

CONSULTATION AND THE LAW, AN OVERVIEW, FOR DISCUSSION

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Consultation – when does it happen?

1. An express statutory requirement:

Some statutory provisions *expressly* require that a public body must consult on something before making a particular decision or exercising a particular discretion.

Where that is the case, the consultation must be in accordance with those requirements, supplemented (unless contradicted) if fairness requires it by what is set out below (albeit that, if the consulter has chosen to go beyond the statutory requirement, it cannot then ‘take refuge’ in the limited requirements of the statute)¹.

2. An implicit statutory requirement

Others can *implicitly* require consultation.

See for example, where the Public Sector Equality Duty – s149 Equality Act 2010 – is in play².

Also ‘Those who make decisions pursuant to statutory procedures must act in good faith and listen to both sides.’³

In such cases, the framework below applies.

3. A “legitimate expectation”: In other cases, a public body may be under an obligation to consult on something because:

- it has promised to do so⁴,
- because it consulted in similar circumstances before⁵; or
- because the public (or members of it) have been given a legitimate expectation that some benefit they enjoy would continue (such that it should not be taken away without them being given an opportunity to comment)⁶.

¹ *Easyjet v Civil Aviation Authority* [2009] EWCA Civ 1361

² See for example: *M, G & H v Birmingham City Council* [2011] EWHC 1147 (Admin)

³ *R v Secretary of State for the Home Department ex p BAPIO* [2007] EWCA Civ 1139 [35]; *Electoral & Boundary Commission v Forest Heath* [2009] EWCA Civ 1296 [38]

⁴ *R (Greenpeace Ltd) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin)

⁵ *R v North and East Devon Health Authority, ex p. Coughlan* [2001] QB 213 at [57b]

⁶ *R v Devon County Council, ex p. Baker* [1995] 1 All ER 73; *Luton BC v Secretary of State for Education* [2011] EWHC 217 (Admin) [83-91]

The framework below applies.

4. Voluntary: Sometimes, public authorities decide to consult even though not required to do so. The framework below applies.

Basic Rules – Coughlan + Gunning

The basic rule is that, whether or not a public body was required to consult, if it does so, then it must⁷ comply with the following overarching obligations (unless detailed statutory rules supplant these)⁸:

Consultation must be at a time when proposals are at a formative stage.

The proposer must give sufficient reasons for its proposals to allow consultees to understand them and respond to them properly.

Consulters must give sufficient time for responses to be made and considered.

Responses must be conscientiously taken into account in finalising the decision⁹.

All of those are aspects of an overriding requirement for ‘fairness’¹⁰. The process must be *substantively fair* and have the *appearance of fairness*¹¹.

Supplementary principles

1. Scope of consultation: it is for the consulter to decide the issues on which it wants to consult¹².
2. Extent of consultation: depends on all the circumstances¹³.

But where the issue was a boundary change ‘persons who may be interested’ included the public as a whole¹⁴.

It can be lawful to consult only representative bodies provided *the court* considers it fair to do so¹⁵.

⁷ A public body cannot dispense with consultation in reliance on urgency of its own making: **R v North East Devon Health Authority ex p Pow** unreported 4 August 1997

⁸ **Coughlan** (see footnote 2); **R v Brent LBC, ex p. Gunning** (1984) LGR 168; but note **Breckland v Boundary Commission** [2009] EWCA Civ 239 [43] where the statute required the consulter to ‘take such steps as they consider sufficient’

⁹ **R v London Borough Of Lambeth Ex Parte N** [1996] ELR 299, **R v Secretary of State for Social Services ex parte Association of Metropolitan Authorities** [1986] 1 WLR 1 “the essence of consultation was the communication of a genuine invitation to give advice and a genuine receipt of that advice”

¹⁰ **R (Edwards) v Environment Agency (No. 2)** [2006] EWCA Civ 877; **R (Greenpeace Ltd) v Secretary of State for Trade and Industry** [2007] EWHC 311 (Admin); **ex p East** [1996] ELR 74, 88; **ex p Baker** [1995] 1 All ER 73 at 88; **Evans v Lord Chancellor** [2011] EWHC 1146 [32]

¹¹ **R(Sadar) v Watford BC** [2006] EWHC 1590

¹² **Vale of Glamorgan v Lord Chancellor**[2011] EWHC 1532 (Admin) [25]

¹³ **R v Camden ex p Cran** (1996) 94 LGR 8; **Wainwright v Richmond on Thames** CO/3605/2000 11 April 2001 [44]

¹⁴ **Breckland v Boundary Commission** [2009] EWCA Civ 239 [45]

¹⁵ **R(Legal Remedy UK) v Secretary of State for Health** [2007] EWHC 1252 (Admin); **Milton Keynes v Secretary of State for Communities and Local Government** [2011] EWHC 1060 (Admin)

3. Formative stage: all issues being consulted upon must be at a formative stage so is it no good consulting just on issues of timing and implementation where the principle has already been decided upon¹⁶.
4. Phased or staged consultation: there is no objection in principle to consulting/deciding in stages (eg issues of principle followed by issues of implementation)¹⁷ provided the stages are not so rigidly defined as to, in effect, preclude full consideration (and response in relation to) the issues in the round¹⁸.

‘The full package must be sufficiently identified as part of the final stage of publication, and there must be adequate time after publication of the final part of the package for the package to be considered as a whole and for representations to be made.’¹⁹

5. Explanation for the consultation:

The obligation is to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response²⁰.

The reasons given for what is proposed must include a candid explanation²¹ (indeed a true explanation!²²) and an explanation of the factors or criteria which the consulter considers important to its decision-making²³.

There is not necessarily an obligation to state the disadvantages of a proposal²⁴.

Although there is no general obligation to disclose unpublished internal advice²⁵ or representations from other consultees²⁶, that remains subject to the overarching requirement to give sufficient reasons for consultees to be able to respond intelligently²⁷, such that, where the decision was being informed by private representations, those representations needed to be made available to consultees²⁸.

¹⁶ *R(Sadar) v Watford BC* [2006] EWHC 1590

¹⁷ *Nichol v Gateshead MBC* (1988) 87 LGR 435

¹⁸ *R(Parents for Legal Action Ltd) v Northumberland* [2006] ELR 397, [2006] EWHC 1081 Admin

¹⁹ *Breckland v Boundary Commission* [2009] EWCA Civ 239 [49]

²⁰ *R v North and East Devon Health Authority, ex p. Coughlan* [2001] QB 213; *R(Forest Heath DC) v Electoral Commission* [2010] PTSR 1227 [54]; *Vale of Glamorgan v Lord Chancellor*[2011] EWHC 1532 (Admin)

²¹ *R (Lloyd) v Dagenham London Borough Council* [2001] EWCA Civ 533; *R v Lambeth London Borough Council, ex p. N* [1996] ELR 299

²² *R(Madden) v Bury MBC* [2002] EWHC (Admin) 1882

²³ *R (Capenhurst) v Leicester City Council* [2004] EWHC 2124 (Admin)

²⁴ *R (Beale) v Camden* [2004] LGR 291

²⁵ *Ex p Bushell* [1981] AC 75

²⁶ *Ex p US Tobacco* [1992] QB 335, 370F-G; *Abbey Mines v Coal Authority* [2008] EWCA Civ 353; *Electoral & Boundary Commission v Forest Heath* [2009] EWCA Civ 1296 [41]

²⁷ *R (Edwards) v Environment Agency (No. 2)* [2006] EWCA Civ 877; *Electoral & Boundary Commission v Forest Heath* [2009] EWCA Civ 1296 [44]

²⁸ *Evans v Lord Chancellor* [2011] EWHC 1146 (Admin)

If the public are being consulted then the consultation document must be available to all, in a language which is simple and clear and not bedevilled with jargon²⁹.

It is not permissible to rely on 'mediation by opinion makers' for (eg) complex financial information³⁰.

It should be clear what is being consulted upon: where only 'issues' were raised, consultees were entitled to proceed on the basis those were the issues and not some underlying decision of principle: could they reasonably foresee that, following consideration of responses, the issue of principle would be decided³¹?

But note that an invitation also to provide "any general comments you may have" can lead to the inference that underlying issues are in play³².

6. Information and documents to be provided: The obligation to provide information to consultees can require the provision of significant amounts of information, and in a form which allows consultees properly to understand and make "meaningful and informed representations"³³ on what is being consulted upon³⁴.

Where the decision-maker has access to important documents which are material to the determination whose contents the public would have a legitimate interest in knowing then those documents should be disclosed in the consultation process³⁵.

If fairness requires it then the consulter may be obliged to provide consultation responses from some consultees to others for the latter's comment³⁶.

Information can be supplemented during the process, but the less information that is provided at the outset, the more likely it is to be unfair to provide substantial information later in the process³⁷.

7. Consultation on a single option: A public body can consult on a single, preferred, option but that is unlikely to be lawful unless other options are identified and the preferred option explained in a way which allows consultees properly to argue in favour of alternatives³⁸.

²⁹ *Bard v Secretary of State for Communities and Local Government* [2009] EWHC 308 (Admin)

³⁰ *Breckland v Boundary Commission* [2009] EWCA Civ 239 [69]

³¹ *R (Greenpeace Ltd) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin)

³² *Bard v Secretary of State for Communities and Local Government* [2009] EWHC 308 (Admin)

³³ *R v Secretary of State for the Home Department, ex p. Harry* [1998] 1 WLR 1737 at 1748

³⁴ *R (Greenpeace Ltd) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin); *R (Eisai Ltd) v National Institute for Health and Clinical Excellence* [2008] EWCA Civ 438;

³⁵ *R (Edwards) v Environment Agency (No. 2)* [2006] EWCA Civ 877

³⁶ *Anglian Water v Environment Agency* [2003] EWHC 1506

³⁷ *R (Greenpeace Ltd) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin)

³⁸ *R (Madden) v Bury Metropolitan Borough Council* [2002] EWHC 1882 (Admin); *Vale of Glamorgan v Lord Chancellor* [2011] EWHC 1532 (Admin)

The consulter should not prematurely preclude options from consideration³⁹.

8. Changes mid process/new options: If the public body fundamentally changes⁴⁰ its proposal mid-process or is minded to proceed in a way which was not part of the proposal consulted upon, then basic fairness may require it to re-consult or consult afresh on the changed proposal⁴¹.

Depending on the circumstances, further consultation may be required on matters and issues that the initial consultation may have thrown up⁴².

9. Considering the responses: The person or people actually making the decision do(es) not need to read every consultation response in order to have been taken conscientiously to have taken them into account.

They are entitled to rely on others to summarise responses⁴³.

But that process must be a fair and neutral one and not omit significant material⁴⁴ points.

Indeed, it “includes a positive duty to provide sufficient information and guidance to enable members to reach a decision...”⁴⁵

Once consultation has completed a decision-maker is not required to disclose his own thought processes for criticism before reaching a decision but if, in the course of decision-making the consulter becomes aware of a new factor of potential significance, fairness may require that concerned parties be given an opportunity to comment⁴⁶.

Issues in legal challenges to consultations

When to challenge? If the allegation is that the consultation is legally flawed from the outset in a way which means that any subsequent decision is bound to be unlawful (eg because a statutory notice of consultation was fundamentally flawed), then it may be appropriate and necessary for any challenge to be brought as a challenge to the legality of the consultation itself.

In other cases, it is likely to be premature to challenge the consultation itself (because the flaw may be cured or the outcome go in favour of the objector

³⁹ *R (Medway Council) v Secretary of State for Transport* [2002] EWHC 2516 (Admin) at [32]

⁴⁰ *R (Smith) v East Kent Hospital NHS Trust* [2002] EWHC 2640 (Admin); *R v Shropshire HA ex p Duffus* [1990] 1 Med LR 119 at 223

⁴¹ *R (Carton) v Coventry City Council* (2001) 4 CCLR 41, 44C-E.

⁴² *R (Edwards) v Environment Agency (No. 2)* [2006] EWCA Civ 877 [103]

⁴³ *Miller v North Yorkshire County Council* [2009] EWHC 2172 (Admin) at [49]; *Bard v Secretary of State for Communities and Local Government* [2009] EWHC 308 (Admin) [96]

⁴⁴ *R (Kides) v South Cambridgeshire DC* [2001] EWHC Admin 839

⁴⁵ *R (Lowther) v Durham County Council* [2001] EWCA 781 at [98] per Pill LJ; *Trillium v Tower Hamlets* [2011] EWHC 146 (Admin); *Wainwright v Richmond on Thames CO/3605/2000* 11 April 2001 [64-67]: not enough to complain that the report could have said more if there were no material omissions

⁴⁶ *R (Edwards) v Environment Agency (No. 2)* [2006] EWCA Civ 877 [103]

regardless of the flaw) such that any challenge should be to the legality of the decision made in reliance on the consultation process⁴⁷.

‘If a consultation is proceeding on a false premise [in the form of a mistake of law] there is every reason to lean on deciding the issue sooner rather than later’⁴⁸

A challenge to the first stage of a multi-stage consultation process may also be premature provided subsequent stage could cure the alleged defect (eg in a site selection short-listing process)⁴⁹.

Who was consulted? It is hard to challenge a decision on the basis that consultation was insufficient (i.e. that people who should have been consulted were not).

But it is nonetheless open to someone who was consulted to complain that others who were not should have been⁵⁰.

It can be sufficient to consult with representative organisations only, particularly if the need to take a decision is urgent⁵¹.

Who can challenge? It is not necessary for someone to have participated in the consultation in order for them to complain about how it was conducted: they are entitled to stand back and let others represent their interests in the consultation but nonetheless later to challenge the lawfulness of the consultation⁵².

Complaints of insufficiency of information: A consultee who complains that insufficient information was provided to consultees is unlikely to succeed unless they raised the point during the consultation and the consulter refuses to give them the further information they requested⁵³.

Overall: the court will not strain to find technical defects which will make the obligations imposed on public bodies unworkable – the court will generally need to be satisfied that something has gone fundamentally wrong⁵⁴ before concluding the consultation (or decision based on it) was unlawful.

But that does not mean that only the ‘most extreme examples’ of failure will be quashed; the ‘true test is whether the consultation process was so unfair that it was unlawful. A Judge is well placed to make that judgment’⁵⁵.

What is called for is an ‘intuitive judgment’⁵⁶.

⁴⁷ *R (Elphinstone) v Westminster City Council* [2008] EWCA Civ 1069; *EISAI* (see above); cf *Nichol v Gateshead Metropolitan Borough Council* (1988) 87 LGR 435; *R v Secretary Of State For Education Ex Parte Robyn Bandtock* [2001] ELR 333

⁴⁸ *Breckland v Boundary Commission* [2009] EWCA Civ 239 [110]

⁴⁹ *Bard v Secretary of State for Communities and Local Government* [2009] EWHC 308 (Admin) [128]

⁵⁰ *Wainwright v Richmond on Thames* CO/3605/2000 11 April 2001 [23-24, 54]; *R v Lambeth ex p N* [1996] ELR 299 at 311

⁵¹ *R (Legal Remedy UK Ltd) v Secretary of State for Health* [2007] EWHC 1252 (Admin)

⁵² *R (Edwards) v Environment Agency (No. 2)* [2006] EWCA Civ 877

⁵³ Compare *R (Eisai Ltd) v National Institute for Health and Clinical Excellence* [2008] EWCA Civ 438 where it was unfair not to provide a fully executable version of the key spreadsheet which consultees had asked for in the process, with *Easyjet v Civil Aviation Authority* [2009] EWCA Civ 1361 where it was not unfair not to provide data which Easyjet had not asked for at the time

⁵⁴ *Greenpeace Ltd v Secretary of State for Trade and Industry* (2007) EWHC 311 (Admin)

⁵⁵ *Devon v Secretary of State for Communities and Local Government* [2010] EWHC 1456 (Admin)

It is not open to the consuler to contend that it had a discretion to adopt a procedure the court considers unfair⁵⁷.

But the result would probably have been the same anyway! If the Court finds that the consultation was unlawful then it is not obliged to set aside the decision in question (because in JR remedies are always discretionary).

But it should not refrain from doing so merely because it considers that the result would probably have been the same if the consultation had been properly carried out – mere probability is not enough⁵⁸.

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⁵⁶ *Easyjet v Civil Aviation Authority* [2009] EWCA Civ 1361 [59]; *Electoral & Boundary Commission v Forest Heath* [2009] EWCA Civ 1296

⁵⁷ *R (Medway Council) v Secretary of State for Transport* [2002] EWHC 2516 (Admin) at [32]

⁵⁸ *Smith v North East Derbyshire Primary Care Trust* [2006] EWCA Civ 1291