

## **OPINION ON THE LAWFULNESS OF THE PROVISION OF INDEPENDENT COMPLAINTS ADVOCACY SERVICES BY THE COMMISSION FOR PATIENT AND PUBLIC INVOLVEMENT IN HEALTH**

Section 12 of the Health & Social Care Act 2001 amended section 19 of the NHS Act 1977 and places a duty on the Secretary of State *'to arrange, to such extent as he considers necessary to meet all reasonable requirements, the provision of independent advocacy services.'*

The Secretary of State for Health can devolve responsibility for carrying out his own functions only with clear legislative authority for that delegation. In this case the clear legislative authority is to be found at section 16 of the National Health Service Reform & Health Care Professions Act 2002. The Secretary of State's duty to provide the service was devolved to PCT Patients Forums by way of section 16 of the National Health Service Reform and Health Care Professions Act 2002 which gave an additional function to PCT Patients Forums of *'providing independent advocacy services to persons in the Trust's area or persons to whom services have been provided by or under arrangements with the Trust'*.

Patients Forums have yet to be established. On the abolition of Community Health Councils the support they provide for complainants will cease. The government has promised that independent complaints advocacy services will be available in England and have stated that the Commission for Patient and Public Involvement in Health will provide the service. There have been suggestions that the Commission will ask local voluntary sector consortia to carry out this function.

Section 12 of the Health & Social Care Act 2001 permits the Secretary of State to *'make such other arrangements as he thinks fit for the provision of assistance to individuals in connection with complaints relating to the provision of services as part of the health service.'* It is within the power of the Secretary of State to make arrangements or award contracts to suitable bodies for this purpose.

The Secretary of State for Health can only require a public body to carry out activities if the activity in question is within that body's legislative functions.

The Commission for Patient and Public Involvement in Health was established under Section 20 of the National Health Service Reform and Health Care Professions Act 2002 as a corporate body. Its functions are detailed at section 20 (2) and includes *'advising and assisting providers of independent advocacy services in England'*. It has not been given as one of its functions the management or commissioning or establishment of advocacy services. Consequently, were it to do so it would be acting ultra vires.

Marion Chester  
08 March 2003



**OPINION ON THE LAWFULNESS OF THE DECISION OF THE  
COMMISSION FOR PATIENT AND PUBLIC INVOLVEMENT IN HEALTH  
TO ASK VOLUNTARY SECTOR BODIES TO PROVIDE STAFF FOR  
PATIENT FORUMS**

The Commission for Patient and Public Involvement in Health was established under Section 20 of the National Health Service Reform and Health Care Professions Act 2002 as a corporate body. Its functions include;  
*'providing staff to Patients Forums established for Primary Care Trusts, and providing advice and assistance to Patients Forums and facilitating the co-ordination of their activities'*

Although this wording does not specifically state that the Commission will employ the staff in question, like all public bodies, there are limits on how they carry out their functions.

At paragraph 2 of Schedule 6 to the Act the Commission is given the power to *'do anything which appears to it to be necessary or expedient for the purposes of, or in connection with, the exercise of its functions.'*

At paragraph 9 of Schedule 6 to the Act the extent to which the Commission may delegate its functions is laid out as follows;

*'The Commission may arrange for the discharge of any of its functions by a committee, subcommittee, member or employee of the Commission.'*

No provision is made for the discharge of the Commission's functions by any other person or body.

At paragraph 10 of Schedule 6 the Commission is given permission to; *'arrange for such persons as it thinks fit to assist in the discharge of any of its functions.'* The Commission has been given the power to make payments to those providing such assistance.

The crucial distinction is between the performance of a function on the one hand and the assistance in performance on the other. The first can only be carried out by a committee etc, whereas the second can be undertaken by a separate body. So, if and to the extent that what is happening constitutes the discharge of the primary function as opposed to mere assistance (a facilitative but not primary function), then there is unlawful delegation.

In view of the fact that voluntary sector bodies are being asked to take on responsibility for setting up Patients Forums, it is clear that their role in general will be central. The role detailed for them by the Commission on their website is as follows:

*'Each partner will support a number of patient forums by activating and drawing on the local networks and knowledge already present within the community. The Commission will provide a governance framework and common standards for the patient forums, which will be managed by the nine regional offices.'*

This clearly indicates that the actual function will be carried out by local voluntary sector bodies in line with guidance issued by the Commission.



If the staff are to be employed by local organisations and in all probability directed in their duties by them, then this will amount to an effective transfer of responsibility from the Commission to the voluntary sector. In essence it will amount to an unlawful delegation of function. It would be helpful to obtain a copy of information that is being supplied to possible bidders by the Commission to establish exactly what exactly they will be expected to do.

A second question which falls to be considered is whether the responsibilities of the Secretary of State to establish Patient Forums will be met through this process.

Section 15 of the National Health Service Reform & Health Care Professions Act 2002 places a duty on the Secretary of State to establish Patients Forums for all NHS Trusts and Primary Care Trusts. The Secretary of State appears to have asked the Commission for Patient and Public Involvement to do this for him. While it is in order for the Secretary of State to delegate his functions and responsibilities to civil servants, including those employed by the Department of Health, the Commission is a body separate from government. Paragraph 1 of Schedule 6 to the Act states that the Commission is not to be regarded as a servant or agent of the Crown. It is not in order for the Secretary of State to delegate his responsibilities to the Commission without legislative permission. Even with that permission, in order for the delegation to be legitimate it would have to be formalised by use of 'an instrument in writing' - usually in the form of regulations. The National Health Service Reform & Health Care Professions Act 2002 does not contain any provision permitting delegation of the Secretary of State's responsibility regarding the establishment of Patients Forums. The Commission for Patient and Public Involvement in Health (Functions) Regulations 2002 do not contain any reference to the Commission having any role in establishing Patient Forums.

It appears that the Secretary of State and Commission are proceeding with scant regard to legal, administrative and constitutional requirements.

Marion Chester  
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