

Specific proposals impacting rights needed to trigger consultation obligations (R (Eveleigh & Others) v Secretary of State for Work and Pension)

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Public Law analysis: The claimants judicially reviewed the alleged failure of the Secretary of State for Work and Pensions (SSWP) to consult lawfully, by way of its UK Disability Survey (the ‘Survey’), before publishing a National Disability Strategy (the ‘Strategy’). The Court of Appeal unanimously reversed the decision of Mr Justice Griffiths in *R (Binder and others) v SSWP*, in finding that the Survey was not, at a common law, a ‘consultation’. This was because the SSWP was not seeking views on a specific proposal likely to have a direct impact on a person or on a defined group of people. The Court of Appeal therefore held that Griffiths J was wrong to decide that the Survey was subject to the Gunning requirements, wrong to hold that the SSWP had acted unlawfully and wrong to quash the Strategy. Written by Jonathan Lewis, barrister at Monckton Chambers.

R (Eveleigh and others) v Secretary of State for Work and Pensions [\[2023\] EWCA Civ 810](#)

What are the practical implications of this case?

It is trite that the common law does not impose a general obligation on public bodies to ‘consult’ in respect of their actions. Such an obligation only arises if there is a statutory duty to do so, if there is a legitimate expectation that a public body will do so (whether because of a promise, or a sufficiently consistent past practice), or if it would be conspicuously unfair not to consult (at para [7]).

In *R v Brent London Borough Council ex p Gunning* (1985) 84 LGR 168, four basic requirements that are essential if the consultation process ‘is to have a sensible content’ were articulated. These have been endorsed by the Supreme Court in *R (Moseley) v Haringey London Borough Council* [\[2014\] UKSC 56](#); [\[2014\] 1 WLR 3947](#). First, the consultation must be at a time when the proposals are still at ‘formative stage’. Second, ‘the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response’. Third, adequate time must be given for consideration and response. Fourth, the product of the consultation must be ‘conscientiously taken into account in finalising any statutory proposals’.

This decision of the Court of Appeal is important in highlighting that not every kind of engagement/interaction between public bodies and the public constitutes consultation simply because the public body is seeking input on a particular matter. Otherwise there would be ‘an unwarranted judicialisation of public life’ (at para [96]).

Rather than jumping straight to an analysis of the of whether the *Gunning* requirements have been met by a public body, practitioners should first consider whether the public body is proposing to make a specific decision which is likely to have a direct impact on the lives of those being consulted. If the public body is merely seeking views to inform general policy, which is still early in the process of development, it is unlikely that the public body’s engagement with the public on the topic (perhaps by way of a survey) will be a consultation to which the *Gunning* requirements apply.

What was the background?

In 2019, the Conservative Party announced its intention to publish a ‘National Strategy for Disabled People’. Work on the Strategy was coordinated by a cross-departmental team in the Cabinet Office, the Disability Unit (the ‘DU’). In January 2020, the DU wrote to the Disability Charities Consortium

setting out key policy themes that it would discuss with them. Twelve meetings were held between the two. A variety of other groups were also selected to participate in several other engagement sessions, working groups, roundtables, and joint roadshows.

In April 2020, the DU issued a press release which stated that 'The strategy will build on evidence and data, and critically on insights from the lived experience of disabled people' and that the DU would 'undertake a full and appropriate programme of stakeholder engagement'. In December 2020, the DU published a blog post, which stated that 'We are continuing to listen to stakeholders to find the right areas to build a strategy that makes a real difference to the lives of disabled people'. None of this engagement elicited views on detailed policy proposals, because no such proposals had been finalised or agreed within government.

The Survey, published in January 2021, was in a multiple-choice format but also had four open questions. It did not outline the proposed content of the Strategy nor allow comment on any specific policy proposals. It was accompanied by a press release which indicated that views received would 'inform the development of' the Strategy. The DU also published a press release stating that it was launching an online survey to gather views as 'a part of our ongoing consultation and marks the start of our insight gathering'. The Survey itself was placed on the DU's website, in a section entitled the 'Consultation Hub'. On 28 July 2021, the Strategy was published.

There was no statutory obligation upon the SSWP to consult. Further, no promise to consult had been made nor was there a legitimate expectation based on any representation or assurances that there would be consultation. Nor was there any established practice of consultation.

The claimants' essential case was that the SSWP had breached the second *Gunning* requirement because there was insufficient information in the consultation document and/or the consultation document was designed in such a way that it precluded proper and effective response. On appeal, the SSWP's first ground was that the judge erred in law in declaring the Strategy to be unlawful because of his conclusion that the Survey was a consultation to which the *Gunning* principles applied. The SSWP later sought permission to advance a second ground, that even if the Survey was a consultation, as it was voluntary, it did not entail the application of the *Gunning* principles.

What did the court decide?

Lady Justice Elisabeth Laing began by setting out the general principles (paras [7]-[23]). She held that there is no magic in the word 'consultation' (at para [81]). The mere use of that word cannot entail legal consequences, especially if that word is used by people who are not lawyers. Hence, the DU's repeated use of that word was legally irrelevant. Whether, when a public authority engages with the public, that engagement attracts legal obligations is a question of substance, not form. The *Gunning* criteria are based on 'self-evident assumptions about the characteristics of the exercise to which they are able, and are intended, to apply' (at para [82]). If the exercise in question does not have those characteristics, the *Gunning* criteria cannot apply to it.

Laing LJ observed that all the cases in which the *Gunning* requirements have been held to apply are cases in which a public authority contemplated making a specific decision which would or might adversely affect a particular person or group of people (at para [83]). The *Gunning* criteria therefore assume that a public authority is proposing to make a specific decision which is likely to have a direct (and usually adverse) impact on a person or on a defined group of people (at para [84]). This could not be said of the Strategy—it was a 'different thing altogether: a series of general policy commitments which are at such a high level of abstraction that it is not easy to see their direct negative (or positive) impact on a particular person or group of people' (at para [84]).

She held that the *Gunning* requirements are premised upon two assumptions about the stage of the decision-making process at which they apply (at para [85]). First, there is a proposal to make a decision, which, while not inchoate, is at a sufficiently 'formative' stage that the views of those consulted might influence it. Second, the proposal has 'crystallised sufficiently that the public authority also knows what the proposed decision may be, and is able to explain why it might make that proposed decision, in enough detail to enable consultees to respond intelligently to that proposed course of action' (at para [85]). This was clearly not the case in respect of the Strategy. When the Survey was conducted, the DU did not have a draft of the Strategy. The purpose of the Survey was to find out information and views which might 'inform' the Strategy. The potential Strategy was 'no more than an inchoate plan which would take shape as and when information was gathered, and in response to that information' (at para [86]). There were no opportunities to comment on the Strategy in the Survey, because the Strategy was not at that stage ready for comment (at para [88]). The fact

that the DU said that the views gleaned from the Survey would influence the contents of the Strategy was insufficient to overcome the absence of a proposal to which the *Gunning* requirements could apply (at para [89]).

As it was unnecessary to do so, Laing LJ declined to decide the issue raised under Ground 2 and refused permission in respect of it. Lord Justice Bean too refused permission but gave a hint as to how he would decide the point: ‘...it is far from obvious to me that a voluntary consultation should be subject to the same rules as one which the public authority is legally obliged to conduct’ (at para [97]).

Case details:

- Court: Court of Appeal, Civil Division
- Judges: Lady Justice Elisabeth Laing, Lord Justice Bean, and Lady Justice Macur.
- Date of judgment: 11 July 2023

Jonathan Lewis is a barrister at Monckton Chambers. Suitable authors are welcome to apply to become members of the panel. Please contact caseanalysis@lexisnexis.co.uk.

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