

NHS consultation duties: lawful consultation

Richard Turney

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When is consultation required?

- Statutory duty
- Policy requirement
- Legitimate expectation
- Voluntary consultations

The requirements for lawful consultation:

Coughlan



- At a formative stage
- Sufficient reasons to allow intelligent consideration and intelligent responses
- Adequate time
- Product of consultation must be conscientiously taken into account

Overall test

- What fairness requires depends on the circumstances
- Legal test if challenged is whether process is so unfair as to be unlawful
- Such a finding will only arise where something has gone “clearly and radically wrong” (Greenpeace)

Formative stage

- Provisional view or even “minded to” decision may still be at a formative stage
- Must be prior to any decision – even if “in principle”
- See, by way of comparison, Sardar and Gate

Sufficient reasons to allow intelligent response



- Consultation documents must be clear and fairly presented
- The documents must facilitate effective responses (e.g. through questions asked)
- If a preferred option is referred to, other options must also be identified

Provision of additional information (1)

- Expert advice received by consulting body: see *United States Tobacco International*
- Compare with *Coughlan*
- Disclosure of data and modelling of data: *Eisai Ltd v NICE*
 - Not all significant data need be disclosed
 - Depends on the circumstances of the case
 - If large amount of material provided, expectations will be higher

Provision of additional information (2)

- Basis for internal assessments may have to be provided
- See Save our Surgery
 - Paediatric heart surgery closures
 - Unfair not to disclose sub-scores from expert panel relating to “Quality” to allow hospitals to rebut the assessments

Adequate time

- Must be proportionate
- Depends on who you are consulting
- Depends on volume of information provided
- May depend on time of year (e.g. Christmas, August)

Conscientiously taking into account product



- Substance of responses must be before decision-maker
- Not enough for substantive points to have been considered by an official who is not the decision-maker
- Consultation failures will normally only give rise to JR grounds where a substantive point is missed
- Cannot normally argue that someone else should have been consulted if the complainant himself had a proper opportunity