



# The Duty to Consult: When does it arise and what does it entail?

**Kuljit Bhogal KC, Andrew Lane & Robert Williams**

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# Our speakers

01

**Rob Williams**



02

**Kuljit Bhogal KC**



03

**Andy Lane**



*“To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; 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 product of consultation must be conscientiously taken into account when the ultimate decision is taken.”*

Lord Woolf MR in R (Coughlan) v North and East Devon Health Authority [2001] QB 213 at 108, approving R. v Brent LBC Ex p. Gunning (1985) 84 LGR 168



# The Gunning Principles...

01

**Formative Stage**

02

**Sufficient  
information**

03

**Adequate time**

04

**Conscientious  
consideration**

# The Cabinet Office Consultation Principles (2012)

last updated 19 March 2018

1. Consultations should be clear and concise.
2. They should have a purpose.
3. They should be informative.
4. Consultations are only part of the process of engagement.
5. They should last for a proportionate amount of time.
6. They should be targeted.
7. They should take account of the groups being consulted.
8. They should be agreed before publication.
9. Consultation should facilitate scrutiny.
10. Government responses should be published in a timely fashion.
11. Consultation exercises should generally not be launched during local/national election periods.

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*"There is nothing a government hates more than to be well-informed; for it makes the process of arriving at decisions much more complicated and difficult". - **John Maynard Keynes***





# When does the issue arise?

Robert Williams



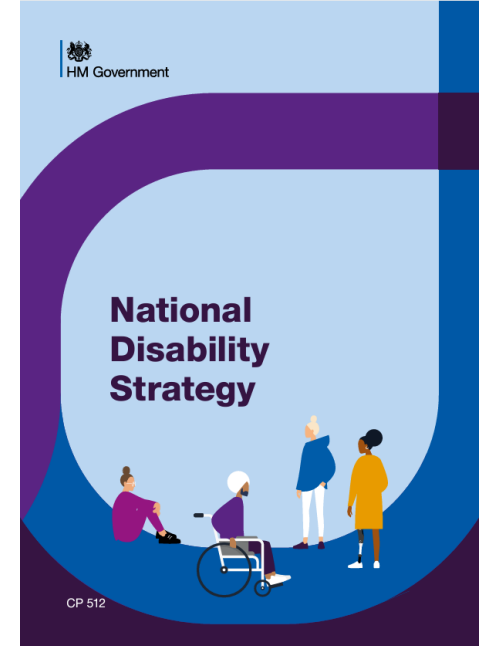
# When is there a duty to consult?

- No general duty to consult before deciding on a measure
- Three potential sources of an obligation to "consult":
  - (1) Statutory duty (express or implied)
  - (2) Legitimate expectation (e.g. arising out of promise or established practice)
  - (3) If it would be "conspicuously unfair not to consult" (not enough that it might be a "good idea" or "sensible")
- Voluntary consultation - no duty, but public body chooses to consult



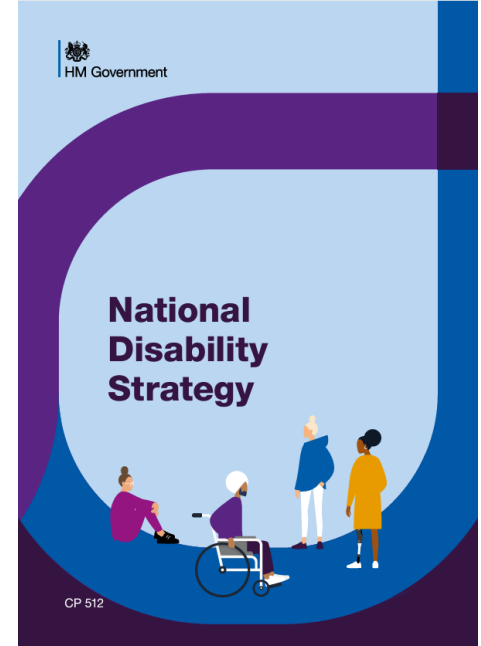
# What constitutes a consultation?(1)

- ***R (Eveleigh) v Secretary of State for Work and Pensions* [2023] EWCA Civ 810**
- Whether UK Disability Survey, which was to inform forthcoming National Disability Strategy, was a consultation to which *Gunning* principles applied
- High Court (Griffiths J) - Yes
  - Because responses to Survey were "integral to development of NDS"
  - Breach of second *Gunning* principle - respondents not told in clear terms what the proposals were



## What constitutes a consultation?(2)

- **Court of Appeal (Laing, Bean and Macur LLJ) disagreed**
- Substance, not form - "no magic in the word 'consultation'" (§81)
- *Gunning* principles assume:
  - (i) "a public authority is proposing to make a specific decision which is likely to have a direct (and usually adverse) impact on a person or on a defined group of people." (§84)
  - (ii) the proposal is at sufficiently formative stage "that the public authority...knows what the proposed decision may be, and is able to explain why it might make that proposed decision, in enough detail to enable consultees to respond intelligently to that proposed course of action." (§85)



# *R(CU) v Secretary of State for Education* [2024] EWHC 638- Eveleigh applied (1)

- Issue - whether *Gunning* principles applied to a "consultation question" concerning the effectiveness of SEND Tribunal's remedies
- Allegation - second *Gunning* principle breached
  - Failure to explain that Tribunal had no power to award compensation in claims of disability discrimination against children by schools
- Found *Gunning* principles did not apply, even though described itself as a "consultation"
- No general policy commitment to change this position, let alone "a policy which had crystallised sufficiently that the proposal could be explained in enough detail to enable consultees to respond intelligently to it." (§54).



## SEND Review:

Right support  
Right place  
Right time



# *R(National Council for Civil Liberties) v Secretary of State for the Home Department [2024] EWHC 1181 - Eveleigh applied*



# *R(National Council for Civil Liberties) v Secretary of State for the Home Department - Eveleigh applied (2)*

- Issue - whether unlawful to bring into effect definitions of "serious disruption" in the Public Order Act by way of Regulations without first consulting with the public
- Govt had consulted National Police Chiefs Council, Metropolitan Police Service, Police and Crime Commissions and National Highway. Govt argued – targeted engagement, not consultation
- Divisional Crt (Green LJ and Kerr J):
  - Not every process of engagement with key stakeholders = consultation (§155). *"The Court will tread with care in characterising as a consultation a process of Government engagement with those from whom it seeks advice."* (§181)
  - But in this case there was "concrete proposal" and "likely and intended to have adverse impact" on those taking part in protests, as well as general public (§163)
  - Consulted stakeholders not simply on specific issues, but on "all aspects of the proposals". All hallmarks of a consultation (§163)

## Is *Eveleigh* the last word?

- **Following *Eveleigh*, Courts applying narrow "impact" test to determine whether exercise = consultation:**
  - Whether "*public authority is proposing to make a specific decision which is likely to have a direct...impact on a person or on a defined group of people.*" (§84)
- **Query whether this test properly captures all forms of consultation to which legal standard should apply**
  - E.g. Consultation on national planning or environmental policies, such as NPPF or National Policy Statements - which likely to affect a large number of people
- **In *Civil Liberties* case, Court said that *Gunning* principles did not necessarily embody totality of requirements for lawful consultation (and applied fairness criterion). Likewise, courts might ultimately conclude that *Eveleigh* test not exhaustive of what = consultation**







# Timing and Reasons

Kuljit Bhogal KC





## The Gunning Principles...

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Formative  
Stage

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Sufficient  
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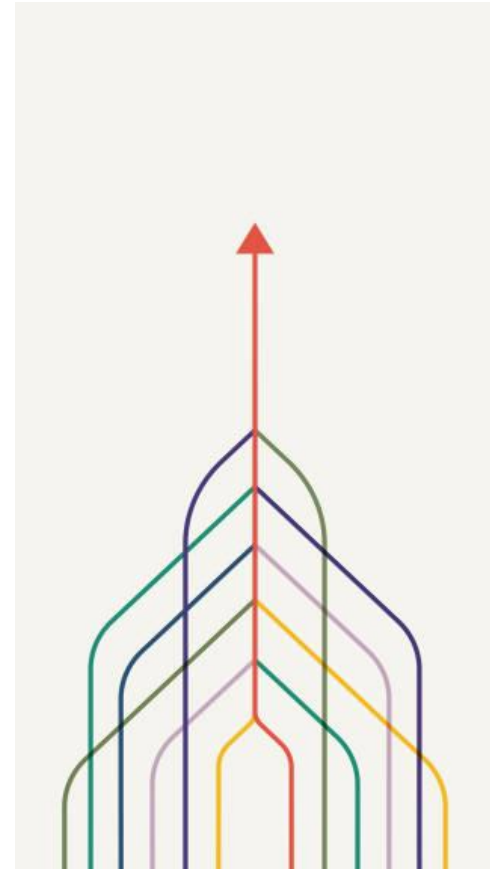
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Conscientious  
consideration

## Timing of consultation

*“To be proper, consultation must be undertaken at a time when proposals are still at a formative stage”*  
ex p Coughlan as affirmed in Moseley

- At a stage when final decisions have yet to be taken
- But the proposal has to have crystallised sufficiently that the public authority knows what the decision may be and is able to explain it (see sufficient reasons)
- Does NOT require consultation on every possible option: the options can be narrowed prior to consultation provided the proposed course can still be altered as a result of it
- Predetermination



## Sufficient reasons (1)

Fratelli: Hey, kid. I want you to spill your guts, tell us everything.

Chunk: Everything?

Fratelli: Everything.

Chunk: [sobbing] Everything. OK, I'll talk!

The Goonies, 1985



## Sufficient reasons (2)

*“[the consultation] must include **sufficient reasons** for particular proposals to allow those consulted to give intelligent consideration and an intelligent response”*

- Duty is context and fact specific
- There is no rule that requires discarded options to be referenced but this may be necessary to ensure fairness or where the general public cannot be expected to be familiar with the issues; see R (Moseley) v Haringey LBC [2014] 1 WLR 3947 SC
- Put consultees in a position to properly consider, and respond to, the consultation request and make an intelligent response
- Need to provide sufficient information to provide a fair opportunity to address the issue Anand v Kensington and Chelsea RLBC [2019] EWHC 2964 (Admin) at [60].

## Sufficient reasons (3)

- Comply with any statutory requirements
- State the reasons for what is proposed
- Identify any criteria that have been adopted
- Identify any factors which are considered to be decisive or of substantial importance
- Don't usually need to give sufficient information about the objections see R. (on the application of Beale) v Camden LBC [2004] EWHC 6 at [19] (Munby J) and Moseley at [40]
- Consider disclosure of documents if these are material to the decision in question and which the public would have a legitimate interest in knowing about, eg a draft order, maps

*"40. That is not to say that a duty to consult invariably requires the provision of information about options which have been rejected. The matter may be made clear, one way or the other, by the terms of the relevant statutory provisions, ...*

*To the extent that the issue is left open by the relevant statutory provisions, **the question will generally be whether, in the particular context, the provision of such information is necessary in order for the consultees to express meaningful views on the proposal.**"*

Lord Reed in Moseley at [40]



# Time and Consideration

Andy Lane



# What is the court focusing on?

01

## Statutory consultation

When a statute imposes a duty to consult, the statute tends to define precisely the subject matter of the consultation and the group(s) to be consulted

Hallett LJ - R (Plantagenet Alliance Ltd) v SSJ & Ors [2014] EWHC 1662 (QB); [2015] 3 All E.R. 261 at 97

02

## Non-statutory consultation

**Is the process so unfair as to be unlawful?**

“likely to be based on a factual finding that something has gone clearly and radically wrong”

Burnett LJ – R (London Criminal Courts Solicitors Association) v Lord Chancellor [2014] EWHC 3020 (Admin); [2015] 1 Costs LR 7 at 36

# Sufficient time

R (Leadbetter) v Secretary of State for Transport [2023] EWHC 210 (Admin)

- Minimum detectable kerb height (important for the visually impaired)
  - Challenge to SST 2022 Guidance – lack of adequate consultation (12 days to respond)
  - Workshops the week before guidance was to be produced – extension of time request refused
  - DHCJ HHJ Jarman KC considered duty of enquiry/PSED – Grounds 1 and 3 (rejected)
  - Duty to consult claimed due to PSED/conspicuous unfairness – Ground 2 on consultation succeeded
- 
- **Extent of inquiry depends upon context of the decision – R (Refugee Action) v SSHD [2014] EWHC 1033 (Admin) at 121.**
  - **Subject to a Wednesbury challenge it is for the public body and not the court to decide upon the manner and intensity of inquiry to be undertaken – see Laws LJ in R (Khatun) v Newham LBC [2005] QB 37 at 35.**



# R v SS for Social Services, ex p AMA [1986] 1 W.L.R. 1 at 4G

## Webster J

- Re Secretary of State decisions on housing benefit amendment regulations
- Declaration that the Minister had failed in their duty to consult
- Not quashed as complaint re failure to consult rather than content of regulations
- No degree of urgency allowed the Minister to be absolved from their consultation duty

“...the essence of consultation is the communication of a genuine invitation to give advice and a genuine receipt of that advice. In my view it must go without saying that to achieve consultation sufficient information must be supplied by the consulting to the consulted party to enable it to tender helpful advice. **Sufficient time** must be given by the consulting to the consulted party to enable it to do that, and **sufficient time** must be available for such advice to be considered by the consulting party. Sufficient, in that context, does not mean ample, but at least enough to enable the relevant purpose to be fulfilled.”

# What is conscientious consideration?

1. It does not mean necessarily agreeing with respondents.
2. It does mean being open to change.
3. It also means all representations being before the decision maker.
4. Tameside duty – i.e., the duty to carry out sufficient inquiry pre-decision – see Lord Diplock in SSE&S v Tameside MBC [1977] A.C. 1014 at 1065B.
5. Statutory consultation may impose substantial express duties of consultation (e.g., a requirement the parties attempt to reach agreement) – see Elisabeth Laing LJ R (BMA) v HM Treasury, SSHSC [2024] EWCA Civ 355 at 159.

# R (Swalcliffe Park School) v Wokingham Park School [2023] EWHC 1451 (Admin)

## DHCJ HHJ Auerbach

- Alleged failure to conscientiously consider school's response
- 4<sup>th</sup> Gunning criteria
- JR succeeded and decision quashed
- "highly likely" test in section 31(2A), Senior Courts Act 1981 considered

88. I do see force in the local authority's point that the school could, for its part, whether or not with the benefit of legal advice, have itself responded differently than it did to the 17 November letter. But I come back to the point that consultation requires dialogue and engagement, and the evidence before me does not demonstrate that there was a good reason why, following the 26 November letter, there could not have been more dialogue and it instead had to proceed directly to a decision.

# R (Police Superintendent's Association) v HM Treasury [2021] EWHC 3389 (Admin)

## Mrs Justice Heather Williams DBE

- Challenge to legality of consultation on pension schemes
- 4 Grounds – unlawful consultation; breach of PSED; breach of substantive legitimate expectation; error of fact
- First 2 grounds successful
- Decision made in advance of consideration of consultation responses
- **Relief refused – section 31(2A), Senior Courts Act 1981**

164. Ultimately I am driven to conclude that the December 2020 Ministerial Submission provides a clear indication that the CST had made his final decision on the prospective policy before he was shown the summary of the consultation responses. There is nothing in the subsequent documentation or known events that negates this. I accept that little weight can be attached to generalised statements in the consultation response that the consultee's views were taken into account. It seems likely that they were taken into account by the officials who drafted the document. However, for reasons I have already explained, it is the Minister's state of knowledge that is crucial. Accordingly, there was a clear breach of the requirement to give conscientious consideration to the consultation responses. I accept that the ultimate test is one of clear unfairness (para 125 above). This amounted to clear unfairness.



**Any Questions?**