

# GLS Administrative Law Webinar

## TRANSCRIPT

### Overview

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Courts are displaying an increasing willingness to intervene in consultation issues so ensuring fairness is particularly important and what is fair will depend on the particular circumstances of the consultation.

By planning to consult in advance, a public authority can help ensure it is conducted properly and fairly.

Explore the core principles in planning for a consultation:

- When might a public authority decide to consult?
- How does a public authority consult?
- What are the pitfalls to avoid?
- What are the consequences of a failure to consult or consult properly?

Once the consultation has commenced, it must be carried out properly and that means fairly. Abiding by the four principles as set out in *R. v Brent London Borough Council; Ex p. Gunning* (1985) 84 L.G.R. 168 can help ensure that a consultation is fair.

Learn how to abide by the four principles:

1. Consultations must be undertaken at a time when the proposals are at a formative stage
2. Consultations must include sufficient reasons for a particular proposal in order to allow those consulted to give intelligent consideration and an intelligent response
3. Adequate time must be given for a response
4. The consultation must be taken into account when the ultimate decision is taken

## Introduction

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**Karl Banister:** Hello, welcome to the first ever GLS webinar organised by the Administrative Law Steering Group and with thanks to Thomson Reuters for making this possible.

Our aim is to give a fairly high-level understanding of the law of consultation. I'm Karl Banister and I lead the Justice and Security team at the Treasury Solicitors, a public law team.

**Francesca Debenham:** And I am Francesca Debenham and I'm in the General Public Law and Planning team, also at the Treasury Solicitor's Department.

**Karl Banister:** The framework for today's talk is drawn from the principles set out in the case of *Gunning* in 1985. And they are that any consultation must take place at a formative stage in the process; that there must be sufficient reasons given in the consultation to allow for an intelligent response; that sufficient time must be allowed during the consultation process; that the information garnered from the consultation must be put to good use; and finally there is an overarching criteria that the whole process must be fair.

**Francesca Debenham:** Today we're going to try to cover four areas of consultation. Firstly, we're going to look at when a consultant might take place. Secondly, we're going to look at how a public authority should go about consulting. We're then going to look at the pitfalls that public authorities should avoid when consulting. And then, finally, we're going to try to cover the consequences of a failure to consult.

**Karl Banister:** Once the webinar is completed you will be presented with some questions. If you get enough of the questions rights you will get the CPD points that can be awarded for this webinar.

Throughout this webinar we're going to be interspersing the reaction of your colleagues when asked questions about consultation and the first question they were asked is, how confident they feel about advising on consultation requirements.

## Hear from your colleagues: Advising on consultation requirements

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**Shabaz Ashraf, Ministry of Justice:** I do feel confident in advising about consultant requirements because the principles for consultation are quite well settled since *Coughlan*, so they've been around for quite a while and it's basic bread and butter for public lawyers to know.

**Alison Naftalin, Ministry of Defence:** I've done quite a lot of work on consultations before and I've been involved in consultation processes, so I think I've got good awareness of when you need to consult and how and what it should involve.

**Ruth Pogonowski, Ministry of Justice:** I do feel confident about advising about consultation requirements because of the training we get as part of being a GLS lawyer and also the support I get from my senior lawyers in the team that I work in at the Ministry of Justice.

**Janet Hall, Cabinet Office:** It's something that we quite often have to do as a government lawyer so it's sort of a regular part of our work. A lot of consultations happen at policy level and we're quite closely involved in them.

**Ben Bridge, Ministry of Justice:** There are issues day to day which come up and trying to keep ahead of case law is often very difficult, and the case law changes over time and being up to date with that is really important. So confident but, you know, always wanting to know more about it.

## When a public authority should consult

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**Karl Banister:** In this part of the session we are discussing when a public authority might decide to consult. So Frankie could you talk us through when that might be?

**Francesca Debenham:** Sure. Well, there might be an express duty to consult to start with and that's pretty straightforward; that's either set out in legislation or some form of statutory guidance. What's more complicated is that there may be an implied duty, even if there is no express duty to consult. And that implied duty can also be termed as a 'common law duty' or a 'procedural legitimate expectation'.

**Karl Banister:** So how does that implied or common law duty arise?

**Francesca Debenham:** Well there's a number of ways in which you might have an implied duty to consult. Firstly, there might be an express promise to do so made by a government department or a Secretary of State or in the wording of some form of policy. There may also be an established practice of consultation. So, for example, if a department has consulted previously on this type of policy or this type of decision then it is probably likely that there would be an expectation that you would consult on the same thing going forward in the future. And then, finally, you have what is called 'exceptional cases' and that is where there is no express promise or established practice of consultation, but where the circumstances or the impact on an individual or group are considered serious enough, or 'pressing and focused enough' is often the words used, that consultation should be used.

**Karl Banister:** So an example of an established practice would be the case of *Bhatt Murphy*. And in that case I think the court said that the position would have to be that if the practice of the department was so unfair as to amount to an abuse of power then a consultation requirement would be engaged.

What about the *Building Schools for the Future* case, what did that say?

**Francesca Debenham:** Well that was an exceptional case. What you had there was it was a case against the Department for Education and it was with regards a policy of funding which was being cut for building schools. And what had been going on there between the department and the groups involved, which were local authorities, was an extensive dialogue and that extensive dialogue the court said led to an expectation that they would be consulted on any funding cuts.

**Karl Banister:** Conversely, in the *Rahman* case, which was about leave to remain in this country, there was a policy that allowed children who had been here for seven years, them and their family, to stay. The policy was withdrawn without notice. Mr Rahman challenged that withdrawal and said he should have

been consulted because the effect was that even though his child had been here for seven years he was now due to be deported. The court said, no. No exceptional requirement to consult. And the court said that the circumstances where an exceptional requirement to consult would be implied were narrow in the extreme.

If there is no expressed or implied duty why else might a department consult?

**Francesca Debenham:** Well you can still have policy reasons to consult. It may be that you're likely to make a better policy by going out and getting stakeholder engagement and seeking out other people's views. And also, you might want to consult to prevent some sort of risk of challenge on that basis. But what I think is really important to remember is that once you do set about a consultation process you have to do it properly and you need to follow the *Gunning* principles, which are the ones that Karl set out at the beginning of the presentation.

**Karl Banister:** And if you need to know why that is, there's a case, the *Gloucestershire Libraries* case, that expressly says that once a public authority consults, it brings all the consultation requirements with it at that point.

And finally some general points. If the court has found an implied duty to consult it's possible that there may be an overriding public interest reason why, even though there is such a duty to consult, that in fact it cannot be enforced. An example of that would be the famous *Council of Civil Service Unions* case where there should have been consultation about changes in terms and conditions but the court ruled that the threat to national security meant that in the circumstances the requirement to consult would not be enforced.

**Francesca Debenham:** So what about a situation where a department argues that it would be too expensive to consult, for example?

**Karl Banister:** Well, unfortunately the cost of the process will not normally be enough to frustrate the requirement. The courts have generally not accepted that as a reason not to consult.

**Francesca Debenham:** And how about if a department says, well we know what the outcome will be so it's futile to consult because it would not make any difference to do so?

**Karl Banister:** Well again, unfortunately the courts have said no to that. Futility, the likely outcome of the consultation process, is not something they are going to take into account; and see, for example, the *Thames Valley v Cotton* case if you want chapter and verse on that.

One other thing I should mention is the guidance, the BIS Better Regulation Executive guidance, was recently replaced by Cabinet Office guidance in July 2012. That guidance sets out general guidance for government departments to consider when consulting, but there is authority in the case of *Niazi* that government departments don't have to comply with that guidance.

**Francesca Debenham:** So it's just good practice.

**Karl Banister:** It is just good practice, that is right.

**Francesca Debenham:** Okay, well now we're going to hear from a few more of our GLS colleagues on concerns they have when they're advising about the consultation process.

### Hear from your colleagues: Concerns when advising on consultation

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**Janet Hall, Cabinet Office:** One of the things that causes me the most difficulty in advising about consultation requirements is the policy pressures that colleagues are under to do things very, very quickly and deliver what ministers want and in making sure that there is a genuine consultation as opposed to just a sort of perfunctory tick box exercise.

**Ruth Pogonowski, Ministry of Justice:** The thing that causes me the most difficulty is understanding what the consultation is trying to achieve. So getting an idea from policy officials what the idea behind the consultation is, that would then enable me to be in a position to advise them properly on how best to approach their consultation.

**Ben Bridge, Ministry of Justice:** New case law comes up all the time and trying to keep on top of it can be really difficult. So, for instance, the amount of depth you need to go into in a consultation, how long your consultation needs to be, whether you're following the guidelines for consultation practice. All those sorts of things are useful to know about.

**Shabaz Ashraf, Ministry of Justice:** The thing that causes me most difficulty in advising about consultation requirements, usually, is being involved at a formative stage, so being involved early enough rather than policy colleagues coming for advice on consultation at a later date.

**Alison Naftalin, Ministry of Defence:** What kind of decisions require a consultation; I think that's probably the trickiest question to get right.

### How to go about consulting

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**Francesca Debenham:** We're now going to talk about how a public authority goes about consulting. So, firstly, Karl I thought we should talk about the length of time that people need to consult for.

**Karl Banister:** Okay, well the critical factor here is allowing enough time to enable consultees to respond. That's the key factor. The second factor, and playing into that, it's got to be a fair amount of time. So there is a series of cases, you won't get hard and fast rules from the courts on this, but there are a series of cases which illustrate the requirement. So the *Gloucester County Council* case, which is about libraries, the timescales were around a month, I think, and that was over Christmas. The *Building Schools for the Future* case, the court said that three weeks would have been sufficient. In *Brent v Gunning*, the famous case, three weeks was woefully inadequate.

**Francesca Debenham:** So essentially, the longer you consult for the safer you're going to be.

**Karl Banister:** That's absolutely right but of course you've got to play into that requirement to get the policy in place. And that's going to be a factor you're going to have to consider, but that's essentially right.

A source of guidance, I have mentioned them before, the Cabinet Office Consultation Principles which set out at page 2 that normally you should allow two to twelve weeks depending on the nature, impact and contentiousness of the proposal.

**Francesca Debenham:** Okay so next, how do you decide who the right people are to consult?

**Karl Banister:** If there's an express requirement in the legislation or in statute or in statutory material or guidance, it may say so; it may say you must consult 'x' and 'y' and in which case you just have to consult those people. Otherwise, you've got to consult all the interested parties who are likely to be affected, so the Cabinet Office guidance has this to say, 'ensure you capture the full range of stakeholders'. In the BIS Better Regulation guidance that's expanded a little to suggest that you pay special attention to groups including, among others, ethnic minorities, children and young people and people in rural areas.

**Francesca Debenham:** Okay, so you know how long you're going to consult for, you know who you're going to consult. How do you then decide exactly what the contents of any consultation should be?

**Karl Banister:** Well again, if the provision under which you're consulting is an express requirement under primary or secondary legislation it may say so; it may say exactly what you've got to consult about. But generally, if you don't have that guidance, the requirement is you have to give enough information to enable a meaningful response. And see here the *Coughlan* case. And in that the court said there must be enough, and I will read this, "Let those that have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it's under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response." So that's a pretty wide requirement, potentially.

**Francesca Debenham:** And that specifically, really, echoes the *Gunning* principle doesn't it?

**Karl Banister:** Precisely, precisely. And I will add to that, you can have a preferred option. You can have a preferred option as long as you've got an open mind and the case for that is the *Gloucestershire* case, mentioned before.

**Francesca Debenham:** What about excluding an option?

**Karl Banister:** Again, you can exclude an option, but only if it's not of central significance.

**Francesca Debenham:** Okay, so you've gone out and consulted, all your responses come back in. How do you deal with those?

**Karl Banister:** Well, the point about dealing with the responses is they've got to be conscientiously taken into account. And that's got to be clear, for example, in ministerial submissions, material that goes round the department and, most importantly of all, in the response to consultation that you eventually publish. What you don't have to do is undertake the most popular response. And the most striking example of this

is the recent Legal Aid challenges in which 92 per cent of respondents disapproved a particular option and that was the option that was pursued and the court said that was fine.

And then finally, perhaps to add, it must be fair; fairness overlays all of this. So if the process doesn't look fair, the court would probably agree with you.

**Francesca Debenham:** Thanks Karl. We are now going to go back to a few of our GLS colleagues to hear about some of the potential pitfalls to avoid during consultation processes.

### Hear from your colleagues: Pitfalls to avoid during consultation

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**Ben Bridge, Ministry of Justice:** Well, the biggest pitfall can be failing to consult when you're obliged to. And knowing when you need to consult and when you don't need to consult is really important. And so if you make a mistake on that, that can be very difficult for the department.

**Janet Hall, Cabinet Office:** Well, as I say, some of the pitfalls are making it too short and not taking into account the responses. But more generally, I suppose, if you have good questions that you're asking in the consultation that are clear and are targeted to the right kind of response, I think that would be something that would benefit the overall consultation.

**Shabaz Ashraf, Ministry of Justice:** I think you really have to evidence the fact that you took responses into consideration. Quite often timeframes are quite short and you may only have a couple of days in which to review hundreds of consultation responses. So I think the key thing is really to be very organised; have a good audit trail to show that you did actually consider all of your consultation responses.

**Alison Naftalin, Ministry of Defence:** It's very important to ensure that the consultation document, if you're sending out a White Paper or something like that, that it is publicly accessible. Quite often we've had issues about making sure that it can be read by the target audience, so for example, could people perhaps with learning difficulties understand it and things like that. So just making sure that as many people can access the information as possible and in a way that they can understand.

**Ruth Pogonowski, Ministry of Justice:** I think pitching the consultation too wide would be one pitfall to avoid, because you can land up with a response that isn't particularly certain and then that can cause you problems when developing your policy going forward. So being specific and knowing what you want to achieve from the consultation.

**Ben Bridge, Ministry of Justice:** A key pitfall can be when you consult without giving enough information about the policy you're consulting on. And that sounds like an obvious thing, but sometimes government goes out too soon when they haven't thought about what they're really asking carefully enough and that can be a pitfall because then you don't have a realistic consultation. What happens is people give very unspecific responses and that really degrades the quality of the feedback you receive.



## Common pitfalls

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**Francesca Debenham:** We're now going to cover some pitfalls to avoid, which are quite common when consulting. Now we've identified five areas: firstly, consulting with a closed mind; secondly, making a decision before the consultation has actually concluded; thirdly, relying on an existing consultation when facts have changed; fourthly, not keeping adequate evidence or records; and finally, behaving unfairly.

So looking at the first area, which is consulting with a closed mind. What this is, is where you are conducting your consultation and your decision making isn't at a formative stage. So you mustn't have already reached your decision before embarking on the process. Now as Karl mentioned before, it is acceptable in some circumstances to either exclude an option or express a preference for an option, but what you must be prepared to do is to change your mind if the responses to a consultation indicate that that's the best way to go.

**Karl Banister:** The second area, as Frankie said, was making a decision before the consultation has concluded. You must take the responses to the consultation into account, so it's pretty clear that if you make a decision before the consultation is finished, if a court then sees the matter, it will be obvious to them you could not have taken all the consultation responses into account.

**Francesca Debenham:** The third area I spoke about was relying on an existing consultation when the circumstances have changed and that's a problem because then your previous consultation effectively becomes invalid and you need to consult again.

**Karl Banister:** And the fourth area, not keeping adequate evidence. And this means, it is a process risk because if you don't keep adequate evidence of what you have done it's harder to prove that you did it properly. So this means keeping meeting notes, letters, responses to the consultation and so on. And it's not simply because a court might one day be considering what you've done, it's because it helps you make a better policy and it's because it may help you, for example, dealing with Select Committee inquiries and so on.

Then the final area Frankie mentioned was behaving unfairly. This again, we've talked about before, it's a court's ability to sweep up the general issues in the consultation and I have a couple examples to give you here. The first one was the *Royal Brompton* case in which consultees weren't informed about what use was going to be made of their responses to the consultation. So even though the consultation process was otherwise fair that problem meant the entire consultation process was vitiated and had to be started again. And even more severe in the *Evans* case, which was about Legal Aid, the government purported to reduce the ambit of Legal Aid funding and it transpired the reason they did that was to limit the possibility of certain kinds of challenges being brought and there was ministerial correspondence to evidence that. And the court said that was an improper consideration brought into the consultation and it rendered the process unfair and the policy therefore fell.

So to recap, we have closed mind, making a decision before the consultation is concluded, relying on an existing consultation, not keeping adequate evidence, and general unfairness as the main pitfalls to avoid.



**Francesca Debenham:** And now our colleagues discuss some learning points.

### Hear from your colleagues: Learning points

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**Alison Naftalin, Ministry of Defence:** I think it's really important that lawyers are involved in the consultation process at an early stage so that they can flag potential legal issues. So I'd say to any lawyers/legal advisers involved in consultation process to make sure that they are involved early enough so that they can shape it.

**Shabaz Ashraf, Ministry of Justice:** Learning points for colleagues when advising on consultation requirements would really be get in early with your policy colleagues, build good relationships, and advise early and plan ahead as well. So work out how long you have from now until implementing the policy and then work backwards from that, divide up the time so that you have a reasonable period for consultation.

**Ben Bridge, Ministry of Justice:** Well, it's partly about being clear on what the general principles are to begin with, so that when we go to speak to ministers or advise policy officials we are able immediately to give a very brief summary of the general principles, but it's then being aware of what the nuances are and what the pitfalls might be. So those are the sorts of things I would tell other colleagues about.

**Ruth Pogonowski, Ministry of Justice:** Know your policy area when you're advising on consultations, what the consultation is about, what it's trying to achieve and who it's approaching for responses.

**Janet Hall, Cabinet Office:** The learning points are, like I say, something about making sure it's a genuine consultation. The courts have frequently said that just going through something and ticking the boxes and not taking account of the responses isn't sufficient. So it's making sure that the responses are taken into account, even if ultimate policy doesn't deliver those responses there is evidence that they have been analysed.

### Consequences of failing to consult properly

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**Karl Banister:** We're now considering the consequences of failing to consult properly.

**Francesca Debenham:** Well the main risk you have when you fail to consult properly is that there will be a legal challenge, and that's usually termed as a judicial review, and that's on the grounds of procedural unfairness or illegality. Now what that could lead to is a quashing of the entire decision and effectively, in practice, that means that the whole policy will be derailed. What you can also have is a complaint being made to the Parliamentary and Health Service Ombudsman, which is a slightly different route and less common, but equally as difficult for any department.

**Karl Banister:** Where there's no legal requirement to consult, as we have previously said, the courts may well still import into the process a requirement to have done it properly; that's the *Gloucestershire* case. But if that doesn't happen, there's still the attendant policy risks in failing to do a proper consultation.

**Francesca Debenham:** Now we're going to hear from Naina Patel of Blackstone Chambers discussing a key consultation case.

## A key consultation case

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**Naina Patel, Blackstone Chambers:** Any Court of Appeal decision in a consultation challenge from mid 2012 arguably reflects a growing reluctance on the part of the courts to intervene in cases where the challenge is to the consultation process, rather than to the decision which emerges from that consultation process.

*The Crown (on the application of Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts*; this was a decision that was handed down on 19 April 2012. The consultation in this case concerned the reconfiguration of national paediatric cardiac surgical services. The consultation was a result of a statutory consultation duty in section 242(2)(b) of the NHS Act 2006. The consultation document expressed a preferred option on the part of the Joint Committee that there be two service centres for these sorts of services in London. These were the Evelina Children's Hospital at Guy's and St Thomas' and Great Ormond Street. That's to say neither of the preferred options was the Royal Brompton Hospital. Royal Brompton challenged the consultation process on various grounds.

In the High Court, Mr Justice Owen had quashed the process on the basis that a legitimate expectation arose from the document that information received in the first part of what was a two stage process would not be used in the second part of that process. And Mr Justice Owen found that there had been a breach of that legitimate expectation and that had resulted in unfairness in the consultation process.

In the Court of Appeal, Lady Justice Arden's decision is very interesting. She placed a lot of emphasis on the fact that this was a challenge to a consultation process and not a challenge to the decision that resulted from that consultation process. She emphasised that it was a function of consultation to effectively winnow out errors in the decision maker's thinking, that's to say it's inherent in a consultation process that it's self-correcting. This was demonstrated in this case by the Joint Committee having received the decision of Mr Justice Owen then asking for more information from Royal Brompton in order to remedy the error that had resulted from the first round of consultation.

The result of all this, Lady Justice Arden said, was that the courts should avoid the danger of stepping in too quickly and impeding the natural evolution of consultation processes through the grant of public law remedies in the courts. In fact it was only if there was an irretrievable flaw in such a process that the courts should step in. In this case then she looked again at the question of legitimate expectation and she found there was no such expectation. Here, the statement about two separate stages in the process had to be read in context and reading that statement in context it was clear that there was no clear and unambiguous statement to give rise to the legitimate expectation that was claimed. Moreover, there was no unfairness caused as a result of any alleged breach of that expectation and that was particularly so given Royal Brompton's second opportunity to provide representations following the High Court decision.

Lady Justice Arden went on to consider various other grounds of challenge and in respect of all of them, again placing emphasis on the fact that this was a challenge to the consultation process and not a decision as a result of that process, she found that those grounds were not made good. In all of the cases, the challenge to the consultation document was one that had no merit. If there was disagreement with what was in the consultation document the recipients of that document had an opportunity to say so in their responses to that consultation.

Two other cases which are of relevance on this topic, although they demonstrate slightly different approaches to the same sorts of issues in slightly different factual contexts, are *The Crown (on the application of Bailey) v London Borough of Brent Council*, a decision of 19 December 2011, and the case of *The Crown (on the application of Milton Keynes Council) v Secretary of State for Communities and Local Government*, a decision of 16 December 2011. Do have a look at those if you're interested in pursuing the topic further.

## Summary & Conclusion

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**Francesca Debenham:** Before we finish we're just going to do a few reminders of key points. So firstly, you're looking for reasons to consult, is there an express or implied duty?

**Karl Banister:** If you read no other case on consultation read *Brent London Borough Council; Ex parte Gunning* from 1985, which sets out the key principles to consider. And they are: undertake consultation when the proposals are at a formative stage; include sufficient reasons to allow intelligent consideration; give adequate time for consultees to respond; and take their responses into account when the decision is taken.

**Francesca Debenham:** And remember, even if there isn't an express or an implied duty if you decide to embark on a consultation you still need to follow the principles that apply to express or implied duty consultations.

**Karl Banister:** Right, if you want any further assistance in advising on consultation matters then you could consider the Cabinet Office Consultation Principles issued in July 2012 that we referred to earlier on in the session. You could look at the LION intranet site, which has extensive guidance on consultation and other matters. You could always go to the Admin Law Updates delivered by Frankie and I. And if any colleagues have problems accessing this material it can be downloaded as an MP3.

You can find a list of the cases we have referred to in this seminar on the webinar website along with links to their case reports in Westlaw.

**Francesca Debenham:** And just a reminder to complete the quiz at the end of the training to get your CPD points.

**Karl Banister:** So it only remains to say thanks again to Thomson Reuters and the Administrative Law Steering Group for making this all possible. Good bye.

**Francesca Debenham:** Good bye.