

CONSULTATION

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Back to basics

Consultation disputes usually fall into one of the following two categories:

- **One:** No consultation has taken place and the question is: should there have been?
- **Two:** There has been a consultation and the question is: was it a fair consultation?

One: When does the duty to consult arise?

- Usefully summarised in *R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2014] EWHC 1662 (Admin) at paras 97-98
- No general duty to consult at common law (*"The government of the country would grind to a halt if every decision-maker were required in every case to consult everyone who might be affected by his decision"*)
- Four *"main circumstances"* where a duty to consult may arise
 - (1) Statutory duty
 - (2) Where there has been a promise to consult
 - (3) Where there has been an established practice of consultation
 - (4) Where *"in exceptional cases"* a failure to consult would lead to *"conspicuous unfairness"*

Two: what makes a fair consultation?

- Compliance with the *Gunning* criteria (endorsed by the Supreme Court in *R (Moseley) v Haringey LBC* [2014] 1 WLR 3947)
- **Gunning 1**: consultation must be at a time when proposals are still at a formative stage
- **Gunning 2**: must give sufficient reasons for any proposal to permit of intelligent consideration and response (the “*obligation is to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration*”: *Coughlan*)
- **Gunning 3**: adequate time must be given for consideration and response
- **Gunning 4**: the product of consultation must be conscientiously taken into account

When is a consultation not a consultation?

- Where consultation is undertaken **voluntarily**, it has been repeatedly stated by the courts that the consultation should still comply with the *Gunning* criteria
- Some challenges on such grounds are now met with the argument that what was being undertaken was “engagement” and not “consultation” such that the principles relating to fair consultation in *Gunning* do not apply: see [R \(Eveleigh\) v Secretary of State for Work and Pensions](#) [2023] EWCA Civ 810

Purposes of consultation

- Rationale behind consultation set out in *Moseley* with the observation that the requirements of fairness must be linked to the purposes of consultation
- **First**, the requirement *“is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested”* (para 67). **Second**, it avoids *“the sense of injustice which the person who is the subject of the decision will otherwise feel”* ...
- *“Such are two valuable practical consequences of fair consultation.”*
- *“But underlying it is also a **third** purpose, reflective of the democratic principle at the heart of our society. This third purpose is particularly relevant in a case like the present, in which the question was not “Yes or no, should we close this particular care home, this particular school etc?” It was “Required, as we are, to make a taxation-related scheme for application to all the inhabitants of our Borough, should we make one in the terms which we here propose?”*

Some recent cases on whether consultation is required

- *R (Freedom from Torture and Helen Bamber Foundation) v Secretary of State for Home Department* [2026] EWHC 1278 (Admin)
- *Medical Justice v Secretary of State for Home Department* [2025] EWCA Civ 251
- *R (Martin) v Chancellor of the Exchequer* [2026] EWHC 1123 (Admin)
- *R (Greyhound Board of Great Britain) v Welsh Ministers* [2026] EWHC 670 (Admin)
- *R (Pompe) v SoS for Foreign, Commonwealth and Development Affairs* [2026] EWHC 529 (Admin)

Duty to consult: Helen Bamber Foundation case

- *R (Freedom from Torture & Helen Bamber Foundation) v Secretary of State for the Home Department* [2026] EWHC 1278 (Admin)
- Feb 2024 SSHD published Version 11 of the Allocation of Asylum Accommodation policy
- Policy as amended contained significant changes (removal of strict criteria preventing certain categories of individuals from being accommodated at large sites and/or room sharing, and replacing it with a discretion to consider exceptional circumstances)
- No advance notice or consultation
- Cs' case – *"fundamental departure from over 20 years of established consultative practice between the Home Office and specialist NGOs"*
- Issue (judgment para 18): *"Did the SSHD have a duty to consult with FfT and HBF in respect of the policy changes to room-sharing and dispersal affecting their patients ... arising as a result of a) an established practice of consultation and/or b) because it would be conspicuously unfair not to do so?"*

Duty to consult: Helen Bamber Foundation case

- Court observed (para 132) that *“where the conduct of the authority conveys, by repetition and consistent practice, that those affected will be consulted, fairness requires the authority to adhere to that practice absent good reason”*
- Debate within the case about whether there is in truth a distinct category of conspicuous unfairness (drawing on comments of Linden J in *Medical Justice* case and Lord Carnwath in *Gallaher Group*), but *“For myself, I would accept that there is, conceptually, a residual category of cases, as identified in Plantagenet where consultation will be required even if the absence of any practice of prior consultation”* (para 136)
- Query if there is an element of circularity in the reasoning on this latter point?

Duty to consult: Helen Bamber Foundation case

- Mere fact that a person or class of persons will be affected by a decision cannot give rise to obligation to consult them (*R (Better Streets for Kensington and Chelsea) v Royal Borough of Kensington and Chelsea* [2023] EWHC 536 (Admin))
- Unifying theme of the categories in *Plantagenet* “whether the circumstances are such that it would be unfair for a public authority to proceed to change policy without first hearing from those whom the change will affect” (para 140)

Duty to consult: Helen Bamber Foundation case

- SSHD argued that although there had been a prior practice, there had then been a significant period of time with no consultation during which time different versions of the policy had been produced
- But court held: *“if there was an established practice it was not broken by a lack of consultation on changes that did not adversely affect their [the claimants] clients”* (para 168): *“adverse changes were never triggered during that period, meaning that the established practice remained entirely unbroken until the abrupt publication of Version 11”*
- Where there is a longstanding and unequivocal pattern of past behaviour, the absence of an explicit promise to continue the consultation is unnecessary (para 177)

Duty to consult: Helen Bamber Foundation case

- SSHD further argued that consultation did not take place because it would not be collaborative or supportive but:
 - There was no internal document or communication indicating that a conscious decision was made not to consult on that basis AND
 - *“The requirement for consultation exists to ensure a decision-maker receives all relevant information, tests it properly, and ultimately makes better decisions reflective of democratic principles. If public authorities only consulted when stakeholders were likely to agree with them, it would completely defeat the principal purpose of consultation: to improve policy making by hearing a diversity of differing voices and views”* para 183 (see also para 205)
 - There was a duty to consult on the basis of established practice; if wrong, court would have concluded in any event a duty arose on basis of conspicuous unfairness (para 187) (see further example *R (Article 39) v SoS for Education* [2020] EWCA Civ 1577)

Duty to consult: Medical Justice

- *Medical Justice v SSHD* [2025] EWCA Civ 251 – SSHD’s appeal against Linden J’s finding that Medical Justice had a legitimate expectation of consultation in relation to interim guidance based on established practice
- SSHD’s position was that there was no such practice – only “consultation on an ad hoc basis ... some constructive engagement”
- Para 51: “Sedley LJ said in *Bapio* at paragraph 39 that “while a practice does not have to be unbroken, it has to be sufficiently consistent to be regarded as more than an occasional act”. Other authorities have referred to a practice being “so unambiguous, so widespread, so well-established and so well-recognised as to carry within it a commitment”, see *R(Davies) v Revenue and Customs Commissioners* [2011] UKSC 47; [2011] 1 WLR 2625 . The description of the process, including the use of the word “consultation”, will not be determinative, see *R(Eveleigh) v Work and Pensions Secretary* [2023] EWCA Civ 810; [2023] 1 WLR 3599 at paragraph 81 . There is a difference between targeted engagement and consultation, see *R(FDA and others) v Minister for the Cabinet Office* [2018] EWHC 2746 (Admin) at paragraph 90 .”

Duty to consult: Medical Justice

- Clear the Court of Appeal was not entirely convinced by the evidence – but said there was no error of approach by Linden J and the appeal court is not permitted to overturn it *“just because I or others might have made a different finding”*
- But court emphasised *“the high bar necessary to show that a past practice of consultation has been so unambiguous, widespread, well-established and well-recognised that it creates a legitimate expectation of consultation, such that it would amount to an abuse of power to frustrate that expectation”*

Non-justiciability: the Martin case

- *R (Martin) v Chancellor of the Exchequer* [2026] EWHC 1123 (Admin)
- Oct 2024: Defendant announced changes to two types of relief from inheritance tax as part of budget statement and published policy paper which stated that the government would hold a technical consultation in early 2024
- The foreshadowed technical consultation was published on Feb 2025
- Response of government to consultation published July 2025
- First reading of the Finance bill containing the changes took place Dec 2025
- By time of court hearing in March 2026 Bill had progressed and was due to receive Royal Assent imminently
- Came into force on 6 April 2026 – after the hearing but before the judgment

Non-justiciability: the Martin case

- Claimants said there had been a failure to consult with them - the technical consultation was too limited and didn't encompass the substance of the proposed changes
- Basis of claim was that the government had made a promise that it would consult on reforms to tax legislation including this reform
- D disagreed –but also raised three threshold objections – non justiciable, delay, standing
- Speaker of House of Commons participated – non justiciable, academic and reliance on certain documents breached parliamentary privilege

Non-justiciability: the Martin case

- Court refused permission on basis that:
 - Claim lacked substantive merit because there was never any legitimate expectation of consultation
 - Out of time
 - Not justiciable
- Claimants' legitimate expectation argument based on what was said to be promises of consultation in policy papers in 2010, 2011 and 2017
- Court found the documents did not contain any legally binding promise to consult on the policy underpinning these *"or any"* proposed tax changes and noted that such a promise *"if it were to be binding"* would *"risk fettering the government's ability to govern by managing the public finances in the way it considered most appropriate from time to time"* (para 63)

Non-justiciability: the Martin case

- The commitments in the policy papers

“are essentially political, made by politicians about the way those politicians intend to govern, and enforceable in the political arena. They are not promises of such clarity and certainty that they create an expectation of a particular action, which expectation is “legitimate” in the sense of being legally binding. These statements are not enforceable as a matter of public law” (para 64)

Non-justiciability: the Martin case

- On timing: Cs argued that time didn't start to run from policy announcement in Oct 2024 because wasn't then clear what scope of consultation would be, claim would be premature, time ran from 27 Feb when consultation launched.
- D argued that the decision under challenge was the decision to adopt changes without full consultation which was announced in Oct 2024
- Court accepted that the Oct policy paper was sufficiently clear that the scope of the consultation would be limited and technical (i.e. a consultation on details of particular changes or legislation in contrast to consultation on merits of policy itself) and that the policy decision had already been made *"the Claimants knew all they needed to know on 30 October 2024"*

Non-justiciability: the Martin case

- “i) Parliamentary privilege goes wider than merely protecting proceedings once they are initiated in Parliament. It encompasses the comity between Parliament and the courts, based on mutual respect and the separation of constitutional powers.*
- ii) Parliamentary privilege can extend to acts by the executive which are earlier in time than the laying of a bill before Parliament. Whether it does, or not, depends in any given case on the facts, on the character of the act in question and on its proximity to the proceedings before Parliament.*
- iii) Where Parliamentary privilege does extend to the earlier acts of the executive, it is not possible to circumvent that privilege by claiming relief in the form of a mandatory order or a declaration limited to those earlier acts. Parliament would, by convention, take heed of any such order which would constitute an interference with Parliamentary processes, by casting a shadow over or implying some taint in the product of Parliament's consideration.”*

The budget announcement and policy paper “are part and parcel of a Parliamentary process to raise public revenues, itself a function which is exclusive and peculiar to Parliament. Parliamentary privilege applied to that announcement and decisions incidental to it, including the decision to have a Technical Consultation limited to the form of the legislation to implement the changes so far as trust property was concerned”

Non-justiciability: the Martin case

- The decision not to consult was covered by Parliamentary privilege and is not justiciable in the courts
- And if (contrary to Court's conclusion) that wasn't the position from the outset, then it became so when Bill was laid on 1 Dec 2025

Non-justiciability: the Greyhound case

- *R (Greyhound Board of Great Britain) v Welsh Ministers* [2026] EWHC 670 (Admin)
- Feb 2025 Proposal to ban greyhound racing in Wales announced in Senedd; further explained that Welsh Ministers would be establishing implementation group to engage with stakeholders and advise on how a ban will come into force, the legislative approach and when it will be delivered
- April 2025 Counsel General confirmed to Senedd that legislative programme would include primary legislation to ban greyhound racing
- May 2025 JR claim filed challenging Feb announcement on the ground of unlawful failure to consult before making it
- Bill introduced Sept 2025

Non-justiciability: the Greyhound case

- Dec 2025 claimant applied to amend claim to challenge Welsh Ministers' decision to introduce the bill
- Court held that the act of introducing bill is integral and necessary part of Senedd's legislative proceedings:
 - It sets in train a procedure which shares the aim though not methods of consultation i.e. to allow for consideration to be given to competing views and interests of those affected.
 - Senedd is in charge of that process.
 - Inconsistent with the procedural aspect of Senedd's plenary powers and contrary to separation of powers if courts could review introduction on ground there should have been some prior process of consultation

Non-justiciability: the Greyhound case

- Recognition of a common law duty on Welsh Ministers to consult before introducing legislation in Senedd would infringe constitutional separation of powers
- It was inappropriate to determine claim as originally drafted (to Minister's earlier statement):
 - it is now academic, “water under the bridge”
 - Bill has completed its legislative stages
 - Court adjudication would therefore also be impermissible interference with Senedd proceedings and contrary to constitutional separation of powers

Non-justiciability: Pompe

- *R (Pompe) v SoS for Foreign, Commonwealth and Development Affairs* [2026] EWHC 529 (Admin): attempt to challenge treaty for transfer of Chagos Islands to Mauritius on grounds including failure to consult
- Non justiciability – fell within foreign policy considerations
- *“the premise that the duty to consult arose is flimsy. The ministerial statements do not amount to a legitimate expectation of a promise to consult, but were the expression of an intention to “engage” – not the required clear and unambiguous promise to consult devoid of relevant qualification (see Secretary of State for Work and Pensions v Everleigh ...). Nor does the historical injustice done to the Chagossians nearly 60 years ago result in an exceptional common law duty of fairness to consult now on a Treaty that does not alter the current position of there being no right of abode for Chagossians on the islands.”*

Duty to consult on closure of adult education centre

- *R (BUJ) v Bromley LBC* [2026] EWHC 102 (Admin) – challenge to decision to close one of the local authority’s 2 adult education centres
- Court applied approach in *Baker* (duty to consult on proposed care home closure) and *LH v Shropshire* (duty to consult on proposed closure of day centres). This was proposed removal of an existing benefit: a *“local provision of benefit to an identifiable cohort ... not a politically delicate national decision or national policy”* (paras 50, 52).
- Once the particular centre was identified during the local authority’s wider review *“long-term users of this adult education centre had a legitimate expectation to consultation in the same way that a local authority should consult residents of an old people’s home or users of a care centre which they proposed to close”* para 54

Duty to consult on closure of adult education centre

- But: the failure to consult was highly likely to have made no difference to the outcome (given to need for costs savings and the fact that the particular centre – unlike alternatives – was an appropriate site for affordable housing): permission refused.

No duty to reconsult

- *R (Hawes) v London Borough of Tower Hamlets* [2026] EWCA Civ 24 – appeal considers when a re-consultation is required where there has already been a consultation process
- Court relied on *Keep Wythenshawe Special* case
- Option 3 (not consulted on) was not very different in substance and effect from the options consulted on; there had already been 2 rounds of consultation and the public did have the opportunity to make other suggestions; it was not unfair if public body revised its earlier thinking following conscientious consideration and came up with a further option that emerged from the consultation process

Compliance with Gunning requirements

- *R (Clifford) v Secretary of State for Work and Pensions* [2025] EWHC 58 (Admin)
 - JR of consultation regarding proposals for changes to disability benefits
 - Useful summary of caselaw in paras 20-27 of judgment
 - Court found breaches of *Gunning 2* (sufficient information) and *Gunning 4* (adequate time)
 - In particular: consultation materials were misleading

Compliance with Gunning requirements

- *R (JO) v Ealing LBC* [2026] EWHC 886 (Admin)
- Challenge to decision to close children's centres
- *Gunning 1* – decision not at formative stage because decision already taken to make savings – court found local authority still had open mind
- *Gunning 2*
 - Failure to include information regarding the selection of particular centres
 - Misleading consultation document because omitted information regarding need for financial savings
 - Court found no breach of *Gunning 2*: assessed the sufficiency of the information by reference to the quality of the responses received

Compliance with Gunning requirements

- *R (Evans) v Aneurin Bevan University Local Health Board* [2025] EWHC 1518 (Admin)
- Challenge to decision approving plans for significant reorganisation of the deployment of the Emergency Medical Retrieval and Transfer Service in Wales
- Grounds included claimed breach of *Gunning 2*
- Court held:
 - Consultation was not flawed by lack of detail with regard to costings of discarded options: the level of detail required to be disclosed regarding discarded options is lower than preferred options, and costs were not a matter on which consultees would be expected to have special insight or experience
 - Consultation was not flawed by lack of more information about likely costs of implementing recommendation – there was “*no obligation ... to provide any greater detail than they did*” – consultation did not require level of disclosure akin to litigation

Compliance with Gunning requirements

- *Heart of Wales Care Ltd v Council of the City and County of Swansea* [2026] EWHC 899 (Admin)
- Providers of care homes challenge to decision to set particular rate of increase (in circumstances where costs to claimants had risen by greater amount)
- Consultation duty contended for on basis of the agreements between the parties which provide for “the normal process” of consultation, and on ground of conspicuous unfairness
- Court rejected argument that dispute was not amenable to judicial review
- Requirement for consultation upheld –consultation required to enable local authority to understand full costs of care
- But court rejected the specific criticisms of the consultation (on *Gunning 1, 2 and 3*)
- There was appropriate consultation on the facts – providers were engaged, a template was sent out for them, the responses were taken into account

Compliance with Gunning requirements

- *R (Moorland Association) v Secretary of State for Environment, Food and Rural Affairs* (judgment 28 Jan 2026, Lieven J)
- JR of Health and Grass etc Burning (England) (Amendment) Regulations 2025 (licensing regime for burning over specified areas of peatland)
- Consultation for 6 weeks – published consultation document set out proposals. On same day D published NEER155 – a Natural England Evidence Review.
- Claimant challenged consultation on ground that the Defendant had failed to consult on key evidence base ie NEER155. Complained the consultation failed to explain its central importance or provide opportunity for consultation on the evidence review
- Rejected – the document was published (contrast *Law Society*) and it was open to consultees to argue that evidence base was wrong and flawed - it was background document and not something which had to be separately consulted on.

Compliance with Gunning requirements

- Court rejected *Gunning 4* argument that conscientious consideration was not given: the Defendant *“met the Fire Chiefs; she had the evidence; she considered the consultation responses, both from the fire bodies and from the Claimant, and she produced a response ... There may not have been as long and detailed a response as [the claimants] may have liked, but there was a response that set out the Secretary of State’s consideration”*.

When consultation is not a consultation

- *R (Transactual CIC) v Secretary of State for Health and Social Care* [2024] EWHC 1936 (Admin)
 - challenge to lawfulness of ban on puberty blockers
- C argued there was partial and unfair consultation
- Court accepted there was no consultation – there were “discussions with stakeholders (CQC, CPhC, GMC, RCGP and NHS England) about the response to the Cass Review and implementation of its recommendations ... This was part of the normal exchange of views between the First Defendant and regulators and NHS bodies. It could not be characterised as a consultation” (para 233)
- There was, after the decision, a “truncated engagement exercise with stakeholders aimed at refining and ensuring the smooth implementation of the Order” – this may have been described as consultation but the label was not determinative and didn’t entail legal consequences
- “the undertaking of limited voluntary engagement after an “in principle” decision has been taken does not attract the application of the Gunning criteria because such engagement cannot amount to a lawful consultation” (para 236)

When is consultation not a consultation

- *R (National Council for Civil Liberties) v SSHD* [2025] EWCA Civ 571
- JR of regulations amending Public Order Act
- C's consultation case based on "the Coughlan principle": there was a (voluntary) consultation and it was unfair being one-sided: *"the Home Office was involved in a series of meetings and communications to discuss what became the Regulations with representatives of various bodies responsible for policing. It [the claimant] says that that constituted voluntary consultation of the kind to which the Coughlan principle applies and that that consultation was unfair – and so not "properly" conducted – because no-one representing the interests of protesters was involved and it was accordingly wholly one-sided."*

When is consultation not a consultation

- SSHD's case was that *"the various meetings and communications in December 2022 did not amount to "consultation" in the sense of an exercise which attracted the requirements of fairness or, more particularly, of fairness in deciding whom to consult – for short, "formal consultation". They were no more than the kind of "engagement" (or "targeted engagement") which ministers proposing legislation routinely conduct with other public authorities involved in the operation of the system to which the legislation related."*
- The Court described the issue: *"The argument was sometimes characterised as being whether that process constituted "formal consultation" or "engagement". That is a convenient shorthand, but we are not ultimately concerned with labels but with a fact-sensitive question of whether what the Secretary of State did in seeking the views of policing bodies was such as to render it unfair not also to seek the views of a body or bodies representing the interests of protesters."*

When is consultation not a consultation

"If [the claimant's] submission were right, the result would make a huge inroad into the hitherto well-understood position that at common law the duty to consult is confined to the limited and specific classes of case identified in Plantagenet Alliance . It would mean that, in a case where there was otherwise no statutory or common law obligation to consult, a decision-maker would nevertheless come under such an obligation if they chose to engage with any third party in circumstances satisfying her three criteria. It will in practice be very common for public authorities contemplating a legislative measure which will affect a particular group or groups to wish to have some such engagement; and if they do it is most likely to occur at a time when the proposal is "sufficiently crystallised" and at a formative stage: that is just when it is most likely to be useful. Yet if they do so they will, on Liberty's case, become automatically obliged to apply the Gunning principles and, it appears, to consult a fairly chosen group representing persons potentially affected. That seems to me wholly inconsistent with the law as it has developed in this field."

When is consultation not a consultation

- *“More precisely, the question is whether what the Secretary of State did in seeking the views of policing bodies in December 2022 was such as to render it unfair for her not to seek also the views of a body or bodies representing the interests of protesters. I do not believe that it was. ”*
- the Gov’s engagement with policing authorities did not have the character of a formal consultation: it was not of a character that required it to comply with the common law principles as regards procedural fairness.
- *“It was not a process set up by the Government with a view to hearing arguments from a range of affected parties for and against the legislative and other changes which it was contemplating making in the light of the Parliamentary debates in the summer and the Just Stop Oil protests in the summer. Rather, its purpose was to obtain the input of the policing bodies as the authorities with executive responsibility in the relevant field. Although of course the police are not a department of government, they are nevertheless arms of the state, for which the Home Secretary has constitutional responsibility: in that sense, the process was essentially intra-governmental. Engagement of this kind is not only sensible but necessary; but it is of a wholly different character from formal consultation.”*

When consultation is not a consultation

- *A & E Baines v North Yorkshire Council* [2026] EWCA Civ 257
- Case regarding lawfulness of TROs
- One ground of challenge was that a public consultation was required before the proposals in revised scheme were implemented
- Rejected for various reasons but court also observed that the resolution didn't require a consultation exercise of the kind that is familiar in public law (*"that is the publication of proposals, time for the public to make representations and consideration of those representations"*) – what was required was *"public engagement"* *"not consultation"*, public engagement may take a number of forms

Issues for discussion

- Discernible trends
- Response of courts to consultation challenges
- Timing issues
- Upcoming cases