

Appendix 3

Legal considerations

High-risk consultation and engagement

Some consultations can be challenged in court through judicial review and will need extra care when being planned and delivered.

Examples include:

- Closures or reductions in services
- Cuts to save money
- Planning issues
- Policies, services and functions covered by the Equality Act 2010

In order to make sure that the consultation will stand up to legal challenge, it is best to make sure that all formal consultations are carried out adhering to the host organisation's guidance and that the equality act guidance is followed. For all activity that might meet these criteria, colleagues must contact the NHCP communication and engagement team, as well as their local communications or engagement colleagues. This is important as it helps NHCP to keep a record of activity in the county, and so collectively respect and look after the experiences of the communities we serve.

Legal aspects of consultation

The law and consultation is a fairly complex area, which has developed over time through case law.

A number of local public bodies have been subject to Judicial Review proceedings in the recent past and were found to have acted unlawfully in their Public Sector Equality Duty. Sometimes this was because of a failure to undertake a sufficiently thorough information gathering exercise and analysis in their decision making process, or because there was insufficient information to enable those consulted to give intelligent consideration and a response to the council's proposals.

The information below is a summary of the key points of consultation and the law. However, if you think that a consultation has the potential to put organisations at risk of litigation you should seek advice from the host organisations legal services team.

A case in point: The Gunning Principles

Before 1985 there was little consideration given to consultations until a landmark case in that year (R v London Borough of Brent ex parte Gunning). This case sparked the need for change in the process of consultations when Stephen Sedley QC proposed a set of principles that were then adopted by the presiding judge. These principles, known as Gunning or Sedley, were later confirmed by the Court of Appeal in 2001 (Coughlan case) and are now applicable to all public consultations that take place in the UK.

Essentially, what these state is whether or not a consultation is a legal requirement. If a consultation is embarked upon then it must be carried out properly. In order for the consultation to be properly carried out, it must be undertaken at a time when proposals are still at a formative stage. It must include sufficient reasons for the proposals to allow those consulted the opportunity to give intelligent consideration and responses and adequate time must be given for this purpose. Finally, the product of consultation must be conscientiously taken into account when the ultimate decision is taken.

To protect the various partner organisations within NHCP from the prospect of legal challenge, officers must ensure that the Gunning Principles are followed in any public consultation exercise.

The Gunning Principles in more detail are:

1. **When proposals are still at a formative stage, consultations should be undertaken before a decision has been made**

Public bodies need to have an open mind during a consultation and not to have already made the decision, but have some ideas about the proposals. This principle does not mean that the decision-maker has to consult on all possible options of achieving a particular objective. A decision-maker can consult on a "preferred option", and even a "decision in principle", as long as its mind is genuinely open.

Where a decision-maker has formed a provisional view as to the course to be adopted, or is 'minded' to take a particular course subject to the outcome of consultations, it is expected that those being consulted should be informed of this 'so as to better focus their responses'.

2. **Provide sufficient reasons for proposals to permit 'intelligent consideration'**

People (consultees) involved in the consultation need to have enough information to make an intelligent choice and input in the process. They should be made aware of the basis on which a proposal for consultation has been considered and will thereafter be considered. Those consulted should be aware of the criteria that will be applied when considering proposals and what factors will be considered 'decisive' or 'of substantial importance' at the end of the process.

Inaccurate or incomplete information may have the effect of precluding an 'informed and intelligent response' to the disadvantage of a party that may be affected by the decision. This is especially important where that information 'is outside the knowledge of those consulted, and upon which they are therefore obliged to rely in formulating their response.'

There is considerable room for argument as to how much information needs to be provided. Where the group to be consulted are particularly expert, then greater detail may be required. Even if not expert, information must be published in a form that consultees can understand.

Ordinarily, it is not necessary for the decision-maker to circulate the submissions of those who respond to the consultation to all others who have responded to it. Although, in general there is no obligation on the decision-maker to communicate advice received from officials or internal material or information to consultees, there may be exceptions. For instance, when issues have emerged that lead the organisation to do something fundamentally different from the proposals consulted upon, or if fairness requires that further consultation on an issue that has emerged, particularly if this issue undermines the value of the responses made to the consultation. Equality Assessments should take place at the beginning of the consultation and be published alongside the document.

3. **Adequate time must be given for consideration and response (the product of consultation must be conscientiously taken into account when the ultimate decision is taken)**

Timing is crucial, so ask:

- Is it an appropriate time and environment?
- Was enough time given for people to make an informed decision and then provide that feedback?
- Is there enough time to analyse those results and make the final decision?

Unless statutory time requirements are prescribed, there is no necessary timeframe within which the consultation must take place. The decision-maker may have adopted a policy as to the necessary time-frame (for example, Cabinet Office guidance, or contact with the voluntary sector), and if it wishes to depart from that policy it should have a good reason for doing so. Otherwise, it may be guilty of a breach of a legitimate expectation that the policy will be adhered to. Where the need to make a decision is urgent, the Courts will tolerate shorter periods for consultation, although a delay by the council in finalising proposals could not be used as a reason for not consulting. (R v NE Devon Health Authority ex parte Pow 1997).

The results of the consultation must be conscientiously considered. This ties in with the first Gunning Principle, which is a proxy for whether the decision-maker has made up their mind. If the decision-maker does not properly consider the material produced by the consultation, then it can be accused of having made up their mind or of failing to take into account a relevant consideration.

The decision-maker does not have to read personally every response provided in the consultation process. However, where a summary is provided, this will need to be accurate and comprehensive. Best practice is that all the underlying materials are made available to the decision-maker, so they can access them if they wish.

4. **Consultation must be conscientiously taken into account**

Think about how to prove decision-makers have taken consultation responses into account. The risk of not following these principles could result in a Judicial Review. A number of public bodies across the UK have been taken to Judicial Review and deemed to have acted unlawfully in their Public Sector Equality Duty – usually linked to the four Gunning Principles.

Appendix 4

Accessible information

NHS England has an Information Standard for accessible information. It is a quality standard framework that supports the production of high quality information. It means organisations have a robust information production process based on best practice to ensure that information meets the needs of its user.

Further information is available from the NHS England website. <https://www.england.nhs.uk/tis/>