



**To consult or not to  
consult... that is the  
question**

**A Good Practice Guide**  
**For Health Overview Scrutiny Committees**

Version One  
February 2018

**healthwatch**  
Sandwell

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# Introduction

Health Overview Scrutiny Committees (HOSC) are statutory Local Authority bodies with the duty to oversee NHS services. HOSC's powers include being able to designate any health service changes as significant changes, which means that consultation is then required. Consultation must meet certain requirements, which are detailed in this guidance.

In Sandwell the duties of HOSC are met by the Health and Adult Social Care Overview Scrutiny Board. This guidance has been produced by Healthwatch Sandwell for use by this Board.

# 1. Consultation Requirements

The following requirements constitute good practice in consulting with the public, and if not adhered to, can be grounds for challenging a consultation.

## Equality Requirements

The Equality Act (2010) s.149 requires public bodies, when making service changes, to have 'due regard' to the implications for protected categories of people to ensure that there is no discrimination. The consultation can be challenged if there is a belief that this has not occurred. Failure to conduct an equality impact assessment has been a common reason for challenges to consultations to succeed.

## Gunning Principles

The emphasis of the Gunning Principles is 'fairness'. The process must be substantively fair and have the appearance of fairness. Below are the 4 components of the principles from NHS Involvement (2017):

### **1. When proposals are still at a formative stage**

Public bodies need to have an open mind during a consultation and not already made the decision, but have some ideas about the proposals.

### **2. Sufficient reasons for proposals to permit 'intelligent consideration'**

People involved in the consultation need to have enough information to make an intelligent choice and input into the process. Equality Assessments should take place at the beginning of the consultation and published alongside the document.

### **3. Adequate time for consideration and response**

Timing is crucial - is it an appropriate time and environment, was enough time given for people to make an informed decision and then provide that feedback, and is there enough time to analyse those results and make the final decision?

### **4. Must be conscientiously taken into account**

Think about how to prove decision-makers have taken consultation responses into account.

See appendix 2 for more information about the Gunning Principles

## Revised Government Consultation Principles

The Cabinet Office Principles confirm that, in considering whether and how to carry out a consultation, public authorities should give detailed thought to what length of consultation and what methods of consultation would be appropriate in all the circumstances. The underlying principle of fairness should be at the forefront of the process. Public authorities should expect any decisions that they make to come

under scrutiny and should ensure that they have a clear set of reasons for structuring and conducting the consultation in the particular way they have chosen, having regard to the extent to which the views of those potentially eligible to be consulted have already been sought through public engagement. The Cabinet Office Principles do not prescribe the requirements for a valid consultation but they give clear guidance to government departments on conducting consultations.

Below are the principles transcribed from The Cabinet Office (January 2016):

**A. Consultations should be clear and concise**

Use plain English and avoid acronyms. Be clear what questions you are asking and limit the number of questions to those that are necessary. Make them easy to understand and easy to answer. Avoid lengthy documents when possible and consider merging those on related topics.

**B. Consultations should have a purpose**

Do not consult for the sake of it. Ask departmental lawyers whether you have a legal duty to consult. Take consultation responses into account when taking policy forward. Consult about policies or implementation plans when the development of the policies or plans is at a formative stage. Do not ask questions about issues on which you already have a final view.

**C. Consultations should be informative**

Give enough information to ensure that those consulted understand the issues and can give informed responses. Include validated assessments of the costs and benefits of the options being considered when possible; this might be required where proposals have an impact on business or the voluntary sector.

**D. Consultations are only part of a process of engagement**

Consider whether informal iterative consultation is appropriate, using new digital tools and open, collaborative approaches. Consultation is not just about formal documents and responses. It is an on-going process.

**E. Consultations should last for a proportionate amount of time**

Judge the length of the consultation on the basis of legal advice and taking into account the nature and impact of the proposal. Consulting for too long will unnecessarily delay policy development. Consulting too quickly will not give enough time for consideration and will reduce the quality of responses.

**F. Consultations should be targeted**

Consider the full range of people, business and voluntary bodies affected by the policy, and whether representative groups exist. Consider targeting specific groups if appropriate. Ensure they are aware of the consultation and can access it. Consider how to tailor consultation to the needs and preferences of particular groups, such as

older people, younger people or people with disabilities that may not respond to traditional consultation methods.

#### **G. Consultations should take account of the groups being consulted**

Consult stakeholders in a way that suits them. Charities may need more time to respond than businesses, for example. When the consultation spans all or part of a holiday period, consider how this may affect consultation and take appropriate mitigating action.

#### **H. Consultations should be agreed before publication**

Seek collective agreement before publishing a written consultation, particularly when consulting on new policy proposals. Consultations should be published on gov.uk.

#### **I. Consultation should facilitate scrutiny**

Publish any response on the same page on gov.uk as the original consultation, and ensure it is clear when the government has responded to the consultation. Explain the responses that have been received from consultees and how these have informed the policy. State how many responses have been received.

#### **J. Government responses to consultations should be published in a timely fashion**

Publish responses within 12 weeks of the consultation or provide an explanation why this is not possible. Where consultation concerns a statutory instrument publish responses before or at the same time as the instrument is laid, except in exceptional circumstances. Allow appropriate time between closing the consultation and implementing policy or legislation.

#### **K. Consultation exercises should not generally be launched during local or national election periods.**

If exceptional circumstances make a consultation absolutely essential (for example, for safeguarding public health), departments should seek advice from the Propriety and Ethics team in the Cabinet Office.

## **Consultation Institute Principles Charter**

The Consultation Institute<sup>1</sup> have produced 7 best practice principles that can be described as best practice in consultation. These principles are recommended as 'good practice' and are not statutory. The following principles are from the Consultation Institute (2017a):

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<sup>1</sup> The Consultation Institute, established 2003, is a not-for-profit best practice Institute, promoting high-quality public and stakeholder consultation in the public (including NHS England), private and voluntary sectors. A membership body offering a variety of support services and training for any person or body with an interest in public dialogue, engagement and participation.

For consultation to yield its true benefits and to assist in the process of evidence-based decision making, it needs to take account of the following seven best practice principles.

### **Principle 1 The INTEGRITY of Consultation**

The process must have an honest intention. The Consultor must be willing to listen to the views advanced by consultees, and be prepared to be influenced when making subsequent decisions.

If the decisions subject to consultation have already been taken, it is a waste of consultees' time and a fraud upon all participants to undertake a purposeless exercise, and breaches the principle of Consultation Integrity.

### **Principle 2 The VISIBILITY of Consultation**

All those who have a justifiable right to participate in a consultation should be made reasonably aware of the exercise. For Closed Consultations (Where the audience only consists of fully identified stakeholders), this will be less demanding than for Open Consultations.

Visibility is also important for decision-makers who should have full awareness of any consultation exercise, which is relevant to decisions they are about to take.

### **Principle 3 The ACCESSIBILITY of Consultation**

Consultees must be able to have reasonable access to the exercise. This means that the methods chosen must be appropriate for the intended audience and that effective means are used to cater for the special needs of 'seldom heard' groups and others with special requirements.

New technology and social media offers an ever-wider choice of consultation mechanism, but consultors must always ensure that the 'Digital Divide' does not disenfranchise citizens or stakeholders.

### **Principle 4 The TRANSPARENCY of Consultation**

Many Consultations are highly public, and rightly so. Indeed, the principle of Transparency and the Freedom of Information Act 2000 requires that stakeholder invitation lists, consultee responses and consultation results be published. But this should only occur with the express or implied consent of participants. Consultors who intend to publish details of respondents and their responses have a duty to ensure that this is understood by all participants.

Consultation submissions will be published unless specific exemptions apply. Freedom of Information Act requests can be used to seek access to data previously kept hidden. (But note that the Data Protection Act 1988 applies to information of a "personal nature")

Consultees rightly expect full transparency of the governance arrangements applicable to a consultation and the decision-making process which will follow. They will also expect explanations for decisions taken following a consultation.

### **Principle 5 The DISCLOSURE obligations in Consultation**

For consultation to succeed, and to encourage a measure of trust between the parties, it is important to provide for reasonable disclosure of relevant information. Consultors are under a duty to disclose information which could materially influence the nature and extent of consultees' responses. In particular, areas where decisions have effectively been taken already, and where consultee views cannot influence the situation, should be disclosed.

Consultees are also under a duty to disclose certain information. If a representative body expresses a view on behalf of its members, it should inform the consultor of the presence of any significant minority opinion within its membership, and be prepared to estimate the extent to which it is held.

### **Principle 6 The FAIR INTERPRETATION of Consultation**

Information and viewpoints gathered through Consultation exercises have to be collated and assessed, and this task must be undertaken promptly and objectively.

In general, decision-makers should not normally be personally involved with primary analysis and interpretation of consultation data, and the use of external data analysts has many advantages.

Where consultors use weighting methods to assist in the assessment process, this must be disclosed to participants and to decision-makers relying on the consultation output.

### **Principle 7 The PUBLICATION of Consultation**

Participants in a consultation exercise have a proper expectation that they will see both the output and the outcome of the process. Except in certain Closed or Internal consultations, the assumption should be that publication in a form accessible to the consultee would follow within a reasonable time after the conclusion of the exercise.

It is the responsibility of a consultor to publish an adequate feedback document, consisting of consultation output, preferably in advance of decisions being taken.

Where no publication is intended, it is the duty of the consultor to disclose this when initially inviting stakeholders or the public to participate.



## 2. What is Consultation in Health Services?

### Who Decides?

Those who can make a decision to consult include:

- Health and Adult Social Care Overview Scrutiny Board (HOSC), if they designate a change to services as a significant change. See Appendix 1 for an explanation of the role of HOSC (2017).
- Service commissioners.

Major changes to health services must be consulted on. In this situation, consultation is a formal process, and must meet specific requirements (see section 1). If a consultation doesn't meet these requirements, it can be open to challenge. This can result in decisions being overturned and consultations having to be repeated.

### Reasons to Consult

The Consultation Institute (2017b) identifies two areas of focus which should be used to decide when consultation should occur:

#### **Statutory Provisions**

##### Health

In health and social care, such requirements exist in the Health and Social Care Act 2012, Section 14Z2, which states that 'the clinical commissioning group must make arrangements to secure that individuals to whom the services are being or may be provided are involved (whether by being consulted or provided with information or in other ways).

In certain cases there will be no requirement for a consultation at all. Whether to consult will depend on the issues, the nature and the impact of the decision and whether interested groups have already been engaged in the policy making process.

##### Equality

The Equality Act 2010 states that public bodies must have 'due regard' to a variety of Equalities objectives (Equality Act 2010, Section 149) and consequently, Equality Analysis (formally Equality Impact Assessments) must be carried out to demonstrate that decision makers are fully aware of the impact that changes may have on stakeholders. The concept of 'due regard' was later reinforced in 2012 during the review of the public sector equality duty which 'requires public bodies to have due regard to the need to eliminate discrimination, advance equality of opportunity and foster good relations between different people when carrying out their activities.

#### **Doctrine of Legitimate Expectation (Common Law)**

The Doctrine of Legitimate Expectation 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 expect a process of consultation, for example for local authority budget cuts or healthcare changes, there are grounds for a judicial review should a public consultation not take place because there is a legitimate expectation for it. 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!) as part of ensuring that the consultation process remains a fair one.

Consultation should take place when policies can be influenced and views genuinely taken into account. This will often be at the earliest opportunity, but it may also be appropriate to consult at varying points in a decision-making process. Whatever else the consultation must take place at a time when the views of the decision maker are still open to change and can therefore be influenced by responses to the consultation. There may also be circumstances where new information comes to light which requires the consultation process to be re-opened.

A formal Consultation may need to take place depending on many things, including:

- A substantial change to the configuration of health services in a local area being proposed, such as hospital closure, or significant service change.
- Redesign or reconfiguration of a service.
- Planning of new services.

## Consultation or Not Consultation?

NHS guidance suggests that a Consultation is taking place if service users are being asked for views on changes, regardless of what it is called i.e. even if consultation isn't referred to. NHS England (2017) states that:

*'Public involvement in commissioning is about enabling people to voice their views, needs and wishes, and to contribute to plans, proposals and decisions about services. The term 'involvement' is used interchangeably with 'engagement', 'participation', 'consultation' and 'patient or public voice' and there are many different ways to involve patients and the public'.*

If it sounds like consultation, it probably is.

## References:

Consultation Institute (2017a) The Consultation Charter. The Consultation Institute, Centre of Excellence, Baystrait House, Station Road, Bigglewade, Beds. SG18 8AL

The Consultation Institute (2017b) <https://www.consultationinstitute.org/when-to-consult-a-short-guidance/>  
[Accessed December 2017]

Equality Act (2010) s.149 Equality Act 2010 [online] URL:  
<http://www.legislation.gov.uk/ukpga/2010/15/section/13> [Accessed December 2017]

Health and Social Care Act 2012 (online) URL:  
<http://www.legislation.gov.uk/ukpga/2012/7/contents/enacted>  
[Accessed December 2017]

HOSC (2017) (online) URL:  
[http://www.sandwell.gov.uk/info/200197/councillors\\_committees\\_and\\_meetings/3694/overview\\_and\\_scrutiny](http://www.sandwell.gov.uk/info/200197/councillors_committees_and_meetings/3694/overview_and_scrutiny)  
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NHS Involvement (2017) The Gunning Principles - NHS Involvement - support, guidance and contacts for NHS engagement (2017) URL:  
<http://www.nhsinvolvement.co.uk/connect-and-create/consultations/the-gunning-principles>  
[Accessed December 2017]

NHS England (2017) Patient and public participation in commissioning health and care: Statutory guidance for clinical commissioning groups and NHS England. NHS England

Revised Government Consultation Principles (2016) Consultation principles: guidance  
The Cabinet Office, Civil service reform URL:  
[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/492132/20160111\\_Consultation\\_principles\\_final.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/492132/20160111_Consultation_principles_final.pdf)

# Appendix 1

## Role of Health and Adult Overview Scrutiny Board (HOSC)

HOSC has the power to refer to the Secretary of State for the following reasons:

1. Dissatisfaction with the content or timescale of a consultation
2. Inadequate reasons for not consulting
3. Proposals not in the interest of the Health Service in the area

### Health and Adult Social Care Scrutiny Board in Sandwell MBC

#### Terms of Reference

As set out in the Scrutiny Procedure Rules contained in Part 4 of the Council's Constitution to scrutinise recommendations, consider referrals under the Call for Action process, and contribute to decision making and policy development through pre-decision scrutiny processes in relation to the following matters: -

- (1) services for older and vulnerable adults;
- (2) local safeguarding arrangements for adults;
- (3) whole life services for people with disabilities and/or learning disabilities;
- (4) mental health services;
- (5) dementia services;
- (6) Public Health;
- (7) the activities of NHS Trusts, Clinical Commissioning Groups (CCGs), NHS England, Health and Wellbeing Board and Healthwatch;

In relation to the council's relevant regulations and directions made under the Health and Social Care Act 2001; all functions of the Council contained in the National Health Service Act 2006; the Local Authority (Overview and Scrutiny Committees Health Scrutiny Functions) Regulations 2002; the Health and Social Care Act 2012 and related regulations the Board will;

- (a) make reports and recommendations to relevant NHS bodies, relevant health service providers and commissioners, the Secretary of State or Regulators;
- (b) be responsible for initiating the response to any formal consultation undertaken by relevant NHS Trusts and CCGs or other health providers or commissioners on any substantial development or variation in services;

(c) participate with other relevant neighbouring local authorities in any joint scrutiny arrangements of NHS Trusts providing cross-border services;

(d) refer a proposed substantial variation in service delivery to the Secretary of State, subject to the agreement of the Chair of the Scrutiny Board who will hold the power of veto in respect of any proposed referral of a substantial variation to the Secretary of State.

(e) review and scrutinise the decisions made or actions of the Health and Wellbeing Board.

SOURCE: HOSC (2017) (online) URL:

[http://www.sandwell.gov.uk/info/200197/councillors\\_committees\\_and\\_meetings/3694/overview\\_and\\_scrutiny](http://www.sandwell.gov.uk/info/200197/councillors_committees_and_meetings/3694/overview_and_scrutiny)

# Appendix 2

## The Gunning Principles

The Gunning Principles provide a helpful overview of what constitutes a fair consultation process. 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.

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.

SOURCE: NHS Involvement (2017) The Gunning Principles - NHS Involvement - support, guidance and contacts for NHS engagement (2017) URL: <http://www.nhsinvolvement.co.uk/connect-and-create/consultations/the-gunning-principles>