

Test: Do I need to consult?

Public consultations are challenging, time-consuming and cost money. Today, given the increasing number of consultation-related judicial reviews, knowing when a consultation is required can save a great deal of time and money. The Consultation Institute identifies two areas to focus on when deciding if you need to consult:

- statutory provisions
- doctrine of legitimate expectation (common law)

Statutory provisions

Statutory provisions are legal requirements which state that a consultation must occur. They exist in several key areas.

- **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).”¹
- **Environment** – In consultations relating to the development of environmental policy, Environmental Impact Assessments² must be carried out, to determine potential effects on the natural environment.
- **Equality** – The Equality Act 2010³ 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 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”⁴

1 [Health and Social Care Act 2012](#), Accessed 8 December 2016
2 [Environmental Impact Assessment](#), Accessed: 13 December 2016
3 [Equality Act 2010](#), Accessed: 13 December 2016
4 [Review of public sector Equality Duty 2012](#), Accessed: 13 December 2016

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• **Best Value Duty Statutory Guidance**

The Best Value Duty⁵ applies to how “authorities should work with voluntary and community groups and small businesses when facing difficult funding decisions.”⁶ It states that authorities are to “consider overall value, including economic, environmental and social value, when reviewing service provision.”⁷ To reach this balance, prior to choosing how to achieve the Best Value Duty, authorities remain ‘under a duty to consult representatives of a wide range of local persons.’⁸ This duty to consult is not optional. Section 3(2) of the Local Government Act 1999⁹ provides details on those who should be engaged in such consultations.

Doctrine of legitimate expectation (common law)

This 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 legitimately expect a process of consultation, for example, with local authority budget cuts or healthcare changes, there are grounds for a judicial review should a public consultation not take place. 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). This is part of ensuring that the consultation process remains a fair one.

5 [Revised Best Value Statutory Guidance 2015](#), Accessed: 13 December 2016

6 *Ibid* (p.4)

7 *Ibid* (p.5)

8 [Revised Best Value Statutory Guidance 2015](#), (p.5) Accessed: 13 December 2016

9 [Local Government Act 1999](#), Accessed: 13 December 2016

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