

How to meet legal obligations in your public consultation process

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A longer version of this document is available [here](#).

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Introduction

This paper collates advice about how to carry out a public consultation legally. A [more detailed version](#) catalogues much of the UK law, official guidance and decisions of the courts that underpin this summary. It was drafted on behalf of the [East Midlands Academic Health Science Network \(EMAHSN\)](#) as part of its work on Public Leadership.

Public authorities have a legal obligation to consult the public before making substantial changes. This guide provides a general outline of what is required so that staff can meet their formal obligations, and so that members of the public can hold them to account. The messages are distilled into simple and clear points.

There is another reason why it is helpful to understand the formal requirements for consulting with the public. This is because many activities that do not require formal consultation would nevertheless benefit from the wisdom and experience of members of the public. This means that the principles which underpin formal consultations can also be used in informal situations. These principles help in co-production and using them will strengthen health and social care service planning and commissioning, delivery and quality assurance, research, and service improvement.

A note on language and the scope of this paper

In this paper, the term:

- *Public Contributor* means a patient, service user, carer or member of the public who brings their lived experience of using health services to help improve services and research.
- *Consultation* means a process of dialogue with citizens and stakeholders which has a defined start and end date and informs a decision about a new proposal or a policy or service change. It excludes longer term engagement work. The specific word 'consultation' does not have to be used for the requirement to consult to apply.



- *Co-production* of public services means “the public sector and citizens making better use of each other's assets and resources to achieve better outcomes and improved efficiency.”¹

Public consultation is linked to, but separate from, the processes by which patients are in control of their own care; and the process by which people feedback their satisfaction with the service they have received to stimulate service improvement.

A complex and layered set of obligations

The UK Government has passed various laws that include a requirement to consult and has also published official guidance, such as its consultation principles². Caselaw sets a precedent, but sometimes a later ruling undercuts or ignores an earlier one. Then national bodies such as NHS England produce resources on consultation³ and others, such as the Ministry of Housing, Communities and Local Government set out their own expectations⁴. At a more local level, a Clinical Commissioning Group, NHS Trust, or local authority might respond to targeted instructions by devising its own strategy for consulting with the general public and specific stakeholders. There is plenty of material for the [Consultation Institute](#) and other commentators⁵ to consider as they monitor the field and offer information resources.

This means that the individual employee or member of the public who is trying to understand where consultation fits into their activities may be subject to multiple layers of regulation, official guidance, and local directives. One would hope that the respective authors of these documents would review the materials that are already available and clearly explain when they are underscoring, augmenting, or overturning previous instructions, but unfortunately, this is not always the case. This is part of the justification for this guide, which in summary captures the main themes and in its lengthier version directs the reader to much of the source material.

Limitations to the use of this guide

This guide provides a general outline only and does not constitute formal legal advice, so neither the author nor EMAHSN can accept any liability for any acts or omissions arising from information found here. As it collates information from a variety of sources from different time periods, readers should seek professional advice about exactly which items are relevant to an individual situation.

There will be some variation in the extent to which specific staff and particular organisations are responsible for launching a consultation. For example, commissioners have a duty to seek stakeholder views before deciding what services to purchase⁶, while provider agencies have their choices constrained by the details of their contract for the provision of services.

Whilst the public have a legal right to be consulted, both the governing bodies of public sector organisations on the one hand, and national and local politicians on the other, also have responsibilities to exercise judgement and make decisions. The interplay between these different stakeholders will vary according to the topic under discussion, and so consultation is an important part but not the sole expression of the democratic process.



Ten features of effective consultations

The ten features set out below are distilled from legislation, government policy and caselaw, with the sources catalogued in the longer version of this guide.

- **Essential.** When planning or changing services the need to consult must be considered, even if the outcome is a decision not to undertake formal consultation. If plans change part-way through, it may be necessary to start again.
- **Proportionate.** Those people most affected by the changes have the most substantial rights to be heard. On some occasions, it may be sufficient to confine the consultation to representative bodies. Avoid excessive and disproportionate cost to the public purse.
- **Embedded.** Formal consultation processes must go hand in hand with approaches that coproduce decisions, services, and research.
- **Tailored.** The type of consultation must be related to the needs of the community and the issue concerned, and reach the full range of affected people, especially by engaging effectively with seldom heard groups.
- **Influential.** The people consulted will not expect every single piece of their advice to be followed but should be able to point to instances where their views have made a difference.
- **Timely.** The consultation should begin before the decision has been made, run for long enough to gather public views and close in time for these views to be properly considered before a decision is made. Public bodies generally avoid public consultations during the pre-election period known as 'purdah' as there are specific restrictions in place.
- **Open.** Key documents that will influence the decision should be made public and the public should be told the basis on which the decision will be made. The consulter may have a forward planning document or a preferred option but should provide information about this to the consultees. While a staged process may be acceptable, this should not be designed to limit discussion of all the options.
- **Transparent.** A range of methods should be used to reach the relevant community, rather than relying on a single means of communication. Documents should be free of jargon and the matters to be decided should be clearly explained in a digestible form. Be clear which aspects are open to change and which matters have already been decided. After the consultation has closed, publish information showing how many responses were received, a summary of what was said, and describe what difference the consultation has made. Balance this transparency with appropriate protection of personal and confidential data.



- **Focused.** The public should be presented with a selection of proposals that they can consider. A general proposal is insufficient – it needs to be specific about which services are to be affected and the likely impact. A single proposal with no alternatives, or one that excludes some key issues or options is unlikely to be acceptable to the courts.
- **Done properly.** Once the organisation embarks on a consultation process, whether it is compulsory or not, it must be carried out properly. Collating and summarising responses may be done by someone other than the decision-makers, but they must be clear that key themes have not been omitted. Data must be handled properly.

Conclusion

Understanding the legal and procedural obligations embedded in formal consultations helps us to grasp what it might mean to involve the public in other decision-making activities. These ten features of the consultation process help when commissioners identify need, leaders innovate and develop services, frontline staff deliver health and social care, everyone checks quality and researchers evaluate impact.

References

¹ <http://www.govint.org/?id=327>

² The UK Government principles on consultation were updated and republished in 2018. They can be found at [Microsoft Word - Consultation Principles \(1\).docx \(publishing.service.gov.uk\)](#).

³ See [NHS England » Documents to support participation](#)

⁴ See the 2021 National Planning Policy Framework and its Statement of Community Involvement at [National Planning Policy Framework \(publishing.service.gov.uk\)](#)

⁵ For a fuller discussion, see Beresford P (2016) *All our welfare: Towards participatory social policy* Policy Press. Also, Morison, J. (2017). Citizen Participation: A Critical Look at the Democratic Adequacy of Government Consultations. *Oxford Journal of Legal Studies*, 37(3), 636-659. <https://doi.org/10.1093/ojls/gqx007>

⁶ See NHS England (2016) *A guide to annual reporting on the legal duty to involve patients and the public in commissioning* at <https://www.england.nhs.uk/wp-content/uploads/2016/07/guid-annual-reprting-legal-duty-july16.pdf>

