

Corporate Scrutiny Committee – 3rd July, 2018

Report of the Lead for Law and Governance and Statutory Scrutiny Officer

Council and Corporate Consultation

Purpose of Report

1. To consider the corporate approach to consultation and the implications of the decision taken by the Cabinet relating to ‘significant’ consultation exercises undertaken by the Council.

Recommendations

2. That the Scrutiny Committee consider the corporate approach to consultation taking account of the existing provisions of the Constitution, legal requirements, guidance and recognised good practices summarised in this report.
3. That the Chief Executive, Strategic Directors and Chief Officers ensure the implementation of the Cabinet decision in respect of all future significant public consultation exercises undertaken by the Council (see paragraph 6).
4. That the details of consultation undertaken be included in Cabinet, Committee reports and Decision Sheets submitted to the relevant decision taker(s).
5. That the Cabinet be recommended to adopt local consultation principles based on the Government’s consultation principles (Appendix 1) and the Local Government Association consultation checklist (Appendix 2).

Background

6. On 17th January, 2018, the Overview and Scrutiny Management Board made a recommendation “that in the case of all future significant public consultation exercises, regardless of subject or requirement, the consent and agreement of the relevant Cabinet Member is required to the form and content of consultation material in order to ensure that it is clear, concise and free from jargon.” This was confirmed by the Cabinet on 21st March. On 27th March, 2018 the Overview and Scrutiny Management Board requested that an item on Council consultations be included in the Annual Scrutiny Programme for 2018/19.

7. The Council undertakes a considerable amount of consultation activity on a wide range of executive functions, statutory responsibilities and discretionary activities. This includes major consultation on strategic issues such as the setting of the Council's Revenue Budget and Council Tax (the Big Question), strategic and statutory planning documents and community engagement on issues such as the Borough Vision 2030. Children's Services have a duty to consult annually on admission numbers and the scheme for financing schools. Consultation is also undertaken on many other functions and activities such as individual planning applications and local projects/schemes and initiatives affecting local communities.
8. This report covers the existing requirements relating to consultation. Whilst the approach to consultation depends largely on individual circumstances, there is recognised good practice, legal obligations and national guidance that should be reflected in the corporate approach to consultation undertaken by all Directorates.

The Council's Constitution

9. Article 13.02 of the Council's Constitution states under 'Principles of Decision Making' that all decisions of the Council will be made in accordance with a series of principles, including 'following due consultation and the taking of advice from professional officers.'
10. Cabinet Procedure Rule 2.3 states that all reports to the Cabinet should set out the details and outcome of consultation as appropriate. The level of consultation required will be appropriate to the nature of the matter under consideration. The Forward Plan of Key Decisions should include details of consultation. This is already covered in the Council's corporate report format, which requires that details of consultation must be included in the background section of reports.
11. The Council's Code of Corporate Governance reinforces the importance of ensuring openness and stakeholder engagement (including consultation with the public).

Principles of Consultation

12. In the context of making policies or issuing guidance, public bodies may be required by law to consult before making decisions. Failure to consult properly and adequately can lead to a policy or decision being overturned by the Courts. Case law has established a set of principles:
 - Consultation must be made at a time when proposals are at a formative stage.
 - Sufficient reasons for the proposal must be given to allow intelligent consideration and response.
 - The product of the consultation must be conscientiously taken into account in finalising proposals.
 - The consultation should be influenced by those who are being consulted.
 - The demands of fairness are likely to be higher when the consultation relates to a decision that is likely to deprive someone of an existing benefit.

13. The public law duty to consult is one aspect of the principle that public authorities should apply fairness in the exercise of their functions. Where the duty to consult is imposed by statute, then the procedure to be adopted is also likely to be prescribed by the legislation. In other contexts, the issues for a public authority will usually relate to; (1) whether there is a duty to consult anyone at all; and (2) if so, what “fair consultation” entails in the circumstances.
14. National Guidance as to how those issues should be addressed can be found in the Government’s Consultation Principles issued by the Cabinet Office (see Appendix 1). The Government’s principles do not directly prescribe the requirements for a valid consultation. However, the governing principle is proportionality of the type and scale of consultation to the potential impacts of the proposed decision being taken. Consideration should be given to achieving real engagement rather than following a bureaucratic process.
15. The Consultation Principles give guidance to Government Departments on conducting consultations. This includes a commitment to use more digital methods to consult with a wider group of people at an earlier stage in the policy-forming process; to make it easier for the public to contribute their views, to use clear language and plain English in consultation documents and to reduce the risk of ‘consultation fatigue’ by consulting only on issues that are genuinely undecided.
16. Both the Government Principles and case law have emphasised that consultation requirements vary from one context to another and should be assessed on an individual basis. The burden is on public authorities to decide how, when, with whom and how widely to consult. Difficult judgments may need to be made on what level of consultation is “proportionate” to the purpose and objectives of a consultation exercise.
17. The Government’s Principles augment but do not replace the general principles set out above as to how consultations should be conducted. There must also be clear evidence that the decision maker has considered the consultation responses, or a summary of them, before taking its decision.
18. The Local Government Association publishes a considerable amount of guidance to the Local Authority on consultation and engagement. The consultation checklist in Appendix 2 is an overview of the typical stages of consultation and the things a Local Authority should keep in mind when conducting a consultation.
19. These principles relate to all consultation generally, however the Council must always comply with statutory processes in particular planning and licensing.

Deciding Whether to Consult?

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

18. Examples of circumstances in which consultation may not be appropriate are for minor or technical amendments to regulations or policies or where adequate consultation has taken place at an earlier stage. Conversely the more serious or significant the impact, the more likely it is that the views and concerns of those affected should be consulted upon before a decision is taken.
19. If a public authority has promised to consult before making a specific decision or type of decision it will be held to that promise. Failure to do so, or any deficiencies in the consultation, may give rise to a legal challenge of the Council's decision. If a public authority has, as a matter of practice, consulted on the relevant type of decision in the past that may give rise to a legitimate expectation that it will do so again.
20. Depending on the nature of a proposed policy change or the issue under consideration, public authorities need to consider whether a consultation exercise is necessary or unnecessary and the level of consultation required.

When to Consult?

21. 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. Public bodies should also be aware that it may be appropriate to engage in different ways at varying stages - but they will need to be able to justify the approach taken.
22. 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. Evidence that careful consideration has been given to which option to pursue in the light of the consultation responses, will support a public authority's position if a challenge arises to its decision. There may also be circumstances where new information comes to light which requires the consultation process to be re-opened or extended.

Content of Consultations

23. Consultations should provide sufficient information to ensure the process is fair. Consultation is not required on every possible option, although every viable option ought to be included. The Council should consider including realistic alternatives in consultation documents so as to allow consultees an opportunity for intelligent consideration of the proposals and to respond in a way which enables them to participate meaningfully to the decision making process.
24. Authorities should also have regard to the form of the consultation in the light of the characteristics of the consultee group. For instance whether it is appropriate to conduct the process in hard copy as well as on-line and how consultation materials can be accessed in compliance with the public sector equality duty.

Length of Consultations

25. A key decision for any authority proposing to consult is the length of the consultation period. The Government principles suggest that the timeframes might typically vary between 2 and 12 weeks and leaves it for public authorities to decide. For instance, if only a small number of likely consultees would have a stake in a particular issue then the consultation period of 12 weeks in length may be too long.
26. The Government principles provide express justification for adopting a shorter period in appropriate circumstances. The principles also recognise that for a new and contentious policy, the full 12 weeks may still be appropriate. Consequently, where decisions to make financial cuts need to be made and those decisions are likely to impact on the vulnerable, longer and more detailed consultations may be necessary.

Consideration of Consultations

27. It is a fundamental aspect of good decision making that a decision maker gives "conscientious consideration" to the outcome of the consultation process. For example, if the Council failed to consider an alternative proposal which had been put forward by a respondent to the consultation, this may render the decision making process flawed. Case law has emphasised the importance of adopting care and a robust approach to the analysis of consultation responses - particularly where the subject matter is highly technical. The Council must be able to show that it has considered the outcome of the consultation process carefully and be prepared to change course in response to the outcome of consultation if appropriate.

'Significant' Public Consultation Exercises

28. On 21st March, 2018, the Cabinet considered a recommendation from the Overview and Scrutiny Management Board and confirmed that in the case of all future significant public consultation exercises, regardless of subject or requirement, the consent and agreement of the relevant Cabinet Member is required to the form and content of consultation material in order to ensure that it is clear, concise and free from jargon.
29. The definition of a 'significant' public consultation exercise is a matter for local discretion, however, the Committee may wish to remind all Directorates of the requirement to work closely with the relevant Cabinet Member before public consultations are launched. In addition, all Officers should ensure that the outcome of consultation is properly included and adequately summarised in any Cabinet, Committee reports or decision sheets that are submitted to the appropriate decision maker or body.

Conclusion

30. The Government's principles and case law confirms 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. 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.

Finance

31. The costs of undertaking consultations are contained within the relevant Directorate's budgetary allocations.

Law

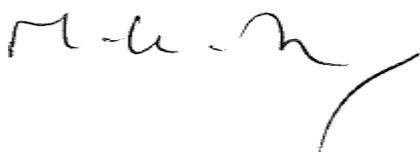
32. Legal implications relating to the duties on public bodies to undertake consultation are set out in the report details. There are circumstances where consultation is a statutory requirement and principles of consultation have been established by case law. Failure to undertake adequate consultation, or any deficiencies in the consultation process, may give rise to a legal challenge of the Council's decisions or render a process vulnerable to judicial review.

Equality Impact

33. The Council must comply with the Equality Act 2010 and the public sector equality duty. The Council must take account of the likely impact of proposals on relevant groups. New policies must be assessed for their impact on different groups before they are introduced and a summary of the impact assessment should be included in any reports on the introduction of a new policy or substantial policy changes. Decision takers should also consider the effects on children and young people; whether there was consultation with children and young people; and the involvement of children and young people in developing proposals.

Human Resources/Transformation

34. There are no direct implications arising from this report.



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Background Documents

[Government Consultation Principles 2018](#)

[The Council's Constitution](#)

Government Consultation Principles 2018

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 impact 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, such as prior discussion with key interested parties or extension of the consultation deadline beyond the holiday period.

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 very exceptional circumstances (and even then publish responses as soon as possible). 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. This document does not have legal force and is subject to statutory and other legal requirements.

Consultation check list

A quick overview of the typical stages of a consultation and the things you should keep in mind when conducting a consultation.

Here is a quick overview of the typical stages of a consultation and the things you should keep in mind when conducting a consultation:

- **Make sure the consultation is necessary:** Before starting any consultation exercise it is vital to make sure that it is necessary. Make sure that you check with colleagues across the organisation that the information you need isn't already available or held elsewhere in the council. Making sure your activity is necessary and valuable will also help to reduce consultation fatigue and encourage residents to engage with the process.
- **Set clear objectives:** Be clear about what you are trying to achieve. What do you want to find out? What information is already available (check your council's consultation database)?
- **Co-ordinate the exercise:** Work in a joined-up way within your council to avoid duplication and over-lapping activities. Gain the necessary approvals from senior management and relevant boards.
- **Allow sufficient time:** Allow adequate time for consultees to respond and for their views to be fully considered before any action or decision is made.
- **Document the costs:** Anticipate how much your consultation will cost, how much capacity is needed and the resources needed to implement any changes following the outcomes of the exercise.
- **Select and recruit participants:** Identify the people or groups who are likely to be affected by, or have an interest in, the focus of the consultation. They will need to know what the consultation is about, what is being asked of them and the potential outcomes.
- **Select an appropriate method:** Choose the most appropriate way to consult depending on the type of questions you want answered – and the subject matter at hand.
- **Promote the exercise:** Request support from within your council to increase awareness of the consultation. You will want to post details of the consultation several weeks prior to it commencing.

- **Gather and input data:** Record the views of participants in a transparent and accessible way. This may be easier for text-based methods such as surveys, than face-to-face methods, for instance.
- **Monitor the responses:** Keep track of the number of responses you receive so action can be taken to improve response rates if necessary. Check the responses being submitted to get an indication of the issues arising.
- **Analyse the results:** Consider what story the data are telling and what this means in terms of the questions asked. Calculate how many people gave certain answers and look for any variations. You should also seek to identify any patterns, trends or themes to help identify key issues.
- **Determine your outcomes:** Your council should decide what it is going to do as a result of the consultation and why. You should explain how consultees' contributions have informed the decision-making process.
- **Feedback to relevant parties:** Ensure that the results and subsequent actions are communicated to participants and other relevant parties.
- **Evaluate your consultation:** Consider if your consultation has achieved its objectives. How have consultees' views affected the council's decision? What has changed as a result of the consultation? What lessons that can be learned?