

## **Patients' legal challenges to NHS cuts/closures**

1. Before NHS bodies can make decisions affecting/varying the provision of health services they must:

- consult the overview and scrutiny committee of the local authority (*Reg 4 Local Authority (Overview & Scrutiny Committees Health Scrutiny Functions) Regulations 2002*) and
- involve and consult service users and potential service users: (s11(1) *Health & Social Care Act 2001*)

### **2. Consultation with overview & scrutiny committees**

- Required when there is under consideration a proposal for a substantial development of the local health service or a substantial variation of local provision. Substantial is not defined.
- This consultation must take place while the proposals are still in a formative stage, to provide an opportunity for representations to be made & for them to be taken into account before a final decision is reached.
- The only circumstances 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' – importantly, not for financial reasons.
- Where it is dissatisfied, the overview & scrutiny committee has powers: to request further information/require an officer from the PCT/Trust to attend its meeting; to 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.
- In cases under very similar earlier rules requiring consultation with CHCs, where consultation was not carried out, decisions to close Community Hospitals (eg in North Devon) were reversed by the courts.

### **3. Public involvement & consultation**

- Relatively new & untested duty on all health bodies (health authorities/PCTs/NHS Trusts) to involve/consult with health service users (and potential users) either directly or through representatives in the: planning of service provision; development/consideration of proposals to change service provision; decision making regarding the operation of those services.
- DoH Guidance (Strengthening Accountability – Involving Patients & 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.'*

- This extended duty to consult – not just on a final proposal - may provide an important extra dimension, where it can be shown that the proposal has not been discussed with ‘stakeholders’ during its formulation. Confirmed by Minister, Lord Warner [HSJ 3 November 2005]. The weight the courts will give to this duty has not yet been tested.

#### 4. Cabinet Office Code of Practice on Consultation

- Six consultation criteria & code – binding on government departments and agencies – except in exceptional circumstances:
  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.*

#### 5. What to do if they decide to make major changes without consulting?

- Find patients affected by the service changes who would be willing to take legal action. If they are in receipt of any means tested social security benefits such as income support, pension guarantee credit, family credit, housing benefit or council tax benefit they are likely to be eligible for Legal Aid (now called Public Funding).
- Collect all of the available documentation available from the relevant NHS bodies (reports, public consultation documents, press releases, press cuttings, correspondence etc).
- Obtain legal advice/help to write a letter before claim to the relevant NHS bodies reminding them of their duties to consult before making substantial changes to health services, threatening judicial review if they do not agree to reverse the decision.
- **Do not delay!** Cases must be brought promptly (within weeks of the decision being made)
- Once a lawyer’s letter has been received in cases where no real consultation has been carried out the decisions are usually put on

hold pending consultation. If not, commencing legal proceedings will need to be considered immediately.

#### **6. What is involved in bringing a judicial review?**

- The case will be heard in the High Court in London (or Cardiff).
- There is no oral evidence so the Claimant does not have to go to court. He or she can play as large or small a part as he or she wants to.
- If the closure is imminent proceedings can move very quickly, suspending a decision in a matter of days or a few weeks. Other wise it can take up to a year.

#### **7. Carry on campaigning!**

- A judicial review about the lack of consultation will only delay a closure decision. To prevent it the political argument needs to be won. It must become too difficult for the PCT/Trust to continue with the closure.
- In the right case – where a case can be made out that the human rights of patients will be breached by a closure decision – a substantive challenge to the decision itself may be attempted. This will be difficult.

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