

TRANSCRIPT

Episode 4 – Public consultation in health service change



Paul Parsons - This is Not a Consultation.

Caroline Latta - I'm Caroline Latta...

Paul Parsons - and I'm Paul Parsons.

Caroline Latta - Welcome to Not a Consultation.

Paul Parsons - Our podcast on all things patient and public involvement and NHS service change.

Caroline Latta - Today we're taking a look at public consultation.

Paul Parsons - Not a consultation on public consultation.

Caroline Latta - Let's not think too much about that.

Paul Parsons - Yes, probably easier if we just get on with it. Public consultation is an important part of any major service change process, but it's often seen as an addition to an exercise, a hurdle to overcome, or a potential barrier to what we want to achieve. In

practice, the duties it carries permeate through our entire process from inception to implementation. So we really need to understand what it entails. Most people don't get to work on a public consultation very often, and an expanding body of case law means the legal requirements around it are developing continuously.

Caroline Latta - Consultation is a subject that's really close to our hearts. And who better to ask about public consultation than the founding directors of The Consultation Institute.

Paul Parsons - We invited Elizabeth Gammell and Rhion Jones to talk to us, and we started as we always do, by asking them to introduce themselves.

Elizabeth Gammell - Hello, I'm Elizabeth Gammell, standards director of The Consultation Institute since it was founded in 2003. I've been very involved in the development, design and delivery of our training portfolio, which now includes a suite of online courses. My speciality is the law of consultation, and I'm also the co author with Rhion of *The Art of Consultation* and *The Politics of Consultation*.

Rhion Jones - I'm Rhion Jones. I founded the Institute with Elizabeth Gammell and Quintin Oliver and Howard Kendall back in 2003. Difficult to think it's 18 years ago. In the 18 years since we've run The Consultation Institute, I've written about 500 topic pieces and run about 400 courses. So I guess that qualifies me for knowing a little bit about it.

Caroline Latta - Rhion, can you tell us what is a public consultation?

Rhion Jones - A public consultation is a dialogue that one organisation, or more than one organisation has with either the general public, it's stakeholders, a variety of people. It's a dialogue and it discusses various issues. But here's the key point with a view to influencing either a decision or maybe it's a policy, or maybe it's a programme of action, so it's a formalised form of engagement and it's enforceable in law.

Caroline Latta - So what's the role of public consultation in health service change programmes?

Rhion Jones - Well, to get one's mind around that, you need to think a lot about what the National Health Service means in this country. I mean, consultation applies to a whole range of public services, but it's rather special. It's rather unique in the NHS, and that's got a lot to do with the founding principles of the NHS. It goes back to my fellow countryman, Aneurin Bevan, and the trade off that he did between letting the professionals, the doctors, the medics run the service and at the same time let the people feel they have an ownership of the service. And it's remarkable how over 50, 60, 70 years, the culture of this being a service unlike any other, the public feel they have an ownership of the health service in a way that they never have, for example, on education or in planning or any of the other public services that we use. And therefore the deal effectively was we will let the professionals run it. Anybody who works today or has worked in the NHS knows it's not a democracy, the professionals run it. But you provide checks and balances for local communities, indeed national communities of interest, to make sure that nothing changes fundamentally. Nothing gets worse fundamentally without a process of dialogue. And over the years we've had various legislative initiatives to circumscribe how those work, when they should work and what they mean. So real history and culture in this.

Paul Parsons - Elizabeth, what are the elements that make up a best-practice consultation?

Elizabeth Gammell - Briefly, as a consultor, you are trying to ask the right people the right questions, use the right methods at the right time, and then give the information you've gathered the right consideration. In our very, very first training course, we just had a slide which explained this, and this is still the foundation of a best-practice consultation. We devised the consultation charter that's got seven principles. They are integrity, visibility, accessibility, transparency, disclosure, fair interpretation and publication. But it's

the first principle, integrity, which underpins them all. And if you can apply all of these, you will be working to the highest standards in a discipline which is highly demanding but also incredibly rewarding.

Paul Parsons - So seven principles there. Talk to me about visibility in a consultation. What does that mean?

Elizabeth Gammell - Well, of course, if your consultation isn't visible, how on Earth are you ever going to get anybody to respond to it and give you the information back that you need? So as a consultor, you have to ensure that people will be able to recognise you are doing a consultation. We live in an incredibly crowded, digital and media filled world and people miss things even when it's important. In the old days, you'd know, when a consultation was coming up, there would be a lot more noise about it. These days, actually getting people to recognise it's there becomes infinitely harder and puts a lot more onus on you as a consultor of ensuring that you go to them. Don't expect them to come to you. You've got to put in the effort to actually find them out and tell them that this is what you want them to take part in.

Caroline Latta - Rhion, the nations of different statutory and regulatory requirements on patient and public involvement in service change programmes where legislation doesn't specifically require public consultation as part of those programmes. When would you say a public consultation is a proportional addition to a programme?

Rhion Jones - I've got three little rules of thumb I've developed over the years because people ring me up and say, I don't think the law requires me to consult, but is it a good idea? So I offer these three. Number one, are you making changes that really impact upon people in a serious way? Who is affected, whose lives are going to change because of changes you're making? So that's the first test. Is there a significant impact? The second test, I would then say is, are there different views about it? Is it controversial? Is it the kind of change that if you go then into your local town, you'll hear people saying, well, who on Earth decided that then? How on Earth did they get away with that change? If the

public is conscious of there being a debate on more than one side, so there's a controversy side. The third thing, if the changes you're proposing might have a bearing upon public confidence in the service suggest a public consultation is due.

Caroline Latta - Thank you, Rhion. What advice would you have for people who were saying, well I'm happy to involve people. I'm happy to consult in the principles that you've suggested. But how do I know what's proportionate?

Rhion Jones - Many have the idea that public consultation can only take place in its large scale, wide angle format. In other words, it's got to be twelve weeks and it's got to cost £50,000, and that's not true. Now, you do need to observe the NHS guidance, which is quite specific in places, but it's perfectly possible to have a small scale consultation with a very targeted group of stakeholders in your sites. It can be short as long as it meets the necessary principles of best practice. So you can make a very, very modest exercise that would still satisfy the rules.

Paul Parsons - When is it okay to involve in other ways and not hold a formal public consultation?

Rhion Jones - Well, if we take a leaf from the book of the NHS in Wales. Interestingly enough, for over a decade their guidance has been very strong on what they call continuous engagement. And let's be blunt, continuous engagement happens rather more than we realise, and it's a good thing. The whole point of having machinery of dialogue with, for example, Health Watch and other representative bodies is that you've got a permanent mechanism of discussing things as they arise. And much of that is quite informal and is basically delivered through the normal course of business. And you don't need to go to consultation on every single issue that people regard as important. You need to exercise a series of judgments. And in my opinion, the judgment is affected very often by who you are and what's the state of play right now. These are fine judgments made by senior managers and let's be honest, what we do in the Institute very often is

whispering in their ears and provide them with the best advice we can on the balance of proportionality.

Caroline Latta - We learn lots about the requirements of public consultation from judgments of high court cases, challenging decisions that are very informed by consultation exercises. What are the main principles?

Elizabeth Gammell - Absolutely, Caroline. Well, what happens in the courts has become a key part of understanding best-practice consultation now, and when you read the judgments, what you realise very quickly is what the judges are looking for, and that is compliance with the Gunning Principles. Now, back in 1985, the London Borough of Brent tried to amalgamate two schools. This required a statutory obligation to consult parents, and on this occasion, absolutely everything went wrong. The furious parents took the Council to a judicial review, and during the proceedings, a Queen's Council called Stephen Sedley, wrote down four propositions which have been cited in every case where consultation is involved ever since. And on the face of it, and people have often said to this, but they're so obvious, but actually a bit like the charter principles, when you start unpicking them you find there's a huge amount contained in each one. The first principle is that consultation must be done at a time when proposals are still at a formative stage. This means you haven't already made up your mind. The second is that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and a response.

The third is the short one, and that's about adequate time to be given for both consultation and response. So time actually puts an obligation on both the consultor and the consultee. And the last one is that the product of consultation has to be conscientiously taken into account when finalising the decision and they make up the law of consultation. Sedley's propositions were finally approved in cases in the Court of Appeal, and then in 2014, the case called Mosley, which went right the way up to the Supreme Court, which is the highest court in the land.

Paul Parsons - Thank you, again, the principles seem very simple at a high level, but just thinking to go into a consultation, you've got to have a pretty firm idea of where you want to go. So what does the proposal still being at a formative stage actually mean?

Elizabeth Gammell - The point is that the formative bit, yes, you might have a pretty clear idea of what's going to happen, but there are always things around it which can be discussed, and it's those which a good consultor brings out in a consultation to enable people to think about it. When the congestion charge was first brought into London and the Mayor of London, Ken Livingstone, knew there was going to be a congestion charge, but there was a lot that could be decided. For example, what the charges were going to be, how wide the area of the people affected was going to be, there were a lot of things that could be put into the consultation which made it a very genuine formative stage consultation without actually pulling apart the fact that they didn't go just saying, we haven't got a clue what we want to do, tell us. So that's in a way where when we work with people on designing consultations and we help them understand how they're going to go to consultation, it's the way you present it. And you must never, ever put up an example, a proposal for a consultation that you wouldn't actually be prepared to go with. You don't put in make weight ones.

Rhion Jones - Despite anything in the wording of the legislation, we believe there's a political commitment by ministers always to consult local people before making big changes. I can assure you if you tune in to the Parliament programme on any given day, there's a good likelihood that a backbench MP is on his feet complaining about changes in the NHS. And never do they say my constituents have not been involved or my constituents not being engaged. The claim is always my constituents haven't been properly consulted. And both Elizabeth and I, from research we've done, can show you clip after clip of prime ministers and secretaries of state for health repeating the mantra, don't you worry, local people will be consulted. And I guess the challenge for us now is to get the consultation to take place at the right time when things are not totally set in stone.

Paul Parsons - So what we're talking about is moving from a wide range of possibilities towards the thing that you are actually going to do in the future. And you must consult at a point where there is still scope for influence. Going right back to the definition that you gave us right at the beginning, Rhion, being at a formative stage means you are consulting before an ultimate decision has been made rather than afterwards. So it would be against the principles to make a decision and then say we'll do a confirmatory consultation with the public.

Elizabeth Gammell - You've captured it. With Gunning used to say, we would think they go in order. You have your first principle, which is one we just been talking about, and then the next challenge, if you can manage to do that, is how do you give them enough information and what is enough information? And that, again, is a massive and very complicated sort of hurdle. And it used to be that people would fall at one and two, but we're rather proud that actually people have really grasped how important this is. And we're seeing cases come to court where actually they pass one and two, but it's the time one that they've got wrong, and particularly now, it's the fourth principle of conscientious consideration. And there are some judgments which you would think how on Earth did they not get that one? A particular case called Kohler, which really turned on one very, very critical response to a consultation. So this is not sort of as simplistic as it looks, maybe on the surface.

Paul Parsons - Thank you very much. So the Gunning Principles sound pretty comprehensive, but is there anything that's not mentioned in them that you think is important?

Elizabeth Gammell - Do you remember what I said at the very beginning about asking the right people. If you haven't actually asked the right people, then you haven't really done a best-practice consultation.

Rhion Jones - The recent court case where the Secretary of State for Education made drastic and rapid changes to children's rights when the lockdown occurred last March

and April. That court case resulted in the action and the legislation being declared unlawful because they haven't consulted the children's commissioner. And if ever we wanted a Gunning five, that's what it becomes, a Gunning five cause célèbre case to make the case, it is that one. It's called the Article 39. It meant taking a lot of rights, about 60 different rights from children because, of course, local authorities couldn't deliver the services in the lockdown, so it's unlawful. They haven't consulted the right people. Now imagine the range of people that have to be that may be affected by actions of the National Health Service. Don't exclude somebody whose views really mattered and might have made a difference.

Paul Parsons - Sometimes in the NHS, public consultation is seen as a scary step to take. What would you say to those people who are a little bit frightened of it?

Elizabeth Gammell - I would say talk to people. You have a huge, valuable resource around you in other people who've actually already been there, done it, probably got a few bruises along the way, but have a massive amount of knowledge. You should never, ever think you're alone in this one. I mean, yeah, it is scary, but wow, if you can get it right, you can have a huge sense of satisfaction. You're actually doing a lot of good.

Rhion Jones - Many years ago, the expertise that you needed to run public services in this country was different from what it is today. Do you know who's going to be running our public services in the future? It's people who've mastered the skills, the arts of public engagement, how to build and preserve and maintain and leverage relationships with communities. So it may be scary. I think Liz was right there. It may be scary, but if you can grasp this, if you're in the field of comms and engagement in the widest sense, it is, in my view, the route to the most senior jobs that are going. And the NHS is a little bit different because of the clinical management aspects, but I think there's huge opportunities. So it may be scary, but it is a part of the profession that's well worth investing in as part of your career development.

Caroline Latta - There's a lot of work, time, effort and resources that go into planning and running a consultation. So what do you think of the benefits?

Rhion Jones - Have you ever heard anybody whom you rate highly saying, I take much better decisions if I don't listen to anybody. Who will say to you, my decisions are better if I haven't gone around and asked those that are affected what the implications will be? Of course not. So you'll make better decisions if you've actually understood how people are affected, what the implications, what the consequences are, and also what people think about it, because remember, in public services, the public are out there, what they think matters. So you have your reputation as an organisation, but you've also got the perceived quality of the services that you are delivering. So whenever somebody says, what are the benefits? It's a no brainer. You'll make better decisions.

Paul Parsons - Rhion, you talk there about a consultation enabling you to make a better decision. In most cases in the NHS, decisions are based on evidence and the evidence base is well developed before a consultation takes place. Aren't we just giving with a consultation, aren't we just giving a platform and a space for people who disagree with us to tell us that they disagree with us and not enhance that evidence base in any significant way?

Rhion Jones - Well, people disagree about the interpretation of evidence. I'm not always convinced when people say to me, we've looked at this in great depth and there is only one solution. And I then ask to see the papers. There is usually more than one side to a story. And the problem with evidence based policymaking, which is a phrase that's been around a long, long time, is that it assumes that the evidence points in one way and one way only.

Paul Parsons - And in any public discourse at the moment, on any topic, there's accusations of false facts and fake news. So how has that affected public consultation?

Elizabeth Gammell - I think it's where a good consultation, you have the opportunity to put the facts as clearly and as cleanly as you possibly can into the public domain for them to be really examined. I mean, that's why transparency is one of the critical things about the charter. You've got to be transparent, and if you do start trying to hide things, then you will be caught out.

Paul Parsons - So that sounds like the purpose of a consultation is not only giving people the opportunity to say what they think about your proposals, it is also to scrutinise the evidence base that lies behind those proposals. Are they equally important or is one more important than the other?

Rhion Jones - Managers who write consultation papers have to be very, very careful not to emphasise the benefits of their proposal and disregard some inconvenient truths that may also apply. So in other words, you've got to give both sides of the story. This is not a propaganda sheet. It's there to lay the facts, the ones that suit you and the ones that don't suit you. That's rather important. People running consultations in the health service have to be so careful with the evidence that you adduce. Never put into a consultation paper any piece of research or anything that will not withstand scrutiny from people who know the subject matter. And open yourselves to the possibility that your findings could be tainted by having given people misleading information.

Caroline Latta - What are your top tips to think about before we go?

Rhion Jones - Well, I would say take it seriously. It's not a side issue. It's at the core of the mission of the National Health Service that it serves the public. And if commercial companies really go out of their way to consult their customers and they spend millions doing so, then the National Health Service is in a similar position. It's at the heart of your mission. So you take that seriously.

Elizabeth Gammell - We are absolutely passionate about good consultation, and you have to take it very, very seriously.

Rhion Jones - I would add something else as well, and that is that the position is not static. I think there is a long term trend towards giving consultees more powers, more rights, and I think the COVID pandemic will have accelerated this trend because lots of decisions have been taken from top down, affecting all our lives. People are going to emerge out of this with an enhanced view of their right to be heard about decisions that matter to them. Over the next few years, consultation, which is already important, already vital, is going to become even more so.

Paul Parsons - It's always a pleasure to spend time speaking to Elizabeth and Rhion. What were your thoughts?

Caroline Latta - It was great to hear Rhion talk about the history of involvement in the NHS and the role of clinicians in particular, and how this is different to other public sector services. What he said was a helpful reminder of the role that health professionals have and how important they are in the transformation of clinical care. Clearly their best place to identify the clinical services problems in the first place and the different ways they could be solved, and then involving patients in developing proposals before those proposals go out to a wider public consultation process. And we know, don't we, that the successful transformation programmes have clinicians at the heart of driving these changes, explaining to patients and the public what the problems are and how changes would make improvements in the quality of care. I really liked the way Rhion was very clear about how consultation is the formalised form of involvement. I mean, that really helps crystallise matters for me I think. In my experience, the C word, as I like to call it, is often overused. It gets misused, too. So I think it's just really helpful to keep coming back to the word involve and involvement.

Caroline Latta - In fact, we know, don't we, that the NHS duty is to involve. So for me, it's a really simple and clear message. We're going to involve you. And involvement is a

spectrum of different types of participation. All the way through from the beginning, sharing information all the way through to major service change and wider public consultations. So for me, that message about round involvement is a much simpler one. And in fact, as we know, it's a safer one too.

Paul Parsons - It absolutely is. When I'm talking to people about planning and organising service change programmes, I encourage them not to use the term consultation until they're certain public consultation is absolutely required to discharge the duty to involve. That's because simply saying that you will consult on service change proposals can leave your organisation with a legal requirement to hold that consultation, even if the changes that emerge from your proposals development process are relatively minor and other less formal involvement approaches would be more appropriate. And utterly agree with you on the point about involvement being a spectrum. The NHS involves patients every day in hundreds of different ways. The formal framework that public consultation brings to involvement is mostly not needed. Even when we're discussing changes to services, getting Rhion's three tests to decide when consultation is appropriate and when it's not was really helpful. It's also good to know that you can have an effective engagement process without consulting, but you can't have a process of consultation without engagement, and that you can hold a public consultation that's smaller and more focused than the NHS twelve week standard. Personally, I find it helps to be clear on both of those when I'm considering that reoccurring question, is this engagement or is it consultation?

Caroline Latta - I really liked the principles of consultation that Elizabeth and Rhion set out, and in particular, principle four, I think is an interesting one around transparency. And one of the best ways to do this, of course, in any kind of transformation programme, is to just keep publishing information on your website, have some dedicated website pages, or if it's a partnership approach, perhaps have a microsite and just keep publishing all the information that you gather. So all the insight reports from patient and public involvement, all the key updates, governance papers, make as much information available as possible, and then linking that to your statement of continuous involvement. Make that part of your offering to people to say, this is where all the information is, this is how you

can contact us, this is how you can get involved. And that links to other principles, including the one of accessibility, which is close to your heart.

Paul Parsons - Yeah. The thing I like about the principles in the consultation charter are that they really are very simple. For a start, it's good to see accessibility in there at all. And expressing it as your consultation should be accessible to the majority of its intended audience covers the whole range of accessibility issues, from information and documents to venues and locations. Right at the point where it matters, the interface with your consultees. Of course, to make sure your consultation is accessible to the majority of the intended audience, you have to have a clear understanding of who that audience is. And that takes us to the point that the Gunning Principles doesn't cover. That is who to consult.

Caroline Latta - Stakeholder analysis is just so important. It's about clearly thinking through who you need to target and why. And we know the change programmes which get off to the best start know who their stakeholders are and how to reach them. Things get done through developing relationships and trust and that's what Rhion was saying about those who master the art of engaging with communities will be the best leaders. I also really like Elizabeth's advice to go and learn from others. That's a common theme coming through in a number of our episodes.

Paul Parsons - It's going to be really rare in the NHS that you're the first people looking at this particular problem. Somebody's always going to have been there before and if it is an entirely new challenge, then there are going to be lots of people who want to be involved and help.

Caroline Latta - So that's another episode complete.

Paul Parsons - It is! Huge thanks to Elizabeth Gammell and Rhion Jones for joining us to talk about public consultation. Their books, *The Art of Consultation* and *The Politics of*

Consultation are both excellent and really worth a read. We'll put links to those with this episode on our website and we'll link to The Consultation Institute website where you'll find all of Rhion's writings and loads of resources on every possible aspect of public consultation.

Caroline Latta - You can find us as Not a Consultation wherever you get your podcasts and you can send your comments and questions to listen@notaconsultation.com.

Paul Parsons - And remember even an episode of Not a Consultation about consultation is not a consultation...

Caroline Latta - It's a podcast.