
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.

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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.

Sources of authority for consultation

Statutory

Before NHS bodies can make decisions affecting or varying the provision of health services they have a legal duty to consult with service users and staff over the policy issues of the changes.

S.11 Health and Social Care Act 2001 gives a legal duty to consult with service users and staff on any proposed changes. S. 11 creates a statutory duty on Strategic Health Authorities, Primary Care Trusts and NHS Trusts to consult in relation to health services for which it is responsible for

- the planning of the provision of those services
- the development and consideration of proposals for changes in the way those services are provided
- decisions to be made by that body affecting the operation of those services.

Legal challenge to lack of consultation under s.11 has now been heard in the Court of Appeal (Pam Smith v North Eastern Derbyshire PCT- August 2006). There is precedent case law that sets out the boundaries of where consultation for changes in service for the provision of GP services has to take place. A fuller note on the case is in this briefing. The Court of Appeal reinforced the legal importance that all proposals are subject to this statutory scrutiny. The RCN has successfully challenged a number of situations in England where the Trust argued that s.11 did not apply.

NHS bodies also have a legal duty (this is not a discretion) to consult the overview and scrutiny committee of the local authority.

Overview and Scrutiny Committees (OSC) have a statutory function in consultation through Regulation 4 Local Authority (Overview & Scrutiny Committees Health Scrutiny Functions) Regulations 2002.

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. Ensure that your consultation is clear, concise and widely accessible.
4. Give feedback regarding the responses received and how the consultation process influenced the policy.
5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.
6. Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate

Department of Health guidance *Strengthening Accountability – Involving Patients and the Public* states that: 'Section 11 places a wider duty to involve and consult patients and the public: not just when major change is proposed, but in the ongoing planning of services; not just when considering a proposal but in developing that proposal; and in decisions that may affect the operations of services.'

The RCN has a clear legitimate expectation that it will be consulted in relation to proposed changes in the delivery of health services.

Action to be taken by RCN activists if the consultation does not seem to following these principles:

- Do not simply accept a Trust saying that s.11 does not apply to the proposals under consideration. The Court of Appeal made it clear that any proposal for reconfiguration, however small it may appear, may well fall within the statutory framework.
- Collect all of the available documentation available from the relevant NHS bodies (reports, public consultation documents, press releases, press cuttings, correspondence etc).
- Assess the views of other organisations, other trade unions and other colleagues.
- Contact the Policy Unit **urgently** for specialist legal advice on drafting a letter to the NHS body reminding them of their duties to consult before making substantial changes to health services. **You should also simultaneously contact your Regional Office.**
- If no positive response is forthcoming, the Policy Unit will provide specialist legal advice on the prospects for a legal

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 that the NHS bodies accepts the failure of consultation and agrees to restart the process or if a case goes to court, the case can be settled if the NHS body agrees to restart the consultation process.
- As with all legal work carried out on behalf of members, the RCN reserves the right to decide whether or not to act in any potential legal claims.

Legal Cases

Court of Appeal Pam Smith v North Eastern Derbyshire PCT (August 2006)

The Court of Appeal (Lord Justice May and Lord Justice Keene) gave judgement on 23 August 2006 in the case of *Pam Smith v North Eastern Derbyshire PCT (Secretary of State for Health as interested party)*.

The PCT had carried out a tender exercise for the provision of GP services in two villages covered by the Trust. The PCT awarded the contract to United Healthcare as preferred bidder. Pam Smith, a former councillor, claimed that the PCT had failed to perform its statutory duty of consultation under s.11 Health and Social Care Act 2001.

In the High Court on 15 June 2006, the judge agreed that there has been a failure to comply with s.11 because there had been insufficient involvement of and consultation with patients. However, the judge decided that despite the failing, the judicial review failed because Pam Smith could have gone to the Patients Forum to seek a consultation. He also found that even if she had done this, the PCT would not have reached a different decision in its tendering exercise.

Pam Smith challenged these findings. Her appeal to the Court of Appeal was heard on 23 August and judgement was given the same day.

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. It had no power to require a PCT to reverse a decision.

Implications: legal

The implications of the judgement are to reinforce the need for all PCTs and other health bodies to consider the use of public consultation when deciding on changes to the services delivered or provided. This will be a challenge for commissioners. Individuals can still use the remedy of judicial review when challenging a decision of lack of consultation and the Court of Appeal has confirmed that patients' forums (in their current status) have no powers to oblige a PCT or other health body to consult or change its decision. It may see an increase in the number of legal challenges now being made about cuts to services, decisions to award provider status, etc

Implications: policy

This in turn will have a policy knock-on effect for the Department of Health as it moves forward with its Voice policy. The Department intends to abolish patients' forums and to replace them with local involvement networks in every local authority area (to be known as LINKs) and to strengthen and simplify s.11 requirements on consultation. There is a commitment by the Department to ensure that commissioners in particular are engaged in consultation with the community. However, the reality to date has been that PCTs have been reluctant to engage s.11 particularly as they drive forward staff cuts to balance deficits. There may well be new guidance issued by the Department in the light of this judgement. This case was significant enough that the Secretary of State for Health was represented at both the High Court and Court of Appeal hearings.

Implications: Northern Derbyshire PCT

A full public consultation will now take place for the bidding process for the GP services.

Implications: RCN

Members who work in specialist nursing roles whose jobs are facing redundancy will be able to question more robustly what s.11 consultation took place in advance of the decision to announce the redundancy. Where this has not taken place, the RCN regional officers can with or without patient groups question why no public consultation

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 as service reconfiguration consultation.
2. Whether the PCT is able to demonstrate that it has complied with service reconfiguration consultation under s.11 will be a matter of fact. The legislative requirements mean that the duty to consult is a wide one however and not restricted just to the OSC.
3. Where any statutory redundancy consultation starts in advance of a service reconfiguration consultation, that will be useful evidence to show that s.11 has not been complied with. It raises the prospect of an automatic challenge under s.11.
4. The RCN is building up a successful track record in England of reminding PCT's of their duties to consult under s.11. In all the cases which have involved liaison with the Policy Unit, we have had the (intended) consequence of removing the need to consider nursing redundancies.
5. This is because when the s.11 consultation is started, it gives nurses time to engage with patient groups to collectively show that reduction in nursing numbers will have a direct negative impact on patient care.

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