

RCN Policy Unit

Policy Briefing 02/2006

Statutory Consultation

ABSTRACT

This briefing contains background to the legal and policy requirements for consultation where service changes are proposed, including the closure or reduction in services. It includes updated case law as well as recommendations for action by activists.

January 2006, Revised September 2006

Introduction

Consultation is a word that is often misunderstood or misused. In law any change in service provision *may* require full public consultation. This is a *different* form of consultation from the statutory requirements under *employment* legislation.

Consultation is required where there is consideration being given to a proposal for a substantial development of the local health service or a substantial variation of local provision. Substantial is not defined. Consultation must take place while the proposals are still in a formative stage, to provide an opportunity for representations to be made and for them to be taken into account before a final decision is reached.

The only circumstance in which such consultation is not required is where the decision has to be taken without time for consultation 'because of a risk to safety or welfare of patients or staff'. Financial issues such as deficits are not a reason to bypass this statutory consultation.

The OSC has legal powers to request further information or to call an officer from the health service, usually the Trust Chief Executive, to attend its meeting. The OSC can send a report to the Secretary of State asking for further consultation to be ordered or to request that the Secretary of State overrules the decision of the local NHS body.

Common Law

It is well established that in order for consultation to be effective and lawful that consultation must be at a time when the proposals are still at a formative stage, that the NHS body must give sufficient reasons for any proposal to permit intelligent consideration and response, that adequate time must be given for consideration and response, and that the product of the consultation must be conscientiously taken into account in finalizing the proposals. (*R v Brent LBC ex p Gunning* (1985) 84 LGR 158)

Government Policy

The Government has its own clear policy on public consultation and has adopted a Cabinet Office Code of Practice on Consultation (third version, September 2005). It is the Government's policy that: "*Government departments should carry out a full public consultation, as outlined in the Code, whenever options are being considered for a new policy or if new regulation is planned.*" This was the case for example, when the Department of Health consulted on a review into commissioning arrangements for specialised services in 2002. In general, such public consultations last for 12 weeks.

The criteria in the Code are to be binding "though they do not have legal force...they should otherwise generally be regarded as binding on UK departments...unless Ministers conclude that exceptional circumstances require a departure." Many Government departments place importance on the use of the Code of Conduct on their websites.

There are 6 consultation criteria:

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
2. Be clear about what your proposals are, who may be affected, what questions are being asked and the timescale for responses.
- 3.

challenge over the failure to consult. Your Regional team will provide local support and liaison with legal services and the Policy Unit

- Be aware that any legal challenge must be brought promptly and in any event within 3 months of the date of the proposals being made. **No legal challenge can be made after this date without significant difficulty.**
- The RCN often works with other solicitors who act for patients or their relatives over proposed changes reconfigurations and closures. This provides a balance to the views of staff and service users.
- The legal remedy for a failure to consult is judicial review. The outcome is generally either t

The Court of Appeal found that a PCT cannot avoid its duty to consult patients by suggesting that an approach to the patients forum was used. A patients' forum did not have the power or status to decide whether s.11 of the 2001 Act applied.

on the impact to patient services has taken place. It will be easier to pose these questions in the light of the CA ruling and hopefully easier to resolve locally. For the first time, we have legal ruling on the extent to which s.11 applies and this will be useful for members and patients. PND advisors will be able to assess with their patient group contacts what consultation is now required where broad nursing services are at risk of cuts or closure or new forms of provision. Policy and Parliamentary advisors will be assisted over Department plans to amend s.11 and create new forms of patient forums in the next round of legislative reform.

Summary

1. The requirements under s.11 Health and Social Care Act 2001 create a duty on the PCT (or Health Authority or NHS Trust) to have public consultation where proposals are in place to change the way health services are provided. This is not a discretion, but a statutory requirement. For shorthand, this can be known