

Factsheet #12: Consultation Duties

Section 19 of the Children and Families Act sets out the key principles which all local authorities must have regard to when exercising their functions under the Act. One of those key principles is:

“the importance of the child and his or her parent, or the young person, participating as fully as possible in decisions relating to the exercise of the function concerned”.

One of the ways which local authorities will ensure effective participation and engagement will be through consultation.

The Act sets out specific duties on local authorities and their partners to consult with children, their parents and young people in the development and reviewing of the Local Offer and further information on the particular requirements for consultation on the Local Offer are set out in a separate factsheet.

The Act also provides that local authorities must consult with children, parents and young people in relation to:

- Considering whether an EHC assessment is necessary
- The contents of their EHC Plans
- When reviewing educational, training and social care provision
- When considering local priorities and outcomes as part of joint commissioning arrangements
- When reviewing EHC plans and deciding on any changes to the support and outcomes
- When considering ceasing to maintain an EHC plan

However, in addition to the specific duties to consult under the New Act which are outlined above, local authorities and other public bodies will often be under a general duty to consult with children and young people with SEN or disabilities, their parents, and representative groups such as Parent Carer Forums when they are taking decisions which will impact upon children with SEN or disabilities. This might include decommissioning a service, introducing a new policy or criteria, or making cuts to services or budgets. This duty can arise where there has been a past practice of consultation, where it would be unfair to make the decision without consultation or where compliance with another duty, for instance the Public Sector Equality Duty described below, requires consultation to take place.

This factsheet is aimed to help you understand the legal duties on all public bodies when they are consulting. If these processes are not followed, the decisions may be open to a legal challenge.

Key Duties

Although as noted above a public body may not have to consult in relation to every decision, if your local authority chooses to consult, then it must be carried out properly. The standard by which the lawfulness of a consultation is measured does not change depending on whether the public body had to consult or chose to do so itself.

The leading judgment regarding consultation is *R v North and East Devon Health Authority ex p Coughlan* [2001] QB 213, and the key principles for a lawful consultation are that:

- The consultation must be undertaken at a time when proposals are still at a formative stage – meaning that the decision makers have an open mind about the final decision ;
- It must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response;
- Adequate time must be given for this purpose; and
- The responses to the consultation must be conscientiously taken into account when the ultimate decision is taken. Importantly though consultation is not negotiation – there is no duty on the public body to do what consultees want as long as the responses are carefully considered.

In addition, where the public are consulted, the relevant documents must be available to all and in a language that is clear and easily understandable.

NHS Trusts also have a duty (under s242 of the NHS Act 2006) to consult with users of health services about decisions affecting:

- The planning and provision of services;
- The development and consideration of proposals for change in the way those services are provided (if implementation would impact on the manner and range of services available);
- Decisions affecting how those services operate.

The same legal standards for lawful consultation described above apply to NHS bodies and local authorities – indeed they apply to all public bodies.

In the event that it is found that a consultation has not complied with one of those core requirements, then the consultation can be found to be unlawful and the decision made following such a process, quashed. This could mean that the public body has to start its decision making again from the beginning. However it is always up to the court to decide what the fair and just 'remedy' would be in the event that it finds unlawfulness.

Public Sector Equality Duty

Section 149 of the Equality Act 2010 requires public bodies (including local authorities and CCGs) to have 'due regard' to the need to promote equality of opportunity for disabled people. In order to demonstrate they have paid 'due regard', local authorities should ensure that they assess the impact of decisions they take on disabled people. If local authorities have not properly assessed the impact of the decision on disabled people before they take the decision then this may leave them open to legal challenge.

In addition, they should also consider whether disabled people should be treated 'more favourably' than nondisabled people to achieve equality.

As part of the process of assessing impact, it may be necessary to consult with disabled people, carers and other interested groups to make sure that the decision makers have sufficient information to understand what effect the proposals will have.

There are also separate consultation duties under the Mental Capacity Act 2005 which are set out in a separate factsheet.