

Appendix B

- Consultation obligations
- Assessing the approach to consultation
- Process for determining consultation approach

1.0 CONSULTATION OBLIGATIONS – the duty to consult

In some areas, legislation (or statutory guidance) expressly imposes a duty on a public authority to engage in some form of consultation before taking a particular decision or exercising a particular function. Statutory provisions exist in the areas of:

- 1) Health
- 2) Environment
- 3) Equality

Even where there is no express duty to consult, the courts may imply a duty to consult as part of a public authority's general duty to act fairly, for example if nature and impact of the decision may mean that fairness requires it. The more serious the impact of a decision is on affected individuals, the more important it is that the right decision is reached and that those affected feel that their concerns have been considered by the decision-maker. Broadly, therefore, the more serious the impact, the more likely it is that fairness requires the involvement of affected individuals in the decision-making process by some form of consultation.

In March 2015, the Government introduced Best Value Statutory Guidance. 'Best Value Duty' applies to how local authorities should work with voluntary and community groups and small businesses when facing difficult funding decisions. Authorities are to 'consider overall value, including economic, environmental and social value, when reviewing service provision.' To reach this balance, prior to choosing how to achieve the 'Best Value Duty' authorities remain 'under a duty to consult representatives of a wide range of local persons.' This duty to consult is not optional.

The doctrine of legitimate expectation (common law) is rapidly becoming the most important aspect of the law of consultation. It is now seen as common law, whereby the courts recognise consultees' rights to expect a fair process which incorporates guidance and management promises. The legitimate expectation applies:

- When there has been a clear promise of consultation
- Where official guidance or policies imply a promise to act in a particular way
- Where there is a withdrawal of a benefit with significant impacts to be considered
- Where the nature of the relationship would create unfairness if there were to be inadequate consultation.

Essentially, where people have come to legitimately expect a process of consultation, for example, with local authority budget cuts or healthcare changes, there are grounds for a judicial review should a public consultation not take place. Similarly, a consultation must be conducted properly should the choice be taken to embark on one (whether a legal requirement exists for it or not). This is part of ensuring that the consultation process remains a fair one.

In non-statutory consultations it is up to the Authority to decide whether there is a duty to consult anyone and if so what 'fair consultation' entails in the circumstances. The Cabinet Office Consultation Principles 2018 document states that consultations must:

- Be clear and concise
- Have a purpose
- Be informative
- Form one part of an overall process of engagement
- Last for a proportionate amount of time
- Be targeted
- Take account of the groups being consulted
- Facilitate scrutiny
- Publish responses within 12 weeks
- Not be launched during election periods

In some circumstances there will be no requirement to consult, and this will depend on the issues, the nature and impact of the decision and whether interested groups have already been engaged in the policy-making process. However, if the proposals could have a significant or serious impact on those affected then it is likely that consultation should take place before a decision is taken.

2.0 ASSESSING THE APPROACH TO CONSULTATION – carrying out a fair consultation (The Gunning Principles)

When there is a duty to consult, the duty is to engage in a lawful and fair consultation, and any consultation (whether there is a Duty to Consult or not) should be both adequate and fair. To establish if proposed consultation is fair, services should be guided by a set of principles set out in case law¹ otherwise known as the Gunning Principles, which defined that a consultation is only legitimate when these four principles are met:

1. Proposals are still at a formative stage. A final decision has not yet been made, or predetermined, by the decision makers.
2. There is sufficient information to give 'intelligent consideration'. The information provided must relate to the consultation and must be available, accessible, and easily interpretable for consultees to provide an informed response
3. There is adequate time for consideration and response. There must be sufficient opportunity for consultees to participate in the consultation. There is no set timeframe for consultation, despite the widely accepted twelve-week consultation period, as the length of time given for consultee to respond can vary depending on the subject and extent of impact of the consultation
4. 'Conscientious consideration' must be given to the consultation responses before a decision is made. Decision-makers should be able to provide evidence that they took consultation responses into account.

These principles have subsequently been reinforced and form a strong legal foundation from which the legitimacy of public consultations is assessed and are frequently referred to as a legal basis for judicial review decisions.

¹ (R v London Borough of Brent, ex p Gunning [1985] LGR 168)

3.0 PROCESS FOR DETERMINING CONSULTATION APPROACH

It is at the discretion of each service area in conjunction with their Executive Member to determine the appropriate methods of consultation, as this will vary according to individual requirements. A simple model that services should follow is below:

Stage One: When considering a potential change to service or policy, the Service Director, in conjunction with the relevant Executive Member, should consider whether the Duty to Consult applies and should agree a proportionate approach to consultation. The Service Director should carefully consider the Gunning Principles when designing any consultation activity.

Stage Two: Service area to consider the issues to be addressed as part of a consultation and identify the key stakeholders to be consulted at an early stage. These key stakeholder groups should be agreed in conjunction with the relevant Executive Member. Consideration should be given to how to include and engage any minority or disadvantaged groups in the consultation.

Stage Three: If appropriate, hold an initial key stakeholder consultation to consult on overarching themes and principles.

Stage Four: After considering responses from key stakeholders, draw up a more specific and targeted public consultation using appropriate methodology. Where relevant, the Zencity Engage Platform will be the method of choice. Consideration should be given to how to include and engage any minority or disadvantaged groups in the consultation. Advice can be sought from the Communications team on methodology and survey wording.

Stage Five: Publicise consultation responses where appropriate and publicly demonstrate how consultation responses will be used in the next steps of the project. Adopt a 'You Said, We Did' approach to giving feedback. Keep people who have participated in the consultation informed about the progress of the project.

4.0 CONTACT

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