



# How to Succeed in the Senior Civil Service

## Part 6 - Consultation<sup>1</sup>

### 6.1 Introduction

Senior decision makers are seldom pleased when they are asked to undertake a lengthy consultation process.

There is nothing a government hates more than to be well-informed; for it makes the process of arriving at decisions much more complicated and difficult. - *John Maynard Keynes*

They sometimes have a point. Machiavelli put it this way:

Princes should consult the many about what they might do, and consult the few about what they are resolved to do.

There is normally no question of ministers needing to enter into anything like a formal consultation process about the most far-reaching of decisions such as whether to go to war. They will of course get lots of strong informal advice anyway.

But ... Ministers and their political advisers all too often have unwarranted confidence in their ability to make sensible, speedy decisions, and their ability to change the public's behaviour. They are also often over-optimistic about what their organisations can achieve. It doesn't help that social media, and the mainstream media that feed on it, cause decision-making to be made under ridiculous pressure.

But a true consultation is not a referendum. It is an opportunity to test the sense and practicality of a possible decision.

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<sup>1</sup> Last updated 17 March 2026

Respondents may, of course, respond in large numbers, all making similar arguments. This can be a real problem for authorities considering planning and traffic decisions, for instance. Vociferous lobbying and strong media campaigns can lead to headlines such as "Two-thirds of respondents [loved] [hated] [the idea]". This can be very helpful to decision-makers when considering their political futures. But it does not absolve officials from the task of identifying killer facts, perhaps mentioned by only one or two respondents, which might derail a proposed course of action - or make it vitally necessary.

Put another way, decision-making should not be delegated to those being consulted. They are much more likely to draw attention to problems - and in particular to their problems - than to the benefits that might accrue from the proposal. They will very seldom offer anything approaching a positive vision. Henry Ford pointed out that "If I had asked people what they wanted, they would have said faster horses". Politicians should therefore say what they want to achieve. Civil servants help them get there, consulting as to means.

Conscious of the risk of an adverse public reaction, it can nevertheless be very difficult to persuade ministers that research and consultation makes sense. It can be worth quoting or paraphrasing the military doctrine that *"The first duty of a commander is reconnaissance."* The best laid schemes will certainly go badly awry unless supported by strong and open-minded consultation processes. Scientists and researchers may have access to data not otherwise available to agencies. Industries and advocacy groups may have important insights into a particular problem. And individuals may be able to draw on their lived experiences to offer valuable perspectives. Ministers must listen to them - and indeed the law requires them to do so.

### 6.2.1 The Law

It is important to remember that most consultations are required by law and must be carried out to a high standard. A legal duty to consult may arise:

- (i) where there is a statutory duty;
- (ii) where a promise to consult has been made;
- (iii) where there is an established practice of consultation and
- (iv) where it would be conspicuously unfair not to.

Consultation processes in practice have two main functions.

The first is to help the consulting authority decide what to do by ensuring that, before it makes a decision, it has access to facts and arguments from a wide range of sources. The process therefore needs to encompass all reasonable options (usually including either 'no change' or uncontroversial improvements) and it needs to be carried out with an open mind, well before the authority reaches a provisional or 'minded to' decision.

The second main function of a legally compliant consultation is to ensure that the reasons for the eventual decision are both sound and clear to third parties.

And - repeating the point made above - the law does not require (or even encourage) decision makers to treat the consultation as a referendum, nor to be swayed by the sheer numbers 'voting' one way or another.

An authority's decision will be successfully challenged (via judicial review) if:

- the authority took into account factors that ought not to have been taken into account, or
- the authority failed to take into account factors that ought to have been taken into account, or
- the decision was so unreasonable that no reasonable authority would ever consider imposing it.

The authority's consultation process and eventual decision document therefore need to demonstrate that the above challenges cannot be sustained. In particular:

- authorities must clearly describe any facts and assumptions (including expert's assumptions) which they have taken into account, so that these can if necessary be challenged, and
- authorities cannot rely upon computer models and spreadsheets. Judges are sceptical of such 'black boxes' and always need to be persuaded of the logic and sense of assertions based on such models.

### 6.2.2 Some Recent Cases

Consultation processes were considered by the Supreme Court in *R v. LB Haringey*. The court confirmed the four 'Gunning' principles that must apply in order for a consultation to be considered fair:

- that it take place when the proposal is still at a formative stage;
- that sufficient reasons for the proposal be put forward to allow for intelligent consideration and response;
- that adequate time be given for that consideration and response; and
- that responses be conscientiously taken into account.

Decision letters and documents must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the principal important controversial issues. Reasons can be briefly stated, the degree of detail required depending entirely on the nature of the issues needing to be decided.

The reasons need refer only to the main issues in the dispute, not to every material consideration. Decision letters must be read in a straightforward manner recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A legal challenge will only succeed if the party aggrieved can satisfy the court that they have genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision.

The third Gunning principle (the need for adequate time) featured in the Metro Mayors' 2023 challenge to a three week (!) consultation about the closure of railway ticket offices. This and other pressure caused the plan to be scrapped.

**The National Council for Civil Liberties (aka Liberty) v Home Secretary (2024)** was interesting in a number of ways. Ministers wanted to expand two public order offences by redefining behaviour which caused 'serious' disruption to that which was 'more than minor'. They failed to do this when taking primary legislation through Parliament so they tried to do it by means of secondary legislation - i.e. regulations.

This seemed to many to be a poor way to legislate in such an important area but, crucially, the government did not consult the public nor any other body or organisation which might have opposed the proposed changes. Ministers argued that the revised regulations did not create a new criminal offence and that, as Parliament had approved them, no further consultation was necessary other than with law enforcement agencies. The court disagreed and declared the regulations unlawful.

**Ellen Clifford v. The Secretary of State for Work and Pensions.** Ms Clifford, on behalf of herself and other disabled people, challenged a consultation on proposed changes to Work Capability Assessment. These lightly edited extracts from the judgment show why she deserved to win:

**DWP failed to explain adequately the proposals.** It was not made adequately clear that the legislative proposals for the affected groups were to replace voluntary work related activity with compulsory work related activity, and to reduce the income of a large number of claimants.

**DWP failed to provide sufficient time for consultees to respond:** the consultation ran for less than 8 weeks, which the Defendant knew or ought to have known in summer 2023 would be inadequate, but insisted upon that despite having no intention to put the measures into effect earlier than 2025-26, because of the unstated intention to be able to “score” fiscal savings on the back of the proposals in time for the 2023 Autumn Statement on 22 November 2023.

I do not accept the suggestion that the consultation period was adequate because only a “tiny minority” expressed concern about the shortness of the consultation period. Many of the NGOs expressed serious concern about it, as did the Work and Pensions Select Committee. In any event, whether the shortness of the consultation period was unfair is not to be judged by reference solely to the percentage of people who complained about it.

The significance of the compressed consultation timetable is that it contributed to (a) the hurried publication of misleading and unfair consultation documents and (b) a failure adequately to explain the proposals themselves or the rationale for making the proposals. As a result, consultees required more time, not less, to understand and take advice on the effect of the proposals upon them.

### 6.2.3 The Decision Document

It is not necessary to respond to every issue raised by consultees when writing a formal decision document. This (from *South Bucks District Council and another -v- Porter (No.2)*) nicely summarises the legal requirement:

The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision.

...

The reasons need refer only to the main issues in the dispute, not to every material consideration. [In the case of a planning decision] they should enable the disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications."

### 6.3 How to Consult Effectively

There are lots of different ways to consult and you should not simply duplicate what someone else has done before you. In particular, don't limit yourself to written communications. Discussion groups, large formal meetings, informal meetings with individuals and the Internet all have a part to play. And even when preparing formal written consultation, there are a number of choices. Have a look at the detailed advice that is available on consultation procedures, and also look at a range of previous consultation documents and choose a format which best suits your needs.

Above all, remember that you are in policy-formulation or policy-implementation mode, so there is no need to be defensive. Indeed, you should positively encourage respondents to point out your mistakes and possible pitfalls. Good decision making depends on allowing or even encouraging dissent up to the point when your organisation has taken its decision. If your process is effective, and you take the responses seriously, you will find that you then avoid a very large number of traps that you would not have spotted by yourself.

You should therefore encourage those who seem to be able to take a wider view. Cultivate those who say unexpected things or comment candidly upon their organisation. Such people shine unaccustomed light on issues and can be invaluable contributors to the policy making process.

### 6.4 Experts

Do not make the mistake of thinking that experts' opinions are always correct. Much science is beyond doubt, but much some softer scientific opinion, such as medicine and economics, may be distinctly flaky. The better doctors, for instance, will tell you that:

- Medical facts (things we know to be true) have a half life of five years.
- Yesterday's heresy is today's orthodoxy and tomorrow's fallacy.

Senior professionals can therefore be very reluctant to accept that their 'tried and tested' way of doing things might be wrong - or at least sub-optimal.

It took far too long, for instance, for convoys to be introduced in the First World War, because of opposition from the Admiralty. There were many reasons for this opposition, including an unwillingness to accept that the arguments of 'amateurs' might be soundly based. And also, in his book *On the Psychology of Military Incompetence*, Norman Dixon suggested that the hostility towards convoys in the naval establishment were in part caused by a (sub-conscious) perception of convoys as effeminate, due to warships having to care for civilian merchant ships. Convoy duty also exposed the escorting warships to the sometimes hazardous conditions of the North Atlantic, with only rare occurrences of visible achievement (i.e. fending off a submarine assault).

It is nevertheless always tempting, and often sensible, to accept the consensus view of numerous experts when trying to predict future behaviour. But a consensus view can sometimes be little more than a best guess - somewhere between upper and lower bounds of expert and/or model's predictions. So you may need to think hard about predictions that lie somewhat outside the consensus. What if that upper bound prediction turns out to be close to what happen? Will you be prepared, or will you be caught napping because you relied too much on the consensus?

There will almost certainly be academics who have thought hard about your policy area. Their advice should not be accepted uncritically, of course. They may have their own political or other agenda, and may be deeply unsympathetic to the constraints on your organisation's ability to pursue particular paths. But they will know a lot of detail, and they will understand both sides of the policy debates. So get to know them as soon as you can, and listen careful to what they have to say.

But don't worry if you can't understand their academic writing. There is a certain academic style which is required in order to impress their senior colleagues, but it is pretty well incomprehensible to the rest of us. The good news is that the best academics will always be delighted to explain quite complex arguments in a simple straightforward way, if asked nicely. If they can't, or won't, then it is generally pretty safe to ignore them.

Take care, though, that you do not mistake the cautiousness of experts as lack of understanding. As Bertrand Russell said:-

"The whole problem with the world is that fools and fanatics are so certain of themselves, yet wiser people so full of doubts."

There is also the Dunning-Kruger Effect which may be summarised as follows:

The more you know, the less confident you're likely to be. Because experts know just how much they don't know, they tend to underestimate their ability; but it's easy to be over-confident when you have only a simple idea of how things are.

## 6.5 Non-Experts May Be Over-Confident

It follows from the above that boardrooms, universities, the media and many other places are full of people who have enormous self-confidence - and often a wide and influential network of supporters. That doesn't mean that they know what they are talking about, especially if pontificating about technical subjects, economics and management. Stick to your guns if you know better - though take care to consider how best to speak truth to power, if that is necessary.

(Newly appointed Vice-President Lyndon Johnson was awed by his first encounter with the assembled brains of the Kennedy Round Table, only to be brought down to earth by an adviser's comment that he would feel a lot better if just one of them had run for Sheriff once – or knew some Vietnamese.)

## 6.6 The 'Valley of Death' between Policy and Delivery

Jon Thompson, the much respected Head of HM Revenue and Customs, used the above dramatic phrase, and made some telling points when talking about the need to consult your own 'front line' whether inside or outside the department. They will have strong views about practicality, resources and communication. Ignore them at your peril.

He stressed that translating policy into delivery is one of the most complex challenges in government. And he argued that a solid understanding of delivery also empowers civil service leaders to 'speak truth to power', and to advise Ministers on the timescales, costs and technical aspects of delivering their policies.

As Charles Dillow says, implementation *is* policy:-

Policy-making is not like writing newspaper columns. It's all about the hard yards and grunt work of grinding through the detail. A failure of implementation is therefore often a sign that the detail hasn't been thought through, which means the policy itself is badly conceived. Reality is complex, messy and hard to control or change. Failing to see this is not simply a matter of not grasping detail; it is to fundamentally misunderstand the world. If you are surprised that pigs don't fly, it's because you had mistaken ideas about the nature of pigs. Bad implementation is at least sometimes a big clue that the policy was itself bad.

## 6.7 Consulting Organisations Outside Government

It is equally important to consult 'on the ground' when seeking the views of businesses and other organisations outside government. Head offices seldom have a good feel for the reality of life outside the corporate bubble.

Deutsche Bank asked 2.4 million customers and their branch managers and their junior branch staff, to rate branch performance. There was a very high correlation between the junior staff's perception and that of their customers, while there was almost no correlation with the branch managers' perceptions and the customers'.

Gill Kernick commented as follows, in the context of Grenfell Tower:

“For the last 10 years I have worked predominantly in high hazard industries looking at how you create safe cultures ... and specifically how to prevent major accidents – low probability, high consequence events. The key to change is creating a connection between the most senior levels of the organisation and the front line. ... In the case of housing, because of the complexity of the world we live in, it is the tacit knowledge of residents that is critical to keeping people safe. They have the experience of living in the building, they know what the issues are, and they probably know how to solve them.”

If it is difficult to access the views of front line staff then the views of small firms in the sector might be very revealing.

## 6.8 Consulting the Public

It is in practice not easy to consult the general public. It is seldom the case that those responding to the consultation are in any way representative of the wider population. And the same people will argue, afterwards, that they haven't been listened to when what they actually mean is that they weren't given a veto. The effort involved in public consultation can therefore seem disproportionate to the benefit - but it is never disproportionate if it concerns their safety or welfare.

Probably the most important thing is that you should not be dismissive of, or even worse nervous of talking to, the general public. The lives of policy-makers and decision-makers are often very different to those of the people that will be affected by their decisions. Boundaries need to be crossed in consultations and this can take courage on both sides. The Grenfell Tower tragedy showed that you should trust people, listen to their leadership, and then either help them or get out of their way.

There was, in the early 2020s, a distressing trend for officials to hide behind webinars. It is more demanding, but much better in so many ways, if there are upset people in the room so that difficult questions can be answered. If they can't then maybe the proposal under consultation needs to be re-evaluated.

In the same vein, Peter Wells tells the delicious story of talking with a senior official at the launch of a UK government technology initiative. They were really keen on engaging the public. He asked what the plan was. They gestured out of a Whitehall window across St James's Park and said "We'll run some events at the Royal Societies".

You can start by ensuring that the consultation documents are written from the perspective of those being consulted and are available in multiple formats and languages. There was much justified criticism when the 2023 consultation on the closure of railway ticket offices was not available in print, let alone large print or as audio or British Sign Language. It was therefore inaccessible to the disabled and elderly - those most likely to be affected.

Then give consultees enough time - 13 weeks minimum - to learn about and assimilate the content of your consultation document. It can easily take this long for representative organisations to forward the document to their members, wait for replies, and then consolidate them - especially around holiday periods.

Make sure you have offered a response format that makes it easy for everyone to contribute. It can often be effective to use trusted intermediaries who might organise 'citizens assemblies' or who might train and pay local residents to run local consultation sessions and summarise responses to feed into the process.

Above all, talk to those who may be unhappy with your policies. They often have a good reason, which you need to bear in mind whether or not you can change the policy, or its detail, as a result. And don't hesitate to let your decision maker have a short note of what you have learned. It might just make him or her think twice.

Be careful to frame your consultation questions in a neutral way.

But you should also - when consulting communities - make it clear from the outset that they have a voice - an important voice - but not a veto. Remember Henry Ford's quote (6.1 above). It is for politicians to take the lead when aiming to change behaviour - to combat climate change, for instance. Consultation should help them find the best way to do so, and ways that are politically acceptable.

It is seldom, if ever, helpful to ask questions such as 'do you agree or disagree' which imply that a sensible proposal will not be taken forward if there are numerous objections. Arguments do not become any stronger as a result of being repeated by lots of respondents. Equally, one serious problem unearthed through consultation can be more than enough to kill a proposal, however many other respondents think it is a great idea.

Not all responses to consultation should be treated equally. I particularly enjoyed an American chemical company's response to a consultation about a chemical spill. The company argued that West Virginians could safely absorb more poison than other Americans because they are fatter than other Americans, and don't drink as much water as their out-of-state cousins (preferring to drink beer instead) ... so even if their water is more toxic they would be drinking less of it.

And John Bull/Garius has often been forced to make the obvious, but often forgotten, point that ...

**"Young people lie constantly in surveys.** Surveys are a game to be won, by saying the thing they think the older people want them to say. They're not even conscious they're doing it. ... I've actively demonstrated this by comparing various well respected (and expensive) UK student survey results with actual behavioural data. Because I don't care how many respondees said the most important thing to them on our university website was detailed course info. I know exactly on what pages, and where on them, that info is. And I can tell you that for most courses they don't scroll far enough down to see it."

## 6.9 Research, inc. Opinion Polling

Because it has to incorporate hard facts and detailed analysis, there is a danger that expert evidence and advice will arrive too late to make a significant difference. You may therefore need to prioritise research and other expert consultation so that their results might arrive when it will be welcomed.

Research etc. must take into account local circumstances. One size seldom fits all. New York knife crime, for instance, was mainly restricted to certain parts of the city. Its successful anti-knife crime initiatives may not therefore translate to London where knife crime is more thinly spread across large parts of the city.

I have already made the important point that a sensible policy should not be abandoned merely because there are numerous objections. It is seldom the case that those responding to the consultation are in any way representative of the wider population. But a truly unpopular policy will most likely unravel however sound it appears to be when viewed from behind an official's desk.

Opinion polling can help. If it demonstrates that the general public sincerely distrust a proposed policy then you can recommend that ministers put further effort into explaining it, or possibly redesigning it. And if it demonstrates that the public are supportive then this might encourage ministers to be brave. (I have seen it argued that some car-unfriendly policies fall into the first category, and others into the second.)

## 6.10 Regulatory Decision Making

Regulators and other officials who are implementing specific laws need to consult those likely to be affected by their decisions - and indeed others who may have advice and information which might help them reach fair and sensible decisions. Some regulators face regular legal challenge and have developed robust processes to ensure that their consultations are effective but without taking too long. There is much to be said from following their template. The terminology varies from institution to institution but -

1. The formal process begins with the publication of *an Issues Statement* defining the decision that is to be made, and listing the main matters to be taken into account in reaching that decision
2. At around the same time, there is *a call for relevant advice and information*.
3. Once a likely decision emerges, there is a 'minded to' document - which regulators often call *Provisional Findings*. It explains in some detail why the decision-maker is minded to make the decision in prospect. It should if necessary include an impact statement.
4. A *final decision* document, again with detail, is then published a little later, usually confirming the provisional decision, but sometimes not, if important new information or argument has come to light. These should be as short and focussed as possible.

Central government frequently used to follow a similar process involving the publication of 'Green' and 'White Papers'. These are relatively rare these days and it would be a very good thing if they were to be used more often.

## 6.11 An Example from History

It is arguable that the Spanish Armada failed in its mission because Philip II of Spain was pretty sure of himself and didn't feel the need to consult.

His Royal Highness never, for instance, brought in officers around a table to pick through any problems with the plan. Had he done so in this case, they might very well have asked: "How is a fleet of 130 ships going to get to the Netherlands at exactly the right moment to meet the troops? How are they going to anchor long enough off the coast of Dunkirk for those troops to get aboard?" And although Santa Cruz and Palmer both submitted written objections that just wasn't the same as the King having to listen to them.<sup>2</sup>

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<sup>2</sup> Interview with Geoffrey Parker in BBC History Magazine