QoF and funding for premises.

GPs must therefore continue dialogue with PCTs to maintain financial strength as not doing so risks damaging not only services to patients but also general practice as a whole.

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## 8. Access for Disabled Customers

A recent Court of Appeal decision has upheld an injunction that ordered a high street bank to undertake almost £200,000 of building work at one of its branches in order to make its full range of services available to a wheelchair-bound customer.

The case usefully illustrates that service providers must ensure that they provide proper access to their services to people with a disability and, just because some adjustments have been made, they cannot assume that their obligations are at an end.

This case further demonstrates the full extent of service providers' obligations to customers and employees in relation to the Disability Discrimination Act 1995.

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## 9. Directors' Duties and Liabilities – A Summary

The Companies Act 2006 sets out for the first time a statutory statement of the general duties owed to a company by its directors. The final set of provisions came into force on 1 October 2009.

The Act sets out seven general duties to which a director will be subject, which are:

- Duty to act within powers
- Duty to promote the success of the company
- Duty to exercise independent judgment
- Duty to exercise reasonable care, skill and diligence
- Duty to avoid conflicts of interest
- Duty not to accept benefits from third parties
- Duty to declare interested in proposed transaction or arrangement

In addition to these 'internal' duties, directors also have wider duties imposed by statute and case law. It is important that these duties are observed as breach can be a criminal offence, punishable by fine and/or imprisonment.

Directors' duties are, broadly speaking, owed to the company rather than any

particular shareholder. This means that it is the company, not the shareholder, which has the right to enforce the duties. Where directors have acted in a way that benefits certain shareholders to the detriment of others, there may be a means of redress.

The new Companies Act makes it easier for shareholders to enforce directors' duties and to bring a claim against directors for alleged negligence arising out of breach of duty. Thus, the importance of directors appreciating their position in law cannot be overemphasized.

Anyone accepting a company directorship should take great care to ensure that they have proper structures in place in the company to be able to meet the various requirements imposed on them by the new legislation (e.g. ensuring suitably experienced delegates are in place compliant with financial recording obligations, that proper enquiry is made of other directors where necessary, concerns minuted at board level and professional advice taken where appropriate).

A fuller treatment of the duties owed by directors to a company can now be found in Lockharts' briefing paper, 'Directors' Duties and Liabilities – A Summary'. The cost of sending a copy of this paper to you (inc P&P) is £48 + VAT. Please contact [csd@lockharts.co.uk](mailto:csd@lockharts.co.uk) to order your copy.

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## 10. Wills and Estate Planning – Inheritance Tax and Nil rate Band

Following the availability of a transferable (IHT) nil rate band applying to spouses or civil partners, executors or trustees would usually dispense with any discretionary provisions – which pre 9 October 2007 might have applied to “mop up” the nil rate band applying of the first spouse (or civil partner) to die.

Post 9 October 2007, any consideration of using the IHT nil rate band, on the first death, can probably be discounted – the anticipation being that the nil rate band will be larger (to be claimed on the surviving spouse's/civil partner's death by their

personal representatives) – any such increase (in the amount of the nil rate band) would assist concurrent increases in asset values over ensuing years until the second death.

### What about existing Wills made prior to (9 October 2007)?

Any arrangements that could have included involving the family home purely to utilise the spouse's nil rate band (eg “debt” or “charge” schemes), will now be unnecessary and consideration given to abandoning any such proposed arrangements if they are contained in existing (pre 9 October 2007) Wills.

Let's assume husband/wife/civil partners are still alive and have already made Wills incorporating nil rate band discretionary trusts. If they feel uncomfortable, with the relative complexity of such trusts in their Wills; they could make new Wills, or perhaps a Codicil to their existing Will would be sufficient, to dispense with the (nil rate band) discretionary legacy.

However, even if new Wills are not contemplated or actioned; on the first death it would be possible (where Wills contain such discretionary nil rate band provisions) for the Trustees of such a clause to invoke their discretion under Section 144 (IHTA 1984) and appoint funds absolutely to the surviving spouse. Professional advice should always be sought – particularly as to timing limitations of any such appointment.

Essentially – there would be no need to change existing Wills: in the above scenario, the trustees (after waiting an initial period of three months), then appoint the entire (IHT) nil rate band, as under the Will, absolutely to the surviving spouse – they have up to twenty four months from the date of the first death to do this. Usually, a deed of appointment, exercised by the trustees, is all that would be required.

Moving on to the death of the surviving spouse: again no actual requirement to change the surviving spouse's existing Will. On the assumption the discretionary clause was properly drawn; it should incorporate a provision that (nil rate band discretionary terms would be excluded) if, at the date of

the second death, the spouse is not married.

### What can go wrong?

People can get into a muddle – as to the tasks and time parameters involved. Not everyone is familiar with drafting deeds of appointment out of discretionary trusts; if the executors are all family members and critical time deadlines are missed - then beneficiaries could be worse off than if the parent spouses had just gone ahead and made new simple Wills.

Particularly, if an executor is a professional, he could be liable in negligence should he not be up to date with tax law or simply fail to achieve what would be appropriate for the family overall in terms of IHT mitigation. The sums potentially involved here are not insignificant – a misapplied (IHT) nil rate band of £325,000, @ 40% tax liability, is £130,000!

Although new Wills being (professionally) prepared for the spouses will involve fees – perhaps, in the light of the above, that would represent good value!

### Where Wills (incorporating Nil Rate Band Discretionary Trusts) still remain an appropriate vehicle for IHT planning

There are circumstances where it still may be appropriate to incorporate nil rate band discretionary trusts, within Wills, to provide absolute flexibility of approach.

Should the surviving spouse have remarried then he/she will have an additional nil rate band available from the death of the first spouse.

A potential scenario is where there are children of the marriage, but the surviving spouse is younger (than the spouse who has died); therefore it is possible he/she could re-marry.

In these circumstances a nil rate band trust would protect the inheritance of the children: as the executors of the surviving spouse could well have more than one transferable nil rate band (from more than one spouse); so as to avoid a proportion of the overall (IHT) relief available being lost.

A nil rate discretionary trust could give the children as much of the nil rate band, as remains available, on the event of the first spouse to die.

Where assets in the estate will qualify for agricultural property relief (APR) or business property relief (BPR). The nil rate band discretionary trust can be a vehicle to hold such assets and this estate planning can effectively “re-cycle” the APR or BPR.

Thus, shares in a family business (worth more than the IHT nil rate band), but should qualify for 100% BPR; can be allocated to the nil rate band trust. The widow can receive the assets that do not qualify for any IHT relief (but will be exempt anyway under spouse exemption); which could include say cash from insurance policies or nominated death in service benefit.

With the cash the widow can purchase the (family business) shareholding from the trustees; that, effectively, would give the trustees far more, in real terms, than the (IHT) nil rate band so that the children would receive a greater inheritance.

If the widow lives for two years, following her purchase of the (family business) shareholding, then BPR will again be available.

Meanwhile the trustees are able to exercise a measure of control over the children's inheritance.

This exercise has provided maximum flexibility of approach with an overall increase in benefit passing down to family members.

Where future care costs are a concern to the spouses. A discretionary trust can shelter from care fees the estate of the first spouse to die (who is often looked after by the spouse who survives but thereafter he/she may also require care provision).

Against this, has to be judged the costs of running such a discretionary trust, and potential adverse income tax rates should the (gross) annual trust income exceed the “standard” income tax rate band applying.

For asset protection purposes – (to guard against future financial or marriage failure); a discretionary trust would protect estates from the subsequent profligacy of a second spouse or partner appearing on the scene!

In all the above “scenarios” – appropriate planning, in conjunction with your professional adviser, is recommended before any action is contemplated.

If you require any further advice on these issues or any matter regarding Wills, Trusts and Estate Planning then please contact Andrew Murdoch at [am@lockharts.co.uk](mailto:am@lockharts.co.uk).

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## Previous Issues

If you would like to receive previous issues of the Lockharts Newsletter please contact Andrew Meadows at [csd@lockharts.co.uk](mailto:csd@lockharts.co.uk).

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